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Problems in determining the proper law of the contract in confirmed letters of credit

Leung Liwen[*]

ABSTRACT

This paper focuses on confirmed letters of credit in Anglo-common law jurisdictions. Although these are covered by the UCP 600, many key issues must be decided by domestic law. Letters of credit do not frequently contain express choice of law clauses. Not every jurisdiction has the same law on exception(s) to the autonomy principle, sanctions, and other issues. Courts are thus left to grapple with the issue of determining the proper law of the contract(s) in the context of letters of credit. Problems arise from the multi-contractual nature of confirmed letters of credit, the possibility of multiple laws governing the contracts that make up a confirmed letter of credit, and the difficulties in arriving at a single law to govern those contracts. Jurisdictions applying the common law approach must also address the conflicts rule against a floating choice of law. This brings into the debate: when is a letter of credit formed? Holding that formation occurs upon communication to the beneficiary, *Sinopec International (Singapore) Pte Ltd v Bank of Communications Co Ltd* [2021] SGHC 245 applied the place of contemplated presentation as the relevant connecting factor, rather than the place of actual presentation. But *Kuvera Resources Pte Ltd v JPMorgan Chase Bank NA* [2022] SGHC 213 accepted that formation occurs upon a complying presentation. Given that the *Kuvera* formulation has not been applied beyond Singapore, the proper law problems present prior to *Kuvera* will be discussed.

Keywords: bankers' credits, commercial credits, documentary credits, letters of credit, private international law, conflict of laws, applicable law, governing law, proper law, choice of law.

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1 Introduction

The ability to ignore an adverse foreign court order safely must surely be a defendant's dream. The proper law of the contract in the context of confirmed letters of credit (LCs[1]) could well make that dream come true. A recent Irish decision, *First Modular*,[2] reveals that the Irish-registered Citibank Europe plc managed to escape the grasp of an order from the High Court in Nigeria restraining parties from acting on a LC.[3] Citibank confirmed a LC issued by Access Bank plc. Citibank 'advised that it did not consider that the Nigerian [c]ourt [o]rder was binding upon it' and First Modular, the applicant of the LC, apparently accepted that.[4] First Modular subsequently sued in Ireland for a similar court order. Despite the existing Nigerian court order, First Modular failed to establish a clear case of fraud arising out of missing cargo[5] in its unsuccessful attempt to persuade the Irish High Court to continue an earlier interim order restraining payment under the LC. There was no express mention of the proper law of the LC in *First Modular*. It seems that parties implicitly accepted that Nigerian law and the corresponding Nigerian court order did not apply. Could First Modular have argued otherwise in its follow-up application?[6] It could have raised various problems in determining the proper law of the contract in the context of confirmed LCs. This paper will examine some of these problems from the perspective of Anglo-common law jurisdictions.

One of the many problems in determining the proper law was identified in *Sinopec*.[7] The problem was that a contract cannot exist 'in a legal vacuum' and the proper law must be determined 'when the [LC] is communicated to the beneficiary'[8] and 'not subsequently when the beneficiary presents documents'.[9]

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1 Also known as 'documentary credits' or 'commercial credits': Eesa A Fredericks and Jan L Neels, 'The Proper Law of a Documentary Letter of Credit (Part 1)' (2003) 15 South African Mercantile LJ 63, fn 1.

2 *First Modular Gas Systems Ltd v Citibank Europe plc* [2023] IEHC 514.

3 Ibid [16]–[17].

4 Ibid.

5 Ibid [78], [85]–[88]. *First Modular* (n 2) was decided on the basis that First Modular had failed to establish the requisite jurisdiction to support any such order against Citibank.

6 Which was also unsuccessful: *First Modular Gas Systems Ltd v Citibank Europe plc* [2024] IEHC 1 [40].

7 *Sinopec International (Singapore) Pte Ltd v Bank of Communications Co Ltd* [2021] SGHC 245, [2022] Lloyd's Law Reports Plus 47, [2024] 3 SLR 476.

8 The argument that this determination should be done even earlier, ie, upon issuance of the LC, will be considered below, in section 2 of this paper.

9 *Sinopec* (n 7) [73] (Ang Cheng Hock J).

In *Sinopec*, the beneficiary sued the issuing bank (issuer) in the Singapore High Court for non-payment of unconfirmed LCs despite the beneficiary's apparently complying presentation. The LCs were issued in Japan. They were available at any bank by negotiation. Thus, the beneficiary was free to present documents to any bank worldwide. The Singaporean-incorporated beneficiary presented the documents to a bank in Hong Kong. The issuer alleged fraud and applied for proceedings to be stayed on the ground of forum non conveniens. Among other things, the issuer argued that Hong Kong law governed the issuer–beneficiary contract because the beneficiary chose to present documents there (the law of the place of actual presentation). The LCs had no express choice of law. The High Court disagreed. Applying the decision in *Sinotani*, Ang Cheng Hock J held that '[t]he contract between the issuing bank and a beneficiary under a letter of credit is formed and the issuing bank becomes irrevocably bound to honour the credit when the credit is communicated to the beneficiary […]'.[10]

The common law rule against a floating choice of law[11] meant that it was impermissible to have the proper law determined sometime after contract formation, as that would leave the contract in a 'legal vacuum'.[12] As such, events occurring thereafter — such as the beneficiary's presentation to a bank — cannot be used to point to the proper law. Due to the beneficiary's choice of presentation location, the 'law of the place of payment against presentation of documents' could not be applied as a connecting factor to determine the proper law. Instead, *Sinopec* read this connecting factor as the law 'of the place where parties had *contemplated* that documents would be presented and payment made, at the time when the terms of the [LC] were communicated to the beneficiary'[13] (the law of the place of contemplated presentation). That was 'the system of law with which the contract [had] its closest connection.[14]

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[10] Ibid, citing *Sinotani Pacific Pte Ltd v Agricultural Bank of China* [1999] SGCA 53, [1999] 2 SLR(R) 970 [24] and Raymond Jack, Ali Malek and David Quest, *Documentary Credits: The Law and Practice of Documentary Credits Including Standby Credits and Demand Guarantees* (3rd edn, Butterworths 2001) [5.3]. Cf *Kuvera Resources Pte Ltd v JPMorgan Chase Bank NA* [2022] SGHC 213, [2023] 1 Lloyd's Rep 604 (*Kuvera (SGHC)*) [61]–[65].

[11] This concept is explained subsequently in section 2 of this paper.

[12] *Sinopec* (n 7) [73].

[13] Ibid, [74] (emphasis in original), following *Marconi Communications International Ltd v PT Pan Indonesia Bank Ltd TBK* [2005] EWCA Civ 422, [2007] 2 Lloyd's Rep 72.

[14] Ibid.

Applying the place of contemplated presentation as the connecting factor, the Singapore High Court reached a 'tentative view'[15] that Singapore law governed that contract because Singapore was where the beneficiary conducted its business operations, and so parties would have contemplated Singapore as the place of presentation and payment.[16]

Sinopec can be juxtaposed with the subsequent Singapore case of *Kuvera*.[17] *Kuvera* accepted that formation occurs upon a complying presentation being made to the bank.[18] This view might be described as having 'commercial weakness' yet having 'the most attractive explanation' doctrinally.[19] But *Kuvera* concerned a dispute over a sanctions clause in a LC and not the proper law of the LC. Furthermore, counsel in *Kuvera* did not appear to cite the binding precedent of *Sinotani*[20] to the Singapore High Court. The question of when a LC is formed becomes a relevant problem.

Given that courts outside Singapore have not yet considered *Kuvera*, this paper focuses on the problems in determining the proper law of the contract in the context of confirmed LCs that were present prior to *Kuvera*. It will first introduce the common law approach and then the European approach (the Rome Convention[21] and Rome I[22]) to determining the proper law.[23] It will subsequently introduce the contractual relationships that make up the LC framework. Thereafter, this paper will identify the proper law problems arising when another bank confirms the LC. Selected key problems will be examined in detail. This paper will conclude by evaluating possible solutions.

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15 Ibid, [77] (Ang Cheng Hock J).

16 Ibid, [75].

17 *Kuvera (SGHC)* (n 10).

18 The analysis of a LC in *Kuvera (SGHC)* (n 10) [65] has been repeatedly referred to without criticism by the Court of Appeal in *Kuvera Resources Pte Ltd v JPMorgan Chase Bank NA* [2023] SGCA 28, [2024] 2 Lloyd's Rep 539 [27]–[36] (Steven Chong JCA); *Crédit Agricole Corporate & Investment Bank v PPT Energy Trading Co Ltd* [2023] SGCA(I) 7, [2024] 1 Lloyd's Rep Plus 8 [18]; *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2023] SGCA 41, [2024] 2 Lloyd's Rep 624 [79].

19 GJ Tolhurst, *Furmston and Tolhurst on Privity of Contract* (2nd edn, OUP 2025) [3.28], referring to *Elder Dempster Lines Ltd v Ionic Shipping Agency Inc* [1968] 1 Lloyd's Rep 529, 535.

20 *Sinotani* (n 10).

21 Rome Convention on the Law Applicable to Contractual Obligations 1990 [1980] OJ L 266/1 (consolidated at [1998] OJ C 27/34); see also Sch 1 to the Contracts (Applicable Law) Act 1990 (UK).

22 Rome I Regulation Recast, ie, Regulation (EC) No 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.

23 Also known as the 'applicable law' or 'governing law' under the Rome Convention and Rome I: see Hang Yen Low and Keith Uff, 'Applicable law in letters of credit transactions' (2014) 25 JBFLP 215, 216.

1.1 Common law approach

Under the Common Law approach, the first step is to characterise the legal issue as either 'procedural' or 'substantive'.[24] The law of the forum (the lex fori) determines procedural issues:[25] for example, evidential issues and injunctions[26] against payment. The law governing the cause of action (the lex causae) determines substantive issues: for example, interpreting the LC terms and conditions,[27] and the parties' rights and obligations under the LC.

The second step is to characterise the substantive issue according to its 'cause of action' category with its own choice of law rules: for example, contract, tort, property, or unjust enrichment. For contractual issues, in most common law jurisdictions a three-stage test determines the proper law of the contract: (1) express choice of law; (2) implied choice of law; (3) the 'system of law with which the transaction has its closest and most real connection'.[28] If parties expressed a choice of law recognised as valid, stages (2) and (3) are moot. Stage (2) is typically omitted for LCs because, absent an express choice of law, it will usually be unrealistic to infer parties' intention as to choice of law.[29] Stage (3) for LCs is generally accepted as the place where 'payment was to be made […] against presentation of documents'.[30] Put simply, at this stage, '[t]he governing law of a letter of credit would be the law of the place of performance, ie, the place of presentation of documents'.[31]

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[24] For the issue of which law should be applied during the characterisation process, see David McClean, *The Conflict of Laws* (11th edn, Sweet & Maxwell 2025) [18-006]–[18-011].

[25] As set out in 'Rule 17': see Lawrence Collins (gen ed), *Dicey and Morris on the Conflict of Laws*, vol 1 (11th edn, Stevens & Sons 1987) 173.

[26] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 390.

[27] *Trafigura Beheer BV v Kookmin Bank Co* [2005] EWHC 2350 (Comm) [24]–[25].

[28] As set out in 'Rule 180' and its sub-rules: see Lawrence Collins (gen ed), *Dicey and Morris on the Conflict of Laws*, vol 2 (11th edn, Stevens & Sons 1987) 1161–1162, 1168–1169, 1182, 1190–1191. Adrian Briggs has stated that 'little is gained by trying to follow this legal rule back to its source': see *Private International Law in English Courts* (2nd edn, OUP 2023) 405.

[29] *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] SGCA 1, [2008] 2 SLR(R) 491 [47], citing *Sinotani* (n 10). See also *Offshore International SA v Banco Central SA* [1977] 1 WLR 399, 401D; *Shinetec (Australia) Pty Ltd v The Gosford Pty Ltd; The Gosford Pty Ltd v Bank of China Ltd (No 2)* [2023] NSWSC 1405 [167].

[30] *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233 (CA) 1240D–E (Lord Denning MR), 1242E–F (Griffiths LJ), and 1244A–B (Waterhouse J); *Sinotani* (n 10) [19]; *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA v Bank of China* [2004] 3 HKC 119 (HKCFI) 140–142; *Agritrade International Pte Ltd v Industrial and Commercial Bank of China* [1998] SGHC 31, [1998] 1 SLR(R) 322 [26].

[31] *CTBC Bank Co Ltd v Industrial and Commercial Bank of China Ltd* [2024] HKCFI 2820, [2024] HKCU 4298 [40] (Anthony Chan J).

Tortious issues are generally governed by the law of the place of the commission of the tort (the lex loci delicti commissi).[32] Property issues, for example, LC proceeds characterised as a debt, are determined by the law of the place of the property.[33] Unjust enrichment issues, such as mistaken LC payments,[34] are either governed by the proper law of the contract, or the law of the place of enrichment if no contract exists in the background.[35]

Not all express choices of law(s) are valid under the common law approach,[36] which is averse to, among other things, a 'floating choice of law', which will be discussed subsequently.[37] In contrast, the European approach appears to 'authorize all floating choice of law clauses'.[38]

1.2 Rome Convention approach

Singapore law continues to apply the common law approach. Insofar as English law is concerned, the Rome Convention approach replaced the common law approach in April 1991 up to the United Kingdom's withdrawal from the European Union (Brexit).[39]

Save for exceptions with limited relevance in the context of LCs,[40] the Rome Convention[41] applies 'to contractual obligations in any situation involving a choice between the laws of different countries'.[42] This applies to LCs by default because there are no specialist rules for

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[32] See, eg, Weitao Wong, 'A Principled Conflict of Laws Characterisation of Fraud in Letters of Credit' (2023) 19 J of Pri Int Law 383, 408, 411. For discussion on the law governing tortious issues in the context of LCs, see generally Anthea Markstein, 'The Law Governing Letters of Credit' (2010) 16 Auckland University LR 138, 148–151.

[33] Also known as the 'lex situs'. See, eg, *Power Curber* (n 30).

[34] *Gulf International Bank BSC v Albaraka Islamic Bank BSC* [2004] EWCA Civ 416.

[35] Paul Torremans (ed), *Cheshire, North & Fawcett, Private International Law* (15th edn, OUP 2017) 779; *Gulf International* (n 34) [39]–[40]. See also Markstein (n 32) 151–153.

[36] See, eg, *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 (PC) 290.

[37] See section 2 of this paper.

[38] James Fawcett, Jonathan Harris and Michael Bridge, *International Sale of Goods in the Conflict of Laws* (OUP 2005) [14.24]. See also Lord Collins of Mapesbury and Jonathan Harris (gen eds), *Dicey, Morris and Collins on the Conflict of Laws*, vol 2 (16th edn, Sweet & Maxwell 2022) [32-112].

[39] Contracts (Applicable Law) Act 1990 (UK), Sch 1, which was in force at 1 April 1991. See also *Bank of Credit & Commerce Hong Kong Ltd (in liquidation) v Sonali Bank* [1995] 1 Lloyd's Rep 227, 237; Briggs (n 28) [7.02].

[40] Rome Convention (n 21), arts 1(2), 1(3), and 1(4).

[41] See *Report on the Convention on the law applicable to contractual obligations* [1980] OJ C282/1 (Giuliano–Lagarde Report).

[42] Rome Convention (n 21), art 1(1).

them despite the debate about whether LCs are sui generis[43] or contractual.[44] Under the Rome Convention, parties' express choice of law governs the contract,[45] but any agreed variation of that law must not prejudice its validity or affect third party rights.[46] In the absence of choice,[47] the law of the country with which the contract is 'most closely connected' governs the contract.[48] Unlike the common law approach, the Rome Convention provides a rebuttable presumption that this 'country' is determined upon contractual formation by the 'residence' of the party 'who is to effect' the 'characteristic' performance of the contract[49] (the characteristic performance[50] presumption). This presumption is displaced via an 'escape clause'[51] if the contract is 'more closely connected with another country'.[52] The Rome Convention approach creates problems in the LC context:[53] should the contractual relationships making up the LC framework be treated as a single multiparty multilateral contract or as separate bilateral contracts? The former treatment points to one characteristic performance, while the latter points to several discrete characteristic performances. Further, what is the characteristic performance of a particular LC contract, given that there can be multiple performing parties even in a bilateral LC contract?

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43 See, eg, 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) 117.

44 For discussion on the contractual nature of LCs, see section 1.4 below.

45 Rome Convention (n 21), art 3(1). See also Rome I (n 22), art 3(1).

46 Rome Convention (n 21), art 3(2). See also Rome I (n 22), art 3(2), which was referred to in *Litasco SA v Banque El Amana SA* [2025] EWHC 312 (Comm) [12]–[22].

47 Rome Convention (n 21), art 3(1).

48 Ibid, art 4(1).

49 Ibid, art 4(2).

50 A doctrine adopted from Swiss law: *Dicey, Morris and Collins on the Conflict of Laws* (n 38) [32-124]–[32-125].

51 The Rome Convention (n 21), art 4(5) and its counterpart in Rome I, Rome I (n 22) art 4(3), were described as such in David McClean and Verónica Ruiz Abou-Nigm, *The Conflict of Laws* (10th edn, Sweet & Maxwell 2021) [15-026]; [15-031]. Its subsequent edition retained this description only for Rome I art 4(3): McClean (n 24) [13-030].

52 Rome Convention (n 21), art 4(5). For the debate on the threshold required to displace the presumption, see Maren Heidemann, *Transnational Commercial Law* (Red Globe Press 2019) 138–139; Jonathan Hill, 'Choice of Law in Contract Under the Rome Convention: The Approach of the UK Courts' (2004) 53 ICLQ 325, 339–341. See also Torremans (n 35) 735–737; CGJ Morse, 'Letters of Credit and the Rome Convention' [1994] LMCLQ 560, 567; AN Oelofse, *The Law of Documentary Letters of Credit in Comparative Perspective* (Interlegal 1997) 525; Jason Chuah, 'Letter of Credit — Applicable Law and Forum Non Conveniens: *Marconi Communications International Ltd v PT Pan Indonesia Bank Ltd TBK*' (2004) 10 JIML 236, 239–240; Heinrich Ferreira, 'Choice of Law and Letters of Credit – Articles 4(2), (5), Rome Convention' [2005] Finance & Credit Law 1, 3 (October 2005, Issue 9). See generally Simon Atrill, 'Choice of Law in Contract: The Missing Pieces of the Article 4 Jigsaw?' (2004) 53 ICLQ 549.

53 Torremans (n 35) 734.

Despite differences between the common law and Rome Convention approaches, they remain 'broadly similar'.[54]

1.3 Rome I approach

For contracts concluded after 17 December 2009, Rome I applies.[55] As a 'revision' of the Rome Convention,[56] Rome I is broadly similar to the Rome Convention.[57] Rome I provides additional specific choice of law presumptions for selected types of contracts. These presumptions are said to be 'stronger' than those in the Rome Convention.[58] The relevant presumption is that 'a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence'[59] because contracts between banks and their customers 'are likely, in most cases, to be treated as contracts for the provision of services'.[60] A version of Rome I is now applicable in the United Kingdom (UK) following Brexit as part of retained European Union law.[61]

Due to similarities between the Rome Convention and Rome I, similar problems arise for both.[62] This paper will discuss the common law and European approaches in a hybrid fashion.

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54 Jack, Malek and Quest (n 10) [13.7]; [13.10]. The latest edition of Jack, Malek and Quest (n 10) does not discuss the common law approach but provides a reference to the third edition: see Ali Malek and David Quest, *Jack: Documentary Credits: The law and practice of documentary credits including standby credits and demand guarantees* (4th edn, Tottel Publishing 2009) [13.24].

55 Rome I (n 22) arts 28–29. For discussion, see Briggs (n 28) 402.

56 McClean (n 24) [13-005].

57 Jonathan Hill and Máire Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (5th edn, OUP 2016) [4.50].

58 Markstein (n 32) 141–142.

59 Rome I (n 22) art 4(1)(b). See Nelson Enonchong, 'Letters of Credit and Stop Payment Orders Made in the Issuer's Country' in Christopher Hare and Dora Neo (eds), *Trade Finance: Technology, Innovation and Documentary Credits* (OUP 2021) [7.30]–[7.32].

60 Louise Merrett, 'Conflict of Laws' in Michael Bridge (ed), *Benjamin's Sale of Goods*, vol 2 (12th edn, Sweet & Maxwell 2024) [26-088].

61 Merrett (n 60) [26-001]–[26-003].

62 See generally Hill and Ní Shúilleabháin (n 57) [4.62]–[4.76]; Richard Gwynne, 'The Governing Law(s) of a Letter of Credit: *Taurus v SOMO* revisited' [2018] LMCLQ 450, 454.

1.4 Contracts in the LC context

A preliminary problem when determining the proper law of the contract in the context of LCs is characterisation of the cause of action. The common characterisations[63] seen in English cases[64] are those of contract or property.

The LC is 'a composite structure comprising distinct but interlinked contractual relationships', even though 'elements for contract formation are met in an unorthodox way'.[65] Others have identified the problem of whether the contractual relationships which make up the LC framework should be characterised as separate and independent bilateral contracts, or as a single multilateral multiparty contract.[66] The predominant view in the case law favours the former characterisation.[67]

The simplest LC involves three entities: the applicant, who applies to the issuer for a LC issued in favour of the beneficiary. If all three parties are in the same jurisdiction (Country A), issues of proper law are unlikely to arise. They inevitably do, however, for transnational LCs where the beneficiary is in another jurisdiction (Country B) because the issuer–beneficiary contract straddles two jurisdictions. The beneficiary might sue the issuer in Country B and argue that a foreign law (Country A's law) governs to avail itself of the law perceived to be most advantageous to the beneficiary's case.[68] The beneficiary, however, will need expert evidence

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63 There might be other complications due to other possible characterisations. For other characterisations, see Gopal (n 43) 117–121; 124–125.

64 See *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Republic of Iraq* [2013] EWHC 3494 (Comm), [2014] 1 Lloyd's Rep 432; *Taurus Petroleum Ltd v State Oilmarketing Company* [2013] EWHC 4495 (Comm); *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; *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64, [2018] AC 690, overruling (at least) part of *Power Curber* (n 30), noted in Nelson Enonchong, 'Letters of Credit Payable Overseas and Third Party Debt Orders' (2015) 30 JIBFL 674; Gwynne (n 62); CH Tham, 'Different Debts for Different Purposes: Taurus v SOMO' [2018] LMCLQ 210; Stephen Tricks, 'Bank-to-Bank Relationships in Letters of Credit: Taurus v SOMO' [2018] LMCLQ 217.

65 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) [2.05]; [2.42]; [2.46].

66 Gopal (n 43) 116; Philip Teoh Oon Teong, 'Letters of Credit: A Conflict of Laws Perspective' (1990) 2 SAcLJ 51, 59. See also Matti Kurkela, *Letters of Credit under International Trade Law: UCC, UCP and Law Merchant* (Oceana Publications 1985) 55–91.

67 See, eg, *Chailease Finance Corp v Credit Agricole Indosuez* [2000] 1 Lloyd's Rep 348 (CA) [39]; *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] AC 168 (HL) 182H–183D; *Governor & Company of the Bank of Ireland v State Bank of India* [2011] NIQB 22, [2011] NI 169 [21]; *Kuvera (SGHC)* (n 10) [34], [42]–[45].

68 Cf where 'it is common ground' that foreign law governs: *Mannesman Handel AG v Kaunlaran Shipping Corp* [1993] 1 Lloyd's Rep 89, 92 (Saville J).

to prove that foreign law is substantially different from forum law for the particular issue under dispute.[69] Otherwise, a court might presume foreign law to be the same as forum law when parties fail to plead[70] or prove foreign law.[71]

Because most current LCs expressly incorporate[72] the 'Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600' (UCP 600)[73] and its harmonising effects,[74] differences between foreign and forum laws are limited to discrete but important issues not covered by UCP 600.

These issues include:

(a) interpretation of LC terms,[75]

(b) implication of terms into LCs,[76] he 'scope of, and exceptions to, the autonomy principle'[77] which will isolate the LC payment obligation from defences arising out of the underlying contract[78] save for exceptions like fraud[79] (and perhaps illegality,[80]

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69 *Marconi* (n 13) [70]; *LG Electronics Hong Kong Ltd v Bank of Taiwan* [2001] 4 HKC 421 (HKCFI) 431G–432B; *Credit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm), [2002] 2 All ER (Comm) 427 [44]; *Kuvera (SGHC)* (n 10) [144].

70 *Agritrade* (n 30) [28].

71 *Marconi* (n 13) [70].

72 Ewan McKendrick, *Goode and McKendrick on Commercial Law* (6th edn, LexisNexis 2020) [35.09].

73 UCP 600, art 1.

74 Ross Cranston and others, *Principles of Banking Law* (3rd edn, OUP 2017) 510.

75 Cranston (n 74) 511. See, eg, *Trafigura* (n 27) [24]–[25].

76 Cranston (n 74) 511; Paul Downes, 'UCP 600: Unspoken Consequences' (2011) 26 JIBFL 318, 320.

77 Cranston (n 74) 511; Nelson Enonchong, *The Independence Principle of Letters of Credit and Demand Guarantees* (OUP 2010) [13.02].

78 UCP 600, arts 4.a. and 5.

79 *United City Merchants* (n 67); *Bank of Nova Scotia v Angelica-Whitewear Ltd* [1987] 1 SCR 59, (1987) 36 DLR (4th) 161, applied in *Eurobank Ergasias SA v Bombardier Inc* 2024 SCC 11, (2024) 490 DLR (4th) 395; *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] SGCA 66, [1992] 3 SLR(R) 146 [20]–[21]; *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2024] SGCA 31, [2024] 1 SLR 1054 [134]. See also Teoh (n 66) 56–57; Xiang Gao, *The Fraud Rule in the Law of Letters of Credit: A Comparative Study* (Kluwer Law International 2002) 56–57, 64; Bernard Wheble (ed), *Opinions of the ICC Banking Commission on queries relating to Uniform Customs and practice for Documentary Credits 1984-1986* (ICC Publishing SA 1987) 70–71; Wong (n 32) 384; Marc Lemieux, '*Eurobank Ergasias SA v Bombardier Inc*: The Fraud Exception Extends to the Fraud of a Third-Party of which the Beneficiary is not innocent' (2025) 103 Can Bar Rev 571.

80 *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 WLR 1152 (CA) 1164. See also Sanam Saidova, 'Autonomy in Documentary Credits: Time for a Nullity Exception?' [2020] LMCLQ 603, 604 n 13; RJA Hooley, 'Bills of Exchange and Banking' in HG Beale (ed), *Chitty on Contracts*, vol 2 (34th edn, Sweet & Maxwell 2021) [36.514]–[36.516]; William Day, *Key Ideas in Commercial Law* (Hart Publishing 2023) 15–17.

nullity,[81] negligence,[82] unconscionability, [83] 'special equities',[84] and 'irretrievable injustice'[85]) which will allow the bank to withhold and recover payment from the beneficiary,[86]

(c) the effect of a sanctions clause,[87]

(d) 'rights of recourse between the [LC] parties',[88] for example, for mistaken payments or overpayments,[89]

(e) legal costs,[90] quantum of liability, limitation of liability, interest rates, limitation periods,[91] jurisdiction,[92] the 'applicable law',[93]

(f) actions of a court such as 'provisional emergency measures resulting in a freeze of [the issuer's] assets […] stop payment orders, injunctions' and whether the issuer is still required to pay despite a stop payment order,[94]

(g) 'whether and at what stage' the issuer must seek to vacate a stop payment order,[95]

(h) whether the LC 'was validly issued',[96] and

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[81] *Beam Technology (Mfg) Pte Ltd v Standard Chartered Bank* [2002] SGCA 53, [2003] 1 SLR(R) 597 [33]–[34]; cf *Montrod Ltd v Grundkötter Fleischvertriebs GmbH* [2001] EWCA Civ 1954, [2002] 1 WLR 1975 [58]–[59]; *Winson Oil* (n 79) [135]–[139].

[82] *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd* [2021] SGHC 120, [2021] 5 SLR 738 [30]; cf *Montrod* (n 81) [66]–[68]; *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] SGHC 53, [2008] 3 SLR(R) 261 [105].

[83] *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 [183]–[184].

[84] Saloni Khanderia, 'The Law Applicable to Documentary Letters of Credit in India: a Riddle wrapped in an Enigma?' [2024] 20 J Priv Int Law 26, 44–45; cf Rishabh Raheja and Arpan Banerjee, 'Restraining the Encashment of Irrevocable Letters of Credit and Unconditional Bank Guarantees based on Special Equities and Irretrievable Injustice in India' [2024] JBL 487.

[85] Ibid.

[86] Gary Collyer & Ron Katz (eds), *ICC Banking Commission Opinions 2009–2011: New Opinions on UCP 600, ISBP 681, UCP 500, URC 522 and URDG 758* (ICC 2012) 40–41.

[87] *Kuvera (SGHC)* (n 10) [15].

[88] Cranston (n 74) 511, 525.

[89] *ICC Banking Commission Opinions 2009–2011* (n 86) 45–46.

[90] Jeremy Smith, 'Documentary Credits: What Law Should Apply?' in Ron Katz (ed), *Insights into UCP 600: Collected Articles from DCI 2003 to 2008* (ICC 2008) 111–112.

[91] *Sonali* (n 39).

[92] See generally Kurkela (n 66) 31–39.

[93] Cranston (n 74) 511; Enonchong (n 77) [13.03]; Paul Todd, *Bills of Lading and Bankers' Documentary Credits* (4th edn, Informa 2007) [2.100].

[94] *DOCDEX Decision No 314* and *DOCDEX Decision No 317* in Gary Collyer & Ron Katz (eds), *Collected DOCDEX Decisions 2009-2012: Decisions by ICC experts on documentary credits, collections and demand guarantees* (International Chamber of Commerce 2012) 116, 129; Gary Collyer & Ron Katz (eds), *ICC Banking Commission Collected Opinions 1995–2001 on UCP 500, UCP 400, URC 522 & URDG 458* (ICC Publishing SA 2002) 92.

[95] *DOCDEX Decision No 314* in *Collected DOCDEX Decisions 2009-2012* (n 94) 117. See also Wheble (n 79) 23.

[96] *ICC Banking Commission Collected Opinions 1995–2001* (n 94) 98.

(i) the applicant–issuer contract.[97]

Determining the proper law is a relatively simple task for the underlying applicant–beneficiary and applicant–issuer[98] contracts. As for the applicant–beneficiary contract, express choice of law and jurisdiction clauses are commonly found in underlying international sales contracts.[99] Such clauses will regulate the underlying the applicant–beneficiary contract. However, because of the doctrine of autonomy, the governing law of the underlying contract cannot determine the proper law of the LC.[100] The contrary might occur if the LC incorporates parts of the underlying contract including the proper law clause.[101] The problem of a LC incorporating another contract with an express choice of law clause (such as an indemnity contract) rather than merely identifying it (and avoiding the risk of having incorporated an express choice of law into the LC) is outside of the scope of this paper. As for the applicant–issuer contract, the applicant–issuer contract is typically not a transnational contract.[102] Even if it was, it is said that:

> [t]he application of the general rule that the governing law is to be determined by looking at the closest and most real connection of each contract results in the internationally acknowledged conclusion that the law governing the relationship between the applicant and the issuing bank is the law of the issuing bank's domicile.[103]

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97 John F Dolan, *The Law of Letters of Credit: Commercial and Standby Credits*, vol 1 (4th edn, AS Pratt 2007) 4-34–4-35, citing *Blonder & Co v Citibank NA* No 604642/01 (Supreme Court of New York, 17 December 2002).

98 Clive M Schmitthoff, 'Conflict of Laws Issues Relating to Letters of Credit: An English Perspective' in Ho Peng Kee and Helena HM Chan (eds), *Current Problems of International Trade Financing* (2nd edn, Butterworths 1990) 110–111; *Dicey, Morris and Collins on the Conflict of Laws*, vol 2 (n 38) [33-340]; Ebenezer Adodo, *Letters of Credit: The Law and Practice of Compliance* (OUP 2014) [PIII.013]; Charles Proctor, *The Law and Practice of International Banking* (2nd edn, OUP 2015) [24.78]; Rolf A Schütze and Gabriele Fontane, *Documentary Credit Law Throughout the World: Annotated Legislation from More than 35 Countries* (ICC Publishing SA 2001) 26.

99 Fawcett, Harris and Bridge (n 38) [13.43].

100 UCP 600, arts 4.a, and 5; *Attock Cement Co Ltd v Romanian Bank for Foreign Trade* [1989] 1 WLR 1147 (CA) 1159DE; Merrett (n 60) [26-088]. cf Adodo (n 98) [11.65], stating that '[i]nsofar as concerns the question of the governing law of the various contracts, the autonomy rule is of little significance'; Christopher Hare, 'On Autonomy' (2018) NUS Centre for Maritime Law Working Paper 18/03 <https://law.nus.edu.sg/cml/wp-content/uploads/sites/8/2020/04/012_2018_Christopher-Hare.pdf> accessed 28 October 2025.

101 See *Offshore International* (n 29) 401E; *Trafigura* (n 27) [15]; *Ash v Lloyd's Corp* (1991) 6 OR (3d) 235 (Ontario Court, General Division, Canada) 240, appeal allowed in part in *Ash v Lloyd's Corp* (1992) 9 OR (3d) 755 (Court of Appeal for Ontario) but not on this point.

102 Schmitthoff (n 98) 110–111; Markstein (n 32) 142. One exception is *Mannesman* (n 68).

103 Schütze and Fontane (n 98) 26. See also Markstein (n 32) 142–143.

In contrast, it is relatively more difficult to determine the proper law for the typically transnational issuer–beneficiary contract. Most LCs do not[104] currently incorporate an express choice of law clause.[105] Judicial decisions in England[106] and Canada,[107] suggest that this might be a widespread phenomenon. This is despite the issuer being 'perfectly at liberty to issue [LCs] which are subject to [the UCP] and to matters not governed therein, to the laws of the country of issuance'.[108] The UCP is not law[109] but is 'a set of contractual rules' which must be incorporated into LCs and may be superseded by '[m]andatory laws'.[110] Even then, UCP 600 does not provide any choice of law rules.[111] If there is no express choice of law, Stage (1) of the common law approach is irrelevant. As explained above, Stage (2) is typically 'skipped'.[112] A further possible factor to be borne in mind is that courts are reluctant to imply terms in the LC context where UCP 600 predominates,[113] and such terms might include a choice of law. Turning to Stage (3), given that the only place for beneficiary to present documents is in Country A, where the issuer is located, the proper law of the issuer–beneficiary contract in the simplest LC context will inevitably be Country A's law, as the law

[104] Exceptions include: *Petrologic Capital SA v Banque Cantonale de Geneve* [2012] EWHC 453 (Comm) [3], [17]; *Banco Nacional De Mexico SA v Societe Generale* 34 AD 3d 124, 820 NYS 2d 588 (Supreme Court of New York, Appellate Division, 19 September 2006); and only one of the seven LCs mentioned in *Ash v Lloyd's Corp* (1991) 6 OR (3d) 235 (Ontario Court, General Division, Canada) 239h–240b. See also Damian Honey and Michael Buffham, 'Economic Sanctions and Letters of Credit in International Transactions' in Barış Soyer and Andrew Tettenborn (eds), *International Trade and Carriage of Goods* (Informa Law from Routledge 2017) 171.

[105] James E Byrne, Soh Chee Seng and Christopher Hare, 'The UCP Regime: Past, Present, and Future' in Christopher Hare and Dora Neo (eds), *Trade Finance: Technology, Innovation and Documentary Credits* (OUP 2021) [1.32]; Michael Brindle et al, 'Documentary Credits and Related Transactions' in Michael Brindle and Raymond Cox (eds), *Law of Bank Payments* (5th edn, Sweet & Maxwell 2018) [7-136].

[106] *Habib Bank Ltd v Central Bank of Sudan* [2006] EWHC 1767 (Comm), [2007] 1 WLR 470 [43].

[107] *JTG Management Services Ltd v Bank of Nanjing Co Ltd* [2014] BCSC 715 [18].

[108] *ICC Banking Commission Collected Opinions 1995–2001* (n 94) 43.

[109] *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc (The Galatia)* [1980] 1 WLR 495 (QB) 509; *Heytex Bramsche GmbH v Unity Trade Capital Ltd* [2022] EWHC 2488 (Ch), [2023] BPIR 432 [21]; Todd (n 93) [1.83]; Honey and Buffham (n 104) 166; Richard King, *Gutteridge & Megrah's Law of Bankers' Commercial Credits* (8th edn, Europa Publications 2001) [10-01]; Byrne, Soh and Hare (n 105) [1.05].

[110] *DOCDEX Decision No 316* in *Collected DOCDEX Decisions 2009–2012* (n 94) 125, para 6. See also *DOCDEX Decision No 314* in *Collected DOCDEX Decisions 2009-2012* (n 94) 116; *ICC Banking Commission Collected Opinions 1995–2001* (n 94) 62, para 4.

[111] Byrne, Soh and Hare (n 105) [1.32]; Todd (n 93) [1.97]. Cf the International Chamber of Commerce's (ICC) Uniform Rules for Demand Guarantees (URDG) 758, arts 34–35.

[112] See n 29 above. See also *Trafigura Beheer BV v Kookmin Bank Co (No 2)* [2006] EWHC 1921 (Comm), [2007] 1 Lloyd's Rep 669 [46], [48]; *Trafigura* (n 27) [15].

[113] *Fortis Bank SA/NV* v *Indian Overseas Bank* [2011] EWCA Civ 58, [2011] 2 Lloyd's Rep 33 [55], citing *Fortis Bank SA/NV* v *Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 Lloyd's Rep 641 [47]. See also *Deutsche Bank AG* v *CIMB Bank Berhad* [2017] EWHC 1264 (Comm), [2017] Bus LR 1671 [37]; *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] SGCA 32, [2016] 3 SLR 1308 [264]. Cf the majority judgment in *Grains* at [97].

of the place of payment against presentation of documents.[114] The same outcome is likely under the European approach.[115]

However, transnational LCs are typically more complicated due to the involvement of a fourth entity, a correspondent bank in Country B, involved for the parties' convenience.[116] The issuer will 'almost invariably' use the services of an advising bank to advise the beneficiary of the LC.[117] The issuer aside, neither the applicant nor the beneficiary have any contractual relationship with the advising bank.[118] The advising bank might face tortious liability instead.[119] The issuer might also authorise the advising bank (and other correspondent banks) to receive documents presented by the beneficiary under the LC, examine such documents, and provide payment against a compliant presentation. In some cases, the issuer might not authorise the correspondent bank to provide payment, but examine presented documents only. Such banks are called 'Nominated bank[s]', at which the LC is available.[120] Following the issuer's authorisation, the nominated bank decides whether (and to what extent) it will act on its nomination.[121] For example, the nominated bank could decide to act on only part of its nomination (for example, examination of documents only) and refuse to pay the beneficiary despite a compliant presentation. The issuer will need to provide payment instead.[122] If it is desired that the nominated bank must pay the beneficiary, the issuer can request the nominated bank to 'add its confirmation' to the LC.[123]

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[114] Carole Murray, David Holloway and Daren Timson-Hunt, *Schmitthoff: The Law and Practice of International Trade* (12th edn, Sweet & Maxwell 2012) [11-022]. See also *Shinetec (Australia) Pty Ltd v The Gosford Pty Ltd; The Gosford Pty Ltd v Bank of China Ltd (No 2)* [2023] NSWSC 1405 [165]–[175]; Schütze and Fontane (n 98) 27.

[115] Todd (n 93) [2.103]; Markstein (n 32) 146.

[116] Todd (n 93) [1.47]; Schütze and Fontane (n 98) 27–28.

[117] Alan Ward and Robert Wight, 'Tortious Liability of an Advising Bank in the Letter of Credit Transaction' (1995) 10 JIBL 136. See the definition of 'Advising bank' in UCP 600, art 2.

[118] Ibid. For discussion on the law governing the contract between the issuer and the advising bank, see Markstein (n 32) 143–144.

[119] Ibid.

[120] See the definition of 'Nominated bank' in UCP 600, art 2.

[121] See generally *Grains* (n 113).

[122] UCP 600, arts 7.a.ii, 7.a.iii, 7.a.iv, and 7.a.v.

[123] UCP 600, arts 8.b, and 8.d. Such a request probably originated from the beneficiary: see Simon Cook, 'Documentary Letters of Credit and Documentary Letters of Credit Facilities' in Geoffrey Wynne (ed), *A Practitioner's Guide to Trade and Commodity Finance* (2nd edn, Sweet & Maxwell 2022) 78–79.

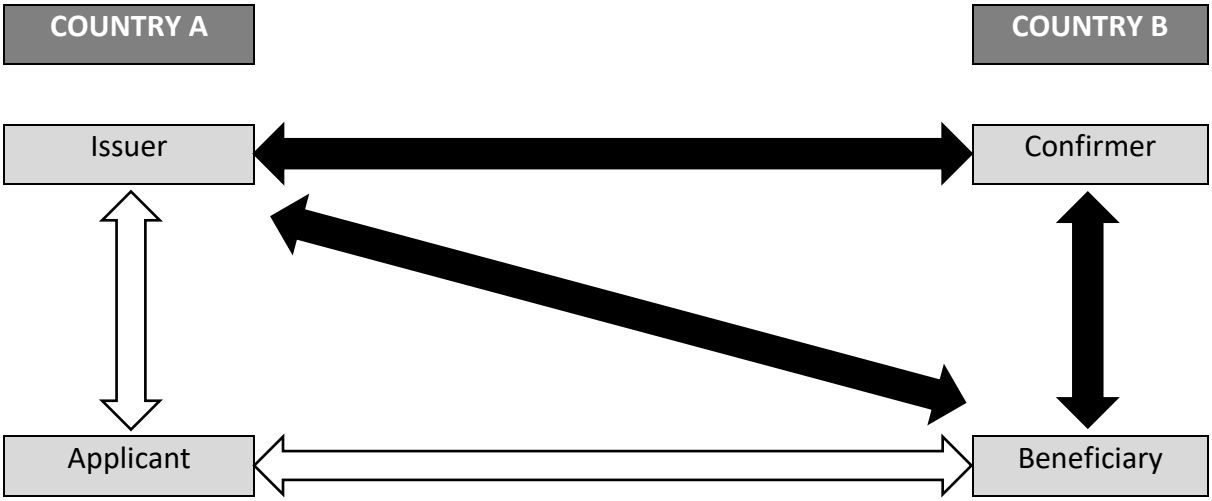
Upon confirmation, the nominated bank becomes a confirming bank (confirmer) and must provide payment against a compliant presentation.[124] Under this bilateral agreement between the issuer and the confirmer (the issuer–confirmer contract), the issuer must reimburse the confirmer.[125] The confirmer is a special type of nominated bank because the confirmer usually replicates the issuer's obligations to the beneficiary in full.[126] Leaving aside the possibility of the confirmer adding in its own terms to its confirmation of the LC, a would-be confirmer faces this all-or-nothing decision of whether to confirm the LC.[127] Thus, the confirmer–beneficiary contract and the issuer–confirmer contract can be described as 'adjacent contracts'.[128] The issuer will subsequently seek reimbursement from the applicant. The applicant–issuer contract and issuer–confirmer contract are also adjacent contracts. In contrast, the issuer–beneficiary and confirmer–beneficiary contracts are 'parallel contracts'[129] in favour of the beneficiary.

1.5 The LC transnational triangle of contracts involving confirmers

This paper will focus on transnational LCs involving confirmers. A confirmed LC comprises five contracts.[130] The first contract is the underlying applicant–beneficiary contract.[131] The second contract is the applicant–issuer contract,[132] which might predate the first contract as a long-standing umbrella bank–customer contract for various banking facilities. The third contract is the issuer–beneficiary contract,[133] which typically arises after the first and second contracts have been formed. The fourth contract is the confirmer–beneficiary contract,[134] which typically follows the terms of the third contract (at least to a large extent[135]). The fifth contract is the issuer–confirmer contract.[136] The third, fourth, and fifth contracts form a triangle of

[124] UCP 600, art 8.b. See the definition of 'Confirming bank' in UCP 600, art 2.
[125] UCP 600, art 7.c.
[126] See, however, *Kuvera (SGHC)* (n 10) [71]–[82], and n 141 below.
[127] Ibid, [71], [79]–[80].
[128] Adopting the phrase used in Koji Takahashi, *Claims for Contribution and Reimbursement in an International Context: Conflict-of-Laws Dimensions of Third Party Procedure* (OUP 2000) 259, fn 56.
[129] Takahashi (n 128) 259, fn 56. See also *Bank of Baroda v Vysya Bank Ltd* [1994] 2 Lloyd's Rep 87, 92.
[130] *Kuvera (SGHC)* (n 10) [34]–[40].
[131] Ibid, [35].
[132] Ibid, [36].
[133] Ibid, [37].
[134] Ibid, [38].
[135] Ibid [82], [102]–[107].
[136] Ibid, [39].

three LC contracts (the LC triangle). The contractual matrix[137] is illustrated[138] below. The three arrows having a dark colour fill represent the LC triangle. The issuer and the applicant are within the territorial jurisdiction of Country A (on the left). The confirmer and the beneficiary are within the territorial jurisdiction of Country B (on the right).



2 Problem 1: Floating choice of law

Both the issuer–beneficiary and the issuer–confirmer contracts straddle two jurisdictions. Following the beneficiary's presentation of compliant documents to the confirmer, both the issuer and the confirmer are obliged to pay the beneficiary under 'parallel contracts'[139] of the issuer–beneficiary contract and the confirmer–beneficiary contract respectively.[140] The beneficiary, of course, cannot obtain double recovery. Alternatively, the beneficiary might choose to present documents to the issuer instead and trigger the issuer's payment obligation.[141]

Due to the beneficiary's choice of presentation location (either Country A or B), it will be problematic to apply the 'law of the place of payment against presentation of documents' as

[137] *Governor & Company of the Bank of Ireland* (n 67) [21]. See also *United City Merchants* (n 67) 182H–183D; *Kuvera (SGHC)* (n 10) [34]–[40].
[138] See also McKendrick (n 72) [35.74], Fig 35.4.
[139] Adopting the phrase used in Takahashi (n 128) 259, fn 56.
[140] UCP 600, arts 7.a and 8.a.
[141] The beneficiary's presentation to the issuer might also trigger the confirmer's payment obligation if the issuer fails to pay, if one interprets the definition of a nominated bank under UCP 600, art 8.a as being wide enough to include the issuer: UCP 600, arts 2, 6, and 8.a.

a connecting factor to determine the proper law of the LC contracts. Under the common law approach, it is impermissible to have the proper law determined sometime after contract formation as that would leave the contract in a 'legal vacuum'.[142] Thus, to avoid issues of a floating choice of law, *Sinopec* clarified the above connecting factor as the law 'of the place where parties had *contemplated* that documents would be presented and payment made, at the time when the terms of the [LC] were communicated to the beneficiary'.[143] In the process of reaching this outcome, *Sinopec* held, without engaging in detailed analysis, that the issuer–beneficiary contract 'is formed and the [issuer] becomes irrevocably bound to honour the [LC] when the [LC] is communicated to the beneficiary'.[144] In contrast, under the *Kuvera* formulation, the LC contract is formed when a complying presentation is made.[145]

What if the issuer–beneficiary contract was formed before its terms were communicated to the beneficiary? On one analysis, '[t]here appear to be three options' as to when the LC is binding upon the issuer and confirmer: (1) when the issuer issues the LC; (2) when the beneficiary is advised of the LC; and (3) when the beneficiary 'acts upon, or manifests its formal acceptance' of the LC.[146]

Option (1) is supported by the wording of UCP 600, which states that the issuer 'is irrevocably bound to honour as of the time it issues the [LC]',[147] and in the case of an amended credit is 'irrevocably bound by an amendment as of the time [the issuer] issues the amendment' to the LC,[148] and 'irrevocably committed to issue the [LC or amendment] without delay' when the issuer 'sends' a 'preliminary advice' of the LC.[149] The confirmer is bound when it 'adds its confirmation to the [LC]',[150] which suggests that the LC is formed prior to its confirmation, which would logically also be prior to the confirmed LC being advised to the beneficiary. In

[142] *Sinopec* (n 7) [73] (Ang Cheng Hock J).
[143] Ibid, [74] (emphasis in original), following *Marconi* (n 13).
[144] Ibid, [73], citing *Sinotani* (n 10) [24] and Malek and Quest (n 54) [5.3]; cf *Kuvera (SGHC)* (n 10) [61]–[65].
[145] *Kuvera (SGHC)* (n 10) [64]–[65].
[146] Cranston (n 74) 523. See also Ellinger and Neo (n 26) 9–10, 110; Murray, Holloway and Timson-Hunt (n 114) [11-025]; *Kuvera (SGHC)* (n 10) [59], [65].
[147] UCP 600, art 7.b. This is a new provision in the UCP 600: see International Chamber of Commerce, *Commentary on UCP 600: Article-by-Article Analysis by the UCP 600 Drafting Group* (International Chamber of Commerce 2007) 38.
[148] UCP 600, art 10.b.
[149] Ibid, art 11.b.
[150] Ibid, art 8.b.

contrast, and in favour of Option (2),[151] UCP 600 also indicates that the confirmer is bound by amendments 'as of the time it advises the amendment' unless it informs the issuer and the beneficiary of its refusal to extend confirmation to the amendment.[152] Nevertheless, and in support of Option (3),[153] UCP 600 also suggests that the beneficiary is bound by amendments when it 'acts upon, or manifests its formal acceptance' and '[a]s of that moment the [LC] will be amended'.[154] Given that UCP 600 uses Options (2) and (3) purely for LC amendments, the wording of UCP 600 would seem to support the proposition that the issuer–beneficiary contract is formed before LC terms are communicated to the beneficiary (Option (1)).[155]

However, domestic contract law rules might override UCP 600 to hold that the issuer–beneficiary contract is formed upon communication to the beneficiary, because UCP 600 is a set of contractual rules applicable only by way of express[156] incorporation into the LC (here, the issuer–beneficiary contract). Thus, if domestic law refuses to recognise a contract prior to communication to the beneficiary, it is impossible for UCP 600 to apply earlier by incorporation into a forthcoming contract.[157] In the words of Lord Diplock, 'contracts are incapable of existing in a legal vacuum'.[158] By definition, the incorporated contractual terms of the UCP are equally incapable of being applied in a contractual vacuum.

Yet, it is arguable that 'the binding force of mercantile usage suffices to displace the ordinary contract rules' which are 'inconsistent with the nature of the transaction and the intention of the parties'.[159] It is also arguable that older decisions[160] providing support for option (2) are

[151] See also Cranston (n 74) 524; Ellinger and Neo (n 26) 9–10, 110.
[152] UCP 600, art 10.b.
[153] See also Cranston (n 74) 523.
[154] Cranston (n 74) 523; UCP 600, art 10.c.
[155] James E Byrne and others, *UCP600: An Analytical Commentary* (Institute of International Banking Law & Practice 2010) 353–354, 373–374; Stefan Kröll, 'Uniform Customs and Practices for Letters of Credit' in Peter Mankowski (ed), *Commercial Law: Article-by-Article Commentary* (Nomos Verlagsgesellschaft 2019) 1438–1439. See also *Kuvera (SGHC)* (n 10) [59]–[60], [64]. Cf also [65].
[156] UCP 600, art 1.
[157] Todd (n 93) [1.75]–[1.76].
[158] *Amin Rasheed Shipping Corpn v Kuwait Insurance Co (The Al Wahab)* [1984] AC 50 (HL) 65C.
[159] Roy Goode, Herbert Kronke and Ewan McKendrick (eds), *Transnational Commercial Law: Text, Cases, and Materials* (2nd edn, OUP 2015) [11.20]. See also McKendrick (n 72) [35.49]–[35.51]. For a discussion of the 'mercantile usage theory', see EP Ellinger, *Documentary Letters of Credit: A Comparative Study* (University of Singapore Press 1970) ch 5. See also *Kuvera (SGHC)* (n 10) [61].
[160] See, eg, *Bunge Corp v Vegetable Vitamin Foods (Private) Ltd* [1985] 1 Lloyd's Rep 613, 617, which was cited in Malek and Quest (n 54) [5.3], which was in turn cited by *Sinopec* (n 7) [73].

now, in light of UCP 600, 'out of line with banking practice' and ought not to be followed.[161] If the *Kuvera* formulation is adopted, the LC contract will be formed upon a complying presentation being made to the bank:[162] this points to Option (3). This paper will not attempt to conclude in favour of any particular option, but will merely highlight the ongoing uncertainty surrounding formation of LC contracts.[163]

If the LC was formed prior to the beneficiary being aware of it, it would be illogical for the beneficiary to have a 'contemplated' place of presentation and payment when the LC was formed. Nevertheless, this logical problem is moot because there will only be one possible place (Country A) until a nominated bank acts upon its nomination or a confirmer adds its confirmation. Thus, Country A's law will govern the issuer–beneficiary contract, at least initially. No problem arises at this stage because the issuer–beneficiary contract is the only contractual relationship in the LC framework for an unconfirmed LC.[164] When the confirmer subsequently adds its confirmation, Country B's law will govern the non-transnational confirmer–beneficiary contract. Thus, two different laws will govern the issuer–beneficiary and the confirmer–beneficiary parallel contracts.

If the LC is treated as a single multiparty multilateral contract, then the problem of two laws governing one contract arises. It remains to be seen if this might be resolvable through the doctrine of dépeçage,[165] which accepts the possibility of one law governing discrete contractual issues, while another law governs the remaining issues. For example, issues concerning the issuer–beneficiary contract are governed by Country A's law, while Country B's law governs issues pertaining to the confirmer–beneficiary contract. However, when the issues are not separable, such as a dispute under the issuer–confirmer contract concerning the issuer's obligation to reimburse the confirmer for paying the beneficiary, dépeçage is unrealistic and unable to assist where one law permits the confirmer to pay the beneficiary,

[161] McKendrick (n 72) [35.49], fn 103.

[162] *Kuvera (SGHC)* (n 10) [61]–[65].

[163] Another issue is which law governs whether (or when) a contract has been formed: see Lawrence Collins (gen ed), *Dicey and Morris on the Conflict of Laws*, vol 2 (11th edn, Stevens & Sons 1987) 1197–1201.

[164] Leaving aside the issue of any advising bank giving rise to an issuer–advising bank contractual relationship, which is irrelevant here.

[165] See *Dicey, Morris and Collins on the Conflict of Laws*, vol 2 (n 38) [32-041]–[32-046]. See also *Enka Insaat ve Sanayi AS v OOO 'Insurance Company Chubb'* [2020] UKSC 38, [2020] 1 WLR 4117 [38]–[39].

while another law does not. This leads to the problem of determining the proper law governing the issuer–confirmer contract.

3 Problem 2: Determining the proper law of the issuer–confirmer contract

Due to 'points of connection with both legal systems', there appears to be 'considerable difficulty' in ascertaining both the system of law most closely connected to the issuer–confirmer contract and the characteristic performance of that contract.[166] This paper will examine this problem in the context of the above-mentioned LC triangle. Leaving aside two options which might not be relevant for every confirmed LC,[167] the main choice appears to be between the law of the place of the issuer and the law of the place of the confirmer (Country A's or B's law). The common law and European approaches can be considered together.

3.1 Arguments in favour of the confirmer's law

On the one hand, the arguments in favour of the confirmer[168] (Country B's law) are as follows. First, it matches the law of the confirmer–beneficiary contract. The issuer–confirmer contract is more closely connected to the confirmer–beneficiary contract than the other contracts.[169] Between the issuer–beneficiary contract and the confirmer–beneficiary contract, the confirmer–beneficiary contract 'should be treated as the principal contract' (because presentation and payment is contemplated at the confirmer rather than the issuer), and the law applicable to the confirmer–beneficiary contract 'should also govern' the issuer–beneficiary contract.[170] Schmitthoff has argued that 'there is a very strong presumption' that the confirmer's law would govern 'the interbank contract', because it is the law of the place of performance of that contract (discussed below in the context of the confirmer's services), and because the same law is likely to apply to the confirmer–beneficiary contract.[171] The confirmer does not expect to bear the legal risk of being out-of-pocket due to differences in

[166] Schmitthoff (n 98) 113.

[167] The two options are: (1) the law of the place where the confirmer is to be reimbursed, and (2) the law governing the confirmer–beneficiary contract: Adodo (n 98) [11.50]; [11.76].

[168] See also Nicholas Creed, 'The Governing Law of Letter of Credit Transactions' (2001) 16 J of International Banking Law 41, 47; Schütze and Fontane (n 98) 28.

[169] Adodo (n 98) [11.75].

[170] *Dicey, Morris and Collins on the Conflict of Laws*, vol 2 (n 38) [33-344].

[171] Schmitthoff (n 98) 113–114.

laws.[172] Being forced to pay under one law and denied reimbursement by another law is contrary to the confirmer's expectation to be 'covered back-to-back'[173] and is 'commercially unreasonable'.[174] Furthermore, the issuer (but not the confirmer) can insist on Country B's law governing the applicant–issuer contract.[175] Alternatively, the issuer can insert an express choice of law clause into the LC, and have the applicant increase the commission amount available to a would-be confirmer to incentivise confirmation. The issuer 'is in the best position to protect itself legally and commercially from the risk of non-matching [obligations]'.[176] In contrast, the confirmer is unable to unilaterally amend[177] a LC issued by the issuer to add in its own choice of law. Nevertheless, by holding that there was 'no legal impediment to a confirming bank adding a term to its confirmation of a [LC] which is not found in the [LC] itself' [178] (so long as the term is not 'fundamentally inconsistent with the commercial purpose of a confirmation'[179]), *Kuvera* suggests that the confirmer could have its own choice of law clause added into its confirmation of the LC.[180] More on this later.[181]

Second, it matches the law of agency contracts. Gopal, treating the confirmer as the issuer's agent, expressed support for the 'law of the place where the agent is expected to act',[182] stating that the issuer–confirmer contract 'should be governed by choice of law rules for contracts of agency'.[183] Indeed, case law does point to some sort of agency relationship in the issuer–confirmer contract.[184] Besides, 'the relationship between two banks is, in the absence of a choice of law, governed by the law of the mandated bank'.[185] An agency contract is

[172] *Wahda Bank v Arab Bank plc* [1996] 1 Lloyd's Rep 470 (CA) 473. Cf Byrne (n 155) 393 at [8].
[173] Takahashi (n 128) 219.
[174] Adodo (n 98) [11.36].
[175] Adodo (n 98) [11.45]–[11.46].
[176] Creed (n 168) 43.
[177] UCP 600, art 10.
[178] *Kuvera (SGHC)* (n 10) [82] (Vinodh Coomaraswamy J).
[179] Ibid, [82].
[180] Ibid.
[181] See the last argument in section 3.2 of this paper.
[182] Gopal (n 43) 123.
[183] Ibid, 135.
[184] Peter Watts and FMB Reynolds, *Bowstead and Reynolds on Agency* (23rd edn, Sweet & Maxwell 2024) [2-034]; *Grains* (n 113) [69]–[81] (but cf the minority judgment at [192]); *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] 1 Lloyd's Rep 275 (CA) 280; *Bank Melli Iran v Barclays Bank (Dominion, Colonial & Overseas)* [1951] 2 Lloyd's Rep 367, 376; *Bank of Baroda* (n 129) 90; *So Sau Lai Connie t/a Wing Fung Trading Co v DBS Bank (Hong Kong) Ltd* [2017] HKCU 82 [60].
[185] Markus Heidinger, 'Austrian Supreme Court Judgment of December 16, 2003 1 Ob 203/03 i' (2005) 20 Journal of International Banking Law and Regulation N-107–N-108. See also Eesa A Fredericks and Jan L Neels, 'The Proper Law of a Documentary Letter of Credit (Part 2)' (2003) 15 South African Mercantile LJ 207, 213.

generally a contract for the provision of services.[186] Even if not, the agent's performance is normally assumed to rank 'as characteristic'.[187]

Third, it matches the characteristic performance presumption under the European approach.[188] In the issuer–confirmer contract, the confirmer provides various services, namely, (a) receiving presented documents; (b) examining presented documents within five banking days;[189] (c) accepting and taking up compliant documents, thereby incurring liability to provide payment to the beneficiary;[190] and (d) forwarding compliant documents to the issuer[191] promptly.[192] On the other hand, the issuer's provision of money to the confirmer[193] (for the confirmer's commission[194] and reimbursement) can be 'rejected as the characteristic performance because this is a common feature of many contracts'.[195] The confirmer sells its services and earns money. The confirmer's services 'marks the nature of the contract'.[196] As the more active performer in the issuer–confirmer contract the confirmer is the party 'more likely to have to consult the law during the course of performance'.[197] This might justify the confirmer as being the 'characteristic performer' in the issuer–confirmer contract[198] and the 'choice of the law of the characteristic performer'.[199]

Fourth, it matches Rome I's treatment for services contracts.[200] The confirmer provides financial services. As mentioned above, the issuer–confirmer contract is a contract for the provision of services by the confirmer at the issuer's request,[201] falling within article 4(1)(b) of Rome I, which will trigger the law of the place of the confirmer's habitual residence, which

[186] Ellinger and Neo (n 26) 362; Watts and Reynolds (n 184) [12-003].
[187] Watts and Reynolds (n 184) [12-003].
[188] Fredericks and Neels (n 185) 214; Enonchong (n 59) [7.53].
[189] UCP 600, arts 14.a, and 14.b.
[190] UCP 600, art 15.b.
[191] UCP 600, art 15.b.
[192] *Grains* (n 113) [97].
[193] UCP 600 art 7.c.
[194] *Dicey, Morris and Collins on the Conflict of Laws*, vol 2 (n 38) [33-343], fn 1568.
[195] Torremans (n 35) 734.
[196] *Dicey, Morris and Collins on the Conflict of Laws*, vol 2 (n 38) [32-125]; Proctor (n 98) [24.89].
[197] Hill and Ní Shúilleabháin (n 57) [4.53].
[198] Morse (n 52) 565.
[199] Hill and Ní Shúilleabháin (n 57) [4.53]. See also Rome I (n 22), arts 4(1)(a) and 4(1)(b). Cf, however, art 4(3).
[200] Enonchong (n 59) [7.30]–[7.32].
[201] UCP 600, art 8.d; Proctor (n 98) [24.89].

will be Country B's law.[202] One author has characterised the LC as 'a financial contract where one party is giving a financial guarantee to another' and stated that '[i]t would not be helpful' to categorise that 'as a contract for the provision of services'.[203] Given that the confirmer performs the above-mentioned services (a) to (d), such a characterisation would be narrow and under-inclusive for the issuer–confirmer contract, given that examination of documents for compliance with the LC's terms is not a straightforward task.[204] The issuer's reimbursement obligation is ancillary to the confirmer's obligation to pay the beneficiary.[205] Likewise, the issuer–confirmer contract (and a part of the issuer–beneficiary contract) is ancillary to and dependent on actions taken in the context of the confirmer–beneficiary contract. A compliant presentation in the confirmer–beneficiary contract triggers payment obligations in the issuer–beneficiary contract or the issuer–confirmer contract, depending on whether the confirmer honours.[206]

Fifth, the confirmer offers a risk mitigation service from the beneficiary's perspective.[207] The confirmer offers the beneficiary the option to deal with the confirmer instead of the issuer. The beneficiary can avoid the risks associated with the issuer, such as credit and country risk.[208] Even if Country A becomes hostile to the beneficiary and imposes sanctions which enable the applicant or the issuer to obtain a stop payment order, or if the issuer becomes insolvent, the beneficiary can still turn to the confirmer. The confirmer, who must deal with

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[202] *Dicey, Morris and Collins on the Conflict of Laws*, vol 2 (n 38) [33-331]; [33-341]; Enonchong (n 59) [7.53]; Torremans (n 35) 257, 727, citing Rome I (n 22) art 4(1)(b).

[203] Paul R Beaumont, 'The Brussels Convention becomes a Regulation: Implications for Legal Basis, External Competence, and Contract Jurisdiction' in James Fawcett (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (OUP 2002) 22–23, cited in Torremans (n 35) 257, fn 574.

[204] Banks have submitted many queries on the issue of documentary compliance. See, eg, the following ICC opinions and decisions: Wheble (n 79); *Collected DOCDEX Decisions 2009-2012* (n 94); Gary Collyer & Ron Katz (eds), *ICC Banking Commission Collected Opinions 1995–2001 on UCP 500, UCP 400, URC 522 & URDG 458* (ICC Publishing SA 2002); Gary Collyer & Ron Katz (eds), *ICC Banking Commission Opinions 2009 - 2011: New Opinions on UCP 600, ISBP 681, UCP 500, URC 522 and URDG 758* (International Chamber of Commerce 2012).

[205] Adodo (n 98) [11.75].

[206] UCP 600 arts 7.a, and 7.c.

[207] George P Graham, 'International Commercial Letters of Credit and Choice of Law: So Whose Law should apply anyway?' (2001) 47 Wayne LR 201, 230; Byrne (n 155) 90 (at [2]), 102 (at [2]), and 393 (at [8]).

[208] Walter Baker and John F Dolan, *Users' Handbook for Documentary Credits under UCP 600* (International Chamber of Commerce 2008) 59; Byrne (n 155) 90 (at [2]), 102 (at [2]), and 393 (at [8]).

the issuer to obtain reimbursement, bears these risks on the beneficiary's behalf. This is a service which the issuer cannot offer.

3.2 Arguments in favour of the issuer's law

On the other hand, the arguments in favour of the issuer (Country A's law) are as follows. First, the law governing the issuer–confirmer contract should match the law governing the applicant–issuer contract (Country A's law). Applying Country B's law to the issuer–confirmer contract would place the issuer in between two different laws,[209] which will deprive the issuer of back-to-back contractual coverage.

Second, the proposition that the issuer–confirmer contract is an agency contract has been doubted.[210]

Third, the 'salient feature' of the issuer–confirmer contract is not the 'agency contract', but the issuer's promise to honour the confirmer's complying presentation and reimburse the confirmer.[211] The confirmer's 'agency services' (ie, LC confirmation and advising the beneficiary) 'do not characterise' the issuer–confirmer contract: article 4(1)(b) of Rome I, which concerns provision of services, is inapplicable.[212]

Fourth, the issuer must still receive documents (albeit from the confirmer), examine them to ascertain compliance, before arranging for the confirmer to be reimbursed. This is the 'central obligation'[213] in the issuer–confirmer contract. While the confirmer performs similar services, that is in the confirmer–beneficiary contract, not the issuer–confirmer contract.

Fifth, assuming that the *Kuvera* formulation is accepted worldwide, the confirmer can add in its own choice of law clause or other term into its confirmation of the LC so long as that term

[209] Eric A Caprioli, 'Conflicts of laws in documentary credit contracts, a comparative law approach' (1991) 7 International Business LJ 905, 937.

[210] Cranston (n 74) 529; *Muslim* (n 184) 280. See also Adodo (n 98) [11.69]–[11.71]; Toh Kian Sing and Chen Zhida, 'Perspectives on the Role of the Nominated Bank in a Letter of Credit' in Christopher Hare and Dora Neo (eds), *Trade Finance: Technology, Innovation and Documentary Credits* (OUP 2021) [4.14]; [4.18]; [4.23]; [4.28].

[211] Adodo (n 98) [11.72]–[11.73].

[212] Ibid, [11.73].

[213] Caprioli (n 209) 937.

is not 'fundamentally inconsistent with the commercial purpose of a confirmation'.[214] Although a confirmer is unable to unilaterally amend the LC by the UCP 600,[215] under the *Kuvera* formulation, the would-be confirmer is free to make any confirmation-consistent tweaks to the terms of the LC prior to its confirmation of the LC. *Kuvera* appears to give the confirmer the ability to substitute any existing choice of law clause in the LC with its own choice of law clause. When a confirmer does not add in its choice of law, it might be deemed to be 'relatively agreeable' to all potential applicable laws, including the issuer's potential choice of law for Country A. That is the argument in favour of Country A's law.

3.3 Conflicting choices of law

Meanwhile, when a confirmer takes the rarely seen step of inserting its own choice of law clause into the LC, the question is whether the confirmer's choice of law clause will bind the issuer for the purposes of the issuer–confirmer contract. If the issuer had refrained from inserting a choice of law clause into the LC, it might be deemed to be 'relatively agreeable' to all potential applicable laws, including Country B's law. But, when the issuer has its own choice of law clause for Country A in the LC and the confirmer has its own supposedly superseding choice of law clause for Country B in the confirmed LC, such conflicting choices of law would appear to negate each other's influence in the tussle over the proper law governing the issuer–confirmer contract.

3.4 Conclusions

The arguments and counter-arguments have been stated. There is a 'clear majority view'[216] that Country B's law should govern the issuer–confirmer contract. This is reflected by most cases suggesting that Country B's law will govern.[217] The confirmer renders the characteristic performance in the issuer–confirmer contract. The one case suggesting the opposite (that characteristic performance is the issuer's reimbursement[218]) has been criticised.[219]

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[214] *Kuvera (SGHC)* (n 10) [82].
[215] UCP 600, art 10.
[216] AN Oelofse, *The Law of Documentary Letters of Credit in Comparative Perspective* (Interlegal 1997) 520.
[217] *Bank of Baroda* (n 129) 90–94; *Sonali* (n 39) 237 (Cresswell J); *Mizuho Corporate Bank Ltd v Cho Hung Bank* [2004] SGHC 159, [2004] 4 SLR(R) 67 [7]. Cf *Governor & Company of the Bank of Ireland* (n 67) [25].
[218] *Governor & Company of the Bank of Ireland* (n 67) [25].
[219] Enonchong (n 59) [7.51]–[7.52].

Nevertheless, this paper will consider both majority and minority views when examining the problem of having multiple laws governing the LC triangle. This is because the case law expressing support for such views pre-date *Kuvera*. It remains to be seen whether the minority view might gain support from *Kuvera*.

4 Problem 3: Multiple laws in the LC triangle

The LC triangle contains three bilateral contracts between the three parties: the issuer, confirmer, and the beneficiary. When multiple laws govern the contracts making up the LC triangle and only two candidate laws exist (the law of Country A and B), one law will govern a majority of the LC triangle; leaving a minority for the other law to govern. This section will first discuss the situation where a majority of the LC triangle is governed by the confirmer's law and then discuss the situation where a majority of the LC triangle is governed by the issuer's law instead.

4.1 Where a majority of the LC triangle is governed by the confirmer's law

Assuming that both Country A's and B's laws indicate that the issuer–confirmer contract is governed by the same law as the confirmer–beneficiary contract (ie, Country B), the next problem is that the LC triangle is governed by two different laws: Country A's for the issuer–beneficiary contract and Country B's for the confirmer–beneficiary contract. It is undesirable to have two different laws governing these parallel contracts.[220] Given that the beneficiary is not precluded from availing itself of the better of two proper laws, two undesirable scenarios arise:

(1) Country A's law permits the beneficiary to obtain payment from the issuer when Country B's law prevents the beneficiary from doing so with the confirmer; or
(2) Country A's law prevents the beneficiary from obtaining payment from the issuer while Country B's law permits the beneficiary to obtain payment from the confirmer.

[220] *Bank of Baroda* (n 129) 90–94. However, Schütze and Fontane (n 98) 28 states that '[s]ome authors and courts differentiate between the beneficiary's claim against the confirming bank and its claim against the issuing bank [and contend that the law governing the latter] remains unaffected by the confirmation'.

In scenario (1), by simply presenting compliant documents at the confirmer, the beneficiary triggers the issuer's and confirmer's payment obligations simultaneously.[221] Alternatively, the beneficiary presents these documents at the issuer. UCP 600 does not expressly allow the issuer to withhold or recover payment on the ground that the confirmer is not legally obliged to pay under a foreign law[222] and it will be difficult to imply such a term into UCP 600.[223] In scenario (2), the issuer is effectively subject to the worse of two proper laws, given that the issuer will have to reimburse the confirmer after the beneficiary obtains payment from the confirmer. UCP 600 does not expressly allow the issuer to withhold or recover reimbursement to the confirmer on the ground that the issuer is not legally obligated to pay the beneficiary under its own domestic law, and again implying terms is difficult. Thus, if two different laws govern the LC triangle such that Country B's law governs the issuer–confirmer contract, the issuer stands to lose, and the beneficiary stands to win, should substantive differences in these laws exist.[224]

4.2 Where a majority of the LC triangle is governed by the issuer's law

Assume instead that the same law governs both the issuer–beneficiary and issuer–confirmer contracts (ie, Country A's law). One might hope that some courts might displace the initial thought of Country B's law governing the non-transnational confirmer–beneficiary relationship, and accept that the law governing confirmer–beneficiary contract should follow the law governing the issuer–confirmer contract, to protect the confirmer's position.[225] The problem of different laws arises if courts do not find the confirmer–beneficiary contract to be governed by Country A's law as well. On the one hand, if the courts of Country A find that Country A's law governs the confirmer–beneficiary contract, but the courts of Country B find that Country B's law governs the confirmer–beneficiary contract, the confirmer is also affected if Country B's law provides for a limitation period longer than that in Country A's

[221] UCP 600, arts 7.a, and 8.a.
[222] UCP 600, art 7.a.
[223] See cases cited above, fn 113.
[224] English law and New York law have different formulations of the 'fraud exception' as defence to a payment claim under the LC. See Wong (n 32) 384–386.
[225] In other words, using the choice of law approach adopted by *Bank of Baroda* (n 129) and inverting the directions.

law.[226] The confirmer can be out-of-pocket when the beneficiary sues the confirmer in Country B and obtains payment from the confirmer under Country B's law, while the issuer obtains a declaration of non-liability from the courts of Country A by relying on the limitation period defence available under Country A's law.[227] On the other hand, if the courts of Country A find that Country B's law governs the confirmer–beneficiary contract, but the courts of Country B find that Country A's law governs the confirmer–beneficiary contract, the beneficiary cannot obtain judgment in the courts of Country B against the confirmer. The beneficiary can, however, obtain judgment against the confirmer in the courts of Country A. The beneficiary can then argue that judgment should be given against the issuer as well, because the issuer's liability to pay the beneficiary (triggered by the confirmer's failure to pay[228]) could supersede any limitation period defence raised by the issuer under Country A's law, which is the law of governing the issuer–beneficiary contract. Finally, if the courts in Countries A and B find that Country B's law governs the confirmer–beneficiary contract, the confirmer might be caught between two different laws. For example: first, the beneficiary presents documents to the confirmer, triggering both the issuer's and confirmer's payment obligations simultaneously.[229] Secondly, shortly thereafter, the applicant obtains an injunction to stop payment under the LC from the courts in Country A[230] (a stop payment order) by producing clear evidence that somehow rubbish was delivered instead of valuable goods, thus committing 'fraud' as defined by the law of Country A.[231] Thirdly, the issuer and confirmer both attempt to refuse payment. The issuer, relying on the law of Country A and the stop payment order made under that law, successfully refuses payment. In contrast, the confirmer is unable to refuse payment because the law of Country B has a narrower definition of fraud.[232] Fourth, the confirmer being out-of-pocket, seeks reimbursement from the issuer

[226] For an example where the limitation period was raised as a defence to a claim for payment under a LC, see *Sonali* (n 39).

[227] The issuer is assumed to have no branches or notable assets outside of Country A.

[228] UCP 600, arts 7.a.ii, 7.a.iii, 7.a.iv, and 7.a.v.

[229] UCP 600, arts 7.a, and 8.a.

[230] See, eg, *Sinotani* (n 10) [7].

[231] See Xiang Gao, 'The Fraud Rule in the Letters of Credit Revisited' in Christopher Hare and Dora Neo (eds), *Trade Finance: Technology, Innovation and Documentary Credits* (OUP 2021) [6.32]–[6.37].

[232] *United City Merchants* (n 67). Issues of characterisation also arise in the context of fraud, which might be characterised as a tortious issue to be governed by the place of documentary presentation by the beneficiary (ie, Country B): see Wong (n 32). However, if the case concerns something other than fraud, it is likely that the courts of Country B will find that Country A's law applies to the confirmer–beneficiary contract, when the laws of both Countries A and B agree that Country A's law should govern the issuer–confirmer contract.

in the courts of Country B. But the issuer successfully refuses reimbursement because Country A's law governs the issuer–confirmer contract and therefore the stop payment order issued by the courts of Country A stops reimbursement.[233] Without reimbursement, the confirmer remains out-of-pocket and stands to lose, while the beneficiary benefits from using the better of two laws applicable to its parallel issuer–beneficiary and confirmer–beneficiary contracts, and, once again, stands to win. For completeness, if the law having the narrower fraud definition is Country A's instead, then the issuer (not the confirmer) must pay: the confirmer does not stand to lose here.

4.3 Other permutations

Any other permutations to the LC triangle would involve the issuer–beneficiary contract deviating away from the governance of Country A's law, or the confirmer–beneficiary contract deviating away from the governance of Country B's law. As discussed above, the former deviation is not always the case due to uncertainty as to formation of the LC contracts, while the latter is unlikely in this LC triangle.

4.4 Conclusions

Thus, if the LC triangle is governed by multiple laws, then in most cases, the beneficiary stands to win and one bank (either the issuer or the confirmer) stands to lose when there is a substantial difference in the laws applicable to the LC triangle. The beneficiary is effectively allowed 'unilaterally to choose the applicable law'.[234] Although the LC has been recognised as a unilateral contract in *Kuvera*, this is an advantage that some might find undue and undesirable. Nevertheless, one could argue that either the applicant or the beneficiary has already paid for this advantage, by arranging for duplicate[235] LC payment obligations in both Countries A and B without duplicating the proper law. The whole point of confirmation is to have access to a reliable local bank for the benefit of the beneficiary. The question is whether this includes access to the familiar local law. UCP 600, while specifying the duplicate payment

[233] *Sinotani* (n 10).

[234] Fredericks and Neels (n 185) 222.

[235] Save for the possibility that a presentation to the confirmer might trigger both the issuer's and the confirmer's payment obligations, whereas a presentation to the issuer might trigger the issuer's payment obligation but not the confirmer's. See n 141.

obligations of the issuer and the confirmer,[236] does not refer to the proper law. Thus, one could argue that the law governing the confirmer–beneficiary contract should be a duplicate of Country A's law governing the issuer–beneficiary contract when the confirmer fails to specify its choice of law in its confirmation of the LC. If so, then the desire for one law to govern the LC triangle suggests that there is a greater chance for Country A's law to govern the issuer–confirmer contract.

5 Problem 4: Difficulties in arriving at a single law to govern the LC triangle

In the solution proposed by Mance J (as he then was) in *Bank of Baroda*,[237] however, it is Country B's law that governs the LC triangle.[238] While the single law solution avoids the above-mentioned undeserved win or lose outcomes, the problem merely morphs into a different one. It appears when the LC triangle is constructed sequentially and not concurrently: the issuer–beneficiary contract is formed first, followed by the formation of the adjacent contracts of the issuer–confirmer and confirmer–beneficiary. Because the issuer–beneficiary contract cannot exist in a 'legal vacuum' under the common law approach,[239] Country A's law must apply to the issuer–beneficiary contract right from the start.[240] Thereafter, when the adjacent contracts are formed upon the confirmer adding its confirmation to the LC, Country B's law will govern the LC triangle. Now, the problem is whether the original law governing the issuer–beneficiary contract can be changed from Country A to B despite being the first contract in the LC triangle to be formed. It could. Because the European approach is not averse to a floating choice of law, this section will discuss the European approach first, followed by the common law approach.

[236] UCP 600, arts 7–8, 14.a, 14.b, 15.a, 15.b, and 16; cf *Kuvera (SGHC)* (n 10) [75], [79]–[82].
[237] *Bank of Baroda* (n 129) 90–94.
[238] *Dicey, Morris and Collins on the Conflict of Laws*, vol 2 (n 38) [33-344]; *Sonali* (n 39) 237; Fredericks and Neels (n 185) 222. See also the 'very strong presumption' to the same effect, posited in Schmitthoff (n 98) 114.
[239] *Sinopec* (n 7) [73]; *The Al Wahab* (n 158) 65C.
[240] *Dubai Electricity Co v Islamic Republic of Iran Shipping Lines (The Iran Vojdan)* [1984] 2 Lloyd's Rep 380, 385; *Armar Shipping Co Ltd v Caisse Algérienne d'Assurance et de Réassurance (The Armar)* [1981] 1 WLR 207 (CA) 215H–216A.

5.1 European approach

The problem of 'changing the original law governing the issuer–beneficiary contract' is easily resolved under the European approach. Mance J's decision in *Bank of Baroda* illustrates.[241] The titular bank (Baroda) had sued Vysya Bank, which applied to set aside the writ and service of it out of the jurisdiction. Vysya Bank was instructed by Aditya to issue a LC in favour of Granada and arrange for a confirmation of that LC by a bank in London, UK. Vysya Bank was like the titular bank an Indian bank, but unlike the titular bank, had no branch in the UK. Aditya was an Indian importer seeking to buy pig iron from Granada, which was an Irish company with a London office. Following refusals by Citibank and the National Westminster Bank to confirm the LC, the London office of the titular bank confirmed the LC and subsequently negotiated the LC. Vysya Bank refused to reimburse the titular bank and alleged fraud. Aditya had obtained a court order in India restraining Vysya Bank from providing reimbursement.

Mance J had to consider whether 'any of the heads of O 11, r 1(1)(d)'[242] applied, one of which he described as 'contract by implication governed by English law'.[243] Parties accepted that the proper law of the contract must be determined by the Rome Convention as enacted by the UK's Contracts (Applicable Law) Act 1990. Mance J found that the characteristic performance of the issuer–confirmer contract lay with the confirmer. Mance J held that by art 4(2) of the Rome Convention, English law governed the Vysya–Baroda interbank contract, and that article 4(5) of the Rome Convention confirmed this. As for the confirmer–beneficiary contract (Baroda–Granada), whether by art 4(2) or art 4(5), English law clearly governed that contract. As to the issuer–beneficiary contract (Vysya–Granada), Vysya argued that Indian law applied. Mance J found it 'wholly undesirable'[244] to have the same LC 'governed by two different laws'[245] but accepted that art 4(2) pointed to Indian law.[246] In arriving at one single law to govern the LC triangle, Mance J relied upon art 4(5) to displace the art 4(2) presumption and have English law apply to the Vysya–Granada contract. Indian law was thereby 'changed' to English law. The application of 'different laws in the context of [LCs]' was avoided by using the

[241] *Bank of Baroda* (n 129).
[242] Ibid, 89.
[243] Ibid, 88.
[244] Ibid, 93.
[245] Ibid, 92.
[246] Ibid, 93.

'displacement provision' (the escape clause) found in the European approach.[247] Although the European approach appears to provide an easy solution to this problem, it remains the case that, prior to LC confirmation or final unappealable court judgment, the issuer suffers from some undesirable uncertainty as to the proper law governing the issuer–beneficiary contract. Pending LC confirmation, would Indian law or English law apply? Which law applies if the beneficiary presented documents a few days before LC confirmation?

5.2 Common law approach

In contrast, the problem of 'changing the original law governing the issuer–beneficiary contract' is more difficult to resolve under the common law approach, which lacks the escape clause of the European approach. While the proper law for the issuer–beneficiary contract must be ascertained upon contractual formation and cannot change into a different law thereafter,[248] this is subject to any subsequent agreement to alter the proper law.[249] The question is whether the appearance of a fourth entity, the confirmer, involves the creation of a subsequent agreement to alter, among other things, the proper law of the issuer–beneficiary contract. This is because Chan Seng Onn JC observed that there was:

> no reason why the entry of new parties subsequently into the [LC] transaction by way of confirmation, […], would not amount to 'fresh agreements' that would displace the initial proper law attached to the [LC] when it was first issued. If the nominated bank refuses to confirm, […], then there would be no change in the initial proper law of the [LC].[250]

When the confirmer adds its confirmation to the LC, fresh agreements are created in the LC triangle: the adjacent contracts of the issuer–confirmer and confirmer–beneficiary. However, the issuer–beneficiary contract has not been changed, save that the issuer is now obligated to pay when the beneficiary presents to a 'third party' (the confirmer), which is unwilling or

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[247] Merrett (n 60) [26-088].

[248] *The Armar* (n 240) 216A.

[249] *Kredietbank NV v Sinotani Pacific Pte Ltd* [1999] SGHC 26, [1999] 1 SLR(R) 274 [117]; the appeal against this Singapore High Court decision was dismissed in *Sinotani* (n 10); Martin Davies et al, *Nygh's Conflict of Laws in Australia* (10th edn, LexisNexis Butterworths 2020) [19.9], citing *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, 746, which in turn cited *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] AC 583 (HL) 603.

[250] *Kredietbank NV v Sinotani* (n 249) [118], discussed in Markstein (n 32) 157–158. But cf Schütze and Fontane (n 98) 28.

unable to pay.[251] Given that UCP 600 already mandates this contractual issuer–beneficiary payment obligation prior to LC confirmation, it is unconvincing to argue that the terms of the issuer–beneficiary contract have changed following confirmation. There is no fresh agreement affecting the issuer–beneficiary contract: a change of its proper law cannot be justified. Further, if LC confirmation is a mere duplication of the issuer's payment obligations by the confirmer, it should not amend the law governing the issuer–beneficiary contract from Country A's law to Country B's law. However, if one views the LC as a single multiparty multilateral contract, such that fresh agreements arising out of LC confirmation can be said to affect the issuer–beneficiary contract, the (possible) change in location of contemplated presentation could justify the change in law governing the issuer–beneficiary contract. The problem is that case law predominantly views the LC as separate bilateral contracts rather than a single multiparty multilateral contract.[252]

The only possible method to create a 'fresh agreement' affecting the issuer–beneficiary contract is to amend the LC after the confirmer adds its confirmation.[253] LC amendment(s) must be accepted by the issuer, the confirmer (if any), and the beneficiary.[254] However, the issuer is bound by amendment(s) when the amended LC is issued.[255] Yet the confirmer may refuse to extend its confirmation to the amended LC.[256] The beneficiary could even remain silent as to whether it accepts or rejects the amendment.[257] As such, amendments could create a problematic mismatched LC triangle, with the issuer–beneficiary contract on the amended LC, and the adjacent contracts of the issuer–confirmer and the confirmer–beneficiary still on the original LC.[258] Furthermore, amendments trivial or irrelevant in content might not be sufficient to persuade a court to hold that the proper law of the issuer–beneficiary contract can be changed to a new law.[259] Even if the amendments include adding

[251] UCP 600, arts 7.a.ii, 7.a.iii, 7.a.iv, and 7.a.v.
[252] See the discussion above, section 1.4.
[253] *Bank of Baroda* (n 129) 89.
[254] UCP 600, arts 10.a, 10.b, and 10.c.
[255] UCP 600, art 10.b.
[256] UCP 600, art 10.b.
[257] UCP 600, arts 10.c, and 10.f.
[258] Byrne (n 155) 418 (at [43(d)]) and 458 (at [14], [14(a)], and [14(b)]).
[259] *ISS Machinery Services Ltd v Aeolian Shipping SA (The Aeolian)* [2001] EWCA Civ 1162, [2001] 2 Lloyd's Rep 641 [14]–[18] (Potter LJ), [26]–[32] (Mance LJ), citing, among other things, Rome Convention (n 21), arts 3(1) and 3(2).

into the LC a choice of law clause with prospective[260] (and possibly retrospective[261]) effect, yet another issue is whether the various laws (the original proper law, the new proper law, and the law of the forum) permit a variation of proper law,[262] especially if third-party rights are adversely affected.[263] As such, the efficacy of this solution seems limited, and certainly does not provide a panacea for all situations.

Given the difficulties of changing the original proper law of the issuer–beneficiary contract midway, one might attempt to bypass the change altogether, either by favouring a 'pro-issuer' connecting factor pointing to Country A's law governing the LC triangle, or by asserting that the LC triangle is set up concurrently, thereby enabling Country B's law to apply to the LC triangle at the outset. Neither of these provides a satisfactory solution.

Using Country A's law to govern the LC triangle creates its own set of problems. First, given that Country A's law applies to the confirmer–beneficiary contract, a stop payment order issued by the courts of Country A could be found relevant when the confirmer (or applicant[264]) applies to the courts of Country B for a corresponding stop payment order against the beneficiary. While the courts of Country B would apply the law of the forum for the confirmer's injunction application, it might consider the stop payment order from Country A.[265] As such, the beneficiary might be partially deprived of a key benefit of confirmation: the beneficiary remains exposed to the country risk of Country A despite paying for confirmation by the confirmer.[266] The unprotected beneficiary would unhappily bear the legal risk of the law of Country A changing to the beneficiary's disadvantage, because lengthy legal

[260] *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328 (Comm), [2013] 2 Lloyd's Rep 121 [19]–[30].

[261] *EI Du Pont De Nemours & Co v Agnew* [1987] 2 Lloyd's Rep 565 (CA) 592; Torremans (n 35) 716; *HIH Casualty & General Insurance Ltd (in liq) v RJ Wallace* [2006] NSWSC 1150, (2006) 68 NSWLR 603 [101], [102], [111].

[262] See Torremans (n 35) 709, fn 266; *Dicey, Morris and Collins on the Conflict of Laws*, vol 2 (n 38) [32-102]–[32-103]; Jonathan Hill and Adeline Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (Hart Publishing 2010) [14.2.34]. Cf Rome Convention (n 21), art 3(2); Rome I (n 22), art 3(2).

[263] Rome Convention (n 21), art 3(2); Rome I (n 22), art 3(2).

[264] *First Modular* (n 2).

[265] Cf *First Modular* (n 2) [16]–[17].

[266] Byrne (n 155) 90 (at [2]) and 393 (at [8]).

proceedings could prolong a LC expiring[267] in the short term.[268] The beneficiary would, in future cases, demand that the applicant open the LC with an issuer in Country B instead. This destroys the LC triangle by rendering the confirmer irrelevant. Second, applying Country A's law to the confirmer (a foreign law) 'would cause great inconvenience'[269] to the confirmer. The confirmer could be made 'to apply a whole variety of foreign laws'[270] for its confirmed LCs 'retrospectively' without having any forewarning such as that provided by an express choice of law clause in the LC which would be noticed by the confirmer prior to the confirmer adding its confirmation. Had the confirmer added its own choice of law into its confirmation of the LC, there arises the now-familiar problem of having multiple proper laws in the LC triangle.

Asserting that the LC triangle is always constructed concurrently (rather than sequentially) runs the risk of going against the law concerning formation of the issuer–beneficiary contract. As mentioned above,[271] there are three possible options (or timings) to indicate the formation of the issuer–beneficiary contract. If Option (1) applies, the issuer–beneficiary contract will always be formed before LC confirmation, which subsequently brings in the adjacent contracts of the issuer–confirmer contract and the confirmer–beneficiary contract. Article 8.b of UCP 600 states that a confirmer 'is irrevocably bound to honour or negotiate as of the time it adds its confirmation to the credit'. The word 'add' or 'adds' suggests that something else (the LC) must already be in existence. If the LC is in existence, it must have been issued. If the LC has been issued, the issuer is irrevocably bound by it.[272] Under the common law approach, the issuer's binding obligation cannot exist in a 'legal vacuum' and must be governed by a law. Even if Options (2) or (3) apply, case law indicates at least one instance where the beneficiary

[267] Each LC must have an expiry date: see UCP 600, arts 6.d, 6.e, and 14.c. However, lengthy legal proceedings to resolve a LC dispute could increase the chance of the contents of the proper law changing to the disadvantage of certain party(s) to the LC during those legal proceedings.

[268] Adodo (n 98) [11.53]; Fredericks and Neels (n 185) 222–223; Brian Davenport and Michael Smith, 'The Governing Law of Letters of Credit Transactions' (1994) 9 Butterworths J of International Banking and Financial Law 3, 6; Byrne (n 155) 393 at [8].

[269] Schmitthoff (n 98) 113.

[270] *Offshore International* (n 29) 401H–402A (Ackner J).

[271] See section 2 of this paper.

[272] UCP 600, art 7.b.

was advised of the LC prior to the issuer finding a bank willing to add its confirmation to the LC, because other banks had declined the issuer's invitation to add their confirmation.[273]

In short, problems with the LC triangle cannot be eliminated without making substantial changes. Possible solutions will now be considered.

6 Solutions

There is a possibility that typical parties to the LC are unwilling to consider express choice of law provisions for the LC. First, parties might be reluctant to insert such provisions for fear of commercial problems or legal problems. Commercial problems include being stuck in negotiation 'deadlock'[274] or 'a debate' not 'worth having'.[275] Legal problems include, for example, being unable to escape conflict of laws issues when determining the proper law. Parties might be content[276] to let the courts decide the proper law based on 'commercial efficacy',[277] namely, pragmatic commercial sense.[278] Second, parties might believe, incorrectly, that the UCP is akin to a proper law[279] that avoids or minimises the need for express choice of law provisions. Third, if the beneficiary is insistent on having Country B's law apply, the beneficiary could insist in the underlying contract that the LC be issued by a bank in Country B.[280] To meet this requirement, the applicant would instruct its bank in Country A (the first issuer[281]) to arrange for a bank in Country B to issue the LC (the second issuer). It is the second issuer which owes the LC payment obligation to the beneficiary,[282] not the first issuer. No transnational LC triangle would form because the beneficiary would have no contract with the first issuer.

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[273] See, eg, the refusals by Citibank and National Westminster Bank plc to add their confirmation to the LC subsequently confirmed by Bank of Baroda in *Bank of Baroda* (n 129) 89.

[274] Adodo (n 98) [PIII.011].

[275] Gwynne (n 62) 452.

[276] Brindle and Cox (n 105) [7-136]; Adodo (n 98) [PIII.011]. See also EP Ellinger, 'The Uniform Customs and Practice for Documentary Credits – The 1993 Revision' [1994] LMCLQ 377, 402; Stuart Dutson, 'A Misguided Proposal' (2006) 122 LQR 374, 375.

[277] Richard Fentiman, *International Commercial Litigation* (2nd edn, OUP 2015) [5.92]–[5.97].

[278] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 [21], [30].

[279] Cook (n 123) 76.

[280] Agasha Mugasha, *The Law of Letters of Credit and Bank Guarantees* (Federation Press 2003) 212.

[281] Also known as the instructing bank, because it is the first issuer that instructs the second issuer to issue the LC: see Mugasha (n 280) 212.

[282] Mugasha (n 280) 212.

As for the UCP, calls for adding proper law provisions have been made,[283] but to no avail. One ICC Working Group concluded that proper law was 'best left for national courts' to resolve.[284] While there are international instruments which provide for proper law provisions for guarantees and similar undertakings,[285] these are not equivalent to LCs.[286] One of these instruments was described as 'unhelpful' and 'questionable' in terms of relevance for LCs.[287]

Nevertheless, assuming that something must be done, candidate solutions will have to be evaluated. This paper will evaluate the following additions to a LC that has no express choice of law:

(1) Express choice of Country A's or B's law: Solution 1.
(2) Express choice of 'choice of law rule', such as the law of the place of the contemplated presentation: Solution 2.
(3) Express choice of Country A's law which will be automatically changed to an express choice of Country B's law when a 'third party' bank (a correspondent bank in Country B) adds its confirmation (the confirmer): Solution 3.

6.1 Solution 1: Express choice of law

Solution 1 is legally permitted (at least in Anglo-common law jurisdictions),[288] tidy (as it does not interfere with the applicant–issuer contract[289]), binding insofar as the issuer–beneficiary

[283] Ellinger (n 276) 402; EP Ellinger, 'The UCP-500: considering a new revision' [2004] LMCLQ 30, 43–44; Jeremy Smith (n 90) 113–114. See also Jason Chuah, 'The Law Applicable to Letters of Credit – why it matters to the trade finance gap problem' (2021) 13 European J of Commercial Contract Law 82, 89.

[284] Davenport and Smith (n 268) 3–4.

[285] Such as the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995) arts 21–22 and the International Chamber of Commerce's (ICC) Uniform Rules for Demand Guarantees (URDG) 758, art 34. See also Georges Affaki and Roy Goode, *Guide to ICC Uniform Rules for Demand Guarantees URDG 758* (International Chamber of Commerce 2011) 472.

[286] Cranston (n 74) 509–510.

[287] Chuah (n 283) 82–83, commenting on the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995).

[288] Brindle and Cox (n 105) [7-136].

[289] *Petrologic* (n 104), which is discussed in Brindle and Cox (n 105) [7-136]. See also Robert Parson, 'Letters of Credit – Jurisdiction clauses: Who can rely on them? *Petrologic Capital SA v Banque Cantonale de Geneve* [2012] EWHC 453 (Comm)' [2012] Finance & Credit Law 1 (May 2012, Issue 5).

contract is concerned,[290] and favoured for resolving uncertainties.[291] The problem is whether Country A's or B's law should be chosen. The beneficiary might favour Country B's law.[292] However, if the beneficiary fails to specify the proper law governing the LC within the underlying applicant–beneficiary contract, the beneficiary might be advised of a LC specifying Country A's law as the proper law of the LC. Because the applicant arranged for a LC not contrary to the underlying contract, the beneficiary cannot then sue the applicant for breach of the underlying contract. The beneficiary can only amend the proper law of the LC if the issuer (and confirmer, if any) agrees.[293] Yet if the laws of Countries A and B are reasonably similar, for example, they are both Anglo-common law jurisdictions, the beneficiary is less likely to be concerned about an express choice of foreign law.[294] Nevertheless, a confirmed LC enables the beneficiary to obtain payment from the confirmer without reference to Country A or its legal system. The confirmed LC passes the 'credit or country risk profile' associated with the issuer from the beneficiary to the confirmer.[295] Having Country A's law governing the confirmer–beneficiary contract will undoubtedly reduce the practical benefits of a confirmed LC. Furthermore, a choice of Country A's law could discourage banks in Country B from confirming the LC, which would prefer to have its own local law apply. A confirmer might even attempt to add its confirmation to the LC with its own express choice of law clause for Country B.[296] Meanwhile, the issuer in Country A, if forced to choose a proper law for the LC, might favour Country A's law instead.

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[290] Chuah (n 283) 86; *Kuvera (SGHC)* (n 10) [79]–[82] suggests that the confirmer can add in a separate and independent express choice of law clause into the confirmer–beneficiary contract to govern confirmer–beneficiary contract.

[291] Solution 1 is popular. See, eg, the following: Ellinger and Neo (n 26) 353; Audi Y Gozlan, *International Letters of Credit: Resolving Conflict of Law Disputes* (2nd edn, Kluwer Law International 1999) 99; Brindle and Cox (n 105) [7-136]; Malek and Quest (n 54) [13.47]; Low and Uff (n 23) 215, 226; Teoh (n 66) 58; Roger Baggallay, 'Bank of Baroda v Vysya Bank Ltd' (1994) 9 J of International Banking Law N-110, N-111; David R Stack, 'The Conflicts of Law in International Letters of Credit' (1983) 24 Virginia JIL 171, 199–200; Denis Petkovic, 'The Proper Law of Letters of Credit' (1995) 10 J of International Banking Law 141, 141, 145; John Spender and Gregory Burton, 'Aspects of Conflict of Laws in Banking Transactions' in *Problems in International Banking Law: Papers from seminars sponsored by the Centre for Commercial Law and Applied Legal Research, Faculty of Law, Monash University held in Melbourne 23 April 1986 and Sydney 29 April 1986* (Monash LawPress 1986) 167–168.

[292] *Agritrade* (n 30) [26].

[293] UCP 600, art 10.a.

[294] *Agritrade* (n 30) [26].

[295] Robert Parson and Geraldine Butac, 'Letters of Credit and the Ukrainian Crisis' [2014] 3 Finance and Credit Law 1, 3. See also Byrne (n 155) 90 (at [2]), 102 (at [2]), and 393 (at [8]).

[296] *Kuvera (SGHC)* (n 10) [79]–[82].

This deadlock between the choice of Country A's or B's law might be a false dichotomy if parties are willing to consider the law of a third country.[297] Still, care must be taken in selecting an appropriate third law. Prudent parties will likely avoid the laws of countries 'carrying a baggage of high credit and political risks'.[298] In particular, sanctions legislation can 'have a substantial impact' on LCs, which 'frequently' include 'sanctions clauses' referring to the 'applicable sanctions law'.[299] When compared to breaching sanctions legislation, a bank might see breaching a LC payment or reimbursement obligation as the 'lesser of [two] evils'.[300]

Finally, there is some uncertainty as to how parties might react if they are forced to choose an express choice of law for the LC, given that parties tend to rely on the UCP and bespoke substantive terms to resolve difficulties.

6.2 Solution 2: Express choice of a 'choice of law rule'

The express choice of a 'choice of law rule', such as the law of the place of the contemplated presentation, invites litigation. *Sinopec* held that:

> in the case of a freely negotiable credit (like the LCs) where the beneficiary may present documents and obtain payment at any bank of its choice, the system of law with which the contract between the issuing bank and the beneficiary has its closest connection is that of the place where parties had *contemplated* that documents would be presented and payment made, at the time when the terms of the letter of credit were communicated to the beneficiary.[301]

Thus, for freely negotiable LCs, one should look at the contemplation of the parties at the time of the beneficiary being advised of the LC.

However, one problem is that by focusing on the time of the beneficiary being advised of the LC, this runs the risk of a floating choice of law issue arising between the time of issuance of

[297] Also known as a 'wholly neutral country': Davenport and Smith (n 268) 6.
[298] Adodo (n 98) [11.39].
[299] Parson and Butac (n 295) 2–4. See also *Kuvera (SGHC)* (n 10) [2]; *Celestial Aviation Services Ltd v UniCredit Bank AG* [2024] EWCA Civ 628, [2025] 1 WLR 196; Kate Richardson, 'Between a rock and a hard place? When a payment under a letter of credit is affected by a sanction, money-laundering or terrorism financing' (2008) 23 JIBFL 341.
[300] Honey and Buffham (n 104) 175; *Kuvera (SGHC)* (n 10) [185].
[301] *Sinopec* (n 7) [74] (Ang Cheng Hock J).

the LC and the time of the beneficiary being advised of such issuance. This is a problem for the common law approach. But if one focuses on the time of the issuance of the LC, then it is arguably artificial and illogical to refer to the beneficiary's contemplation because the beneficiary has not been advised. The counter-argument is that the beneficiary could have, at the pre-advice stage, contemplated presentation in Country B because it is aware of the underlying sale contract requiring a confirmed LC. The question is whether this presently impossible contemplation of the beneficiary is a valid contemplation because it might become possible in the future? Furthermore, what about the issuer's contemplation? The issuer might not be confident of obtaining confirmation of the LC from a correspondent bank in Country B if it experienced historical difficulty. The issuer might be of the view that presentation can only be contemplated within Country A because confirmation is unlikely. Should such a view be disregarded in favour of the beneficiary's contemplation? *Sinopec* did not suggest that one party's contemplation should prevail over another's.

Assume instead that it is European approach that applies instead of the common law approach. The problem now is that *Sinopec*'s holding cannot be readily applied to confirmed LCs that are not freely negotiable because a correspondent bank can decline to confirm the LC; yet proceed to advise the beneficiary and the issuer[302] of the unconfirmed LC. If the beneficiary was advised of a confirmed LC, the only place of contemplated presentation would be Country B at the time of advice. If the beneficiary was advised of the LC prior to confirmation, presentation can only be contemplated within Country A at the time of advice. The issue is whether such contemplation would change to Country B upon the beneficiary given subsequent advice that the LC was confirmed by some other bank? This problem did not arise in *Sinopec*. On the one hand, it would be uncommercial not to recognise such a change. The proper law would then be dependent on whether the advising bank had indicated that it had confirmed the LC in its first advice to the beneficiary about the issuance of the LC. On the other hand, even if this change is accepted, it is unclear whether this change would have a retrospective effect[303] (especially for issues concerning the validity of the contract and third-party rights[304]).

[302] UCP 600, art 8.d.
[303] *Mauritius* (n 260) [19]–[30]; *Agnew* (n 261) 592; Torremans (n 35) 716.
[304] Rome Convention (n 21) art 3(2); Rome I (n 22) art 3(2).

6.3 Solution 3: Changing the express choice of law to another express choice of law upon confirmation of the LC

An express choice of Country A's law, which will be changed to Country B's law when a correspondent bank adds its confirmation (the confirmer), appears to be commercially acceptable. Decisions in favour of Country B's law[305] for confirmed LCs do not appear to have caused 'widespread dissatisfaction'.[306] The question is whether Solution 3 is legally pragmatic as well. Solution 3 avoids some legal issues faced by the other solutions. First, it avoids the 'contemplation' and LC contractual formation problems by fixing the initial proper law before LC issuance. Second, it avoids the floating choice of law problem by specifying the initial proper law and an 'objectively ascertainable event' that does not depend on 'the unilateral choice of one party'[307] (except for the confirmer adding its confirmation) to change that proper law.[308] If needed, parties can also add in a supplementary formulation of Solution 3, which is Solution 3 limited in scope to just the issuer–beneficiary contract (Solution 3A). This ensures that one law governs the LC triangle even if Solution 3 is struck down for the confirmer's unilateral choice of law due to the confirmer's confirmation, which might not be an 'objectively ascertainable event'. Solution 3A cannot be struck down for this reason because the confirmer is not involved in the issuer–beneficiary contract. Third, it avoids commercial impracticalities by preserving Country A's law until confirmation is added, and by providing for Country B's law thereafter. The issuer can rest assured that Country A's law still applies if no bank in Country B confirms the LC, even though parties had contemplated for a confirmer in Country B (a factor which would normally point towards Country B's law). The confirmer can rest assured that the courts will see parties' choice for Country B's law upon the confirmer's confirmation. Fourth, it provides the necessary express 'power' for a third party's confirmation to change the proper law.[309] Fifth, it does not disturb the position reached by existing English case law.

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[305] See n 217 above.

[306] Brindle and Cox (n 105) [7-136].

[307] Hill and Ní Shúilleabháin (n 57) [4.48].

[308] See also *Astro Venturoso Compania Naviera v Hellenic Shipyards SA (The Mariannina)* [1983] 1 Lloyd's Rep 12.

[309] Adodo (n 98) [10.70]–[10.72].

Nevertheless, Solution 3 has flaws. First, while prospective change of proper law is accepted, it is unclear whether such change can apply retrospectively [310] (especially for issues concerning validity of the contract and third-party rights[311]). However, this is unlikely to be a practical problem where the beneficiary is advised of the LC after LC confirmation, which would be the usual scenario. Second, the initial or subsequent proper law (or the law of the forum) might not permit variation of proper law.[312] Third, if LC confirmation is delayed, the beneficiary might be able to present documents to the issuer under Country A's law, and then, following confirmation, re-present (to the issuer or the confirmer) under Country B's law if the issuer rejects and returns those documents. In doing so, the beneficiary gets the best of both laws if LC confirmation is delayed and if there is no retrospective change in law. Fourth, if the beneficiary presents to the issuer on (or just before) the LC confirmation day (whatever that might be defined to mean), and if there is no retrospective change in law, there is the undesirable prospect of parties arguing that either A or B's law should apply to that presentation. This is because the issuer has five banking days to examine any presentation.[313] To be fair, the third and fourth flaws are dependent on the lack of retrospectivity. If the various laws (the law of the forum, the initial proper law, and the subsequent proper law) expressly permit variation of proper law with retrospective effect, then Solution 3 might be feasible. However, parties are unlikely to favour such a complicated solution.

7 Conclusions

Of the three possible solutions examined, Solution 1 appears to be the most promising. Solution 1, though plausible, is dependent on the following requirements: (1) the underlying contract must not prohibit the LC from including a governing law clause; (2) it should also require the applicant to arrange for such a LC; (3) the issuer must be willing to add a governing law clause into the LC; and (4) that governing law clause should not cause would-be confirmers to either decline confirmation or accept confirmation on the condition that a contrary choice of law clause is included as a term of that confirmation. Requirements (3) and (4) are not problematic if the confirmer trusts the issuer and if both banks trust the selected

[310] *Mauritius* (n 260) [19]–[30]; *Agnew* (n 261) 592; Torremans (n 35) 716.
[311] Rome Convention (n 21), art 3(2); Rome I (n 22), art 3(2).
[312] See n 262 above.
[313] UCP 600, art 14.b.

law. Requirement (1) is unlikely to be a problem. Some bargaining power—such as that of an oil major—might be necessary to force the applicant to accept requirement (2). To illustrate, major oil companies like BP,[314] Shell,[315] and Repsol[316] have an express choice of English law in their standard form LCs appended to their general terms and conditions (GTCs) for the sale of crude oil. Even where such GTCs do not include a standard form LC, the GTCs themselves can provide that '[t]he construction, performance and validity of all Letters of Credit will be governed by and construed in accordance with English Law'.[317] It is said that the 'most commonly used GTCs' for trading crude oil are 'probably' BP's.[318] In contrast, standard form LCs from Qatar Energy,[319] Equinor,[320] and the Nigerian National Petroleum Corporation[321] do not appear to include an express choice of law.

[314] BP: see number nine of the 'Special Conditions' of the 'Letter of Credit format' found in Schedule B (at p 99) of 'BP Oil International Limited General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products 2015 Edition (Version 1.2)' <https://www.bp.com/content/dam/bp/business-sites/en/global/bp-supply-trading-and-shipping/documents/bp-oil-gtc-2015-version-1.2.pdf> accessed 29 October 2025.

[315] Shell: see the provision following number 12 of the 'Special Conditions' at p 48 of 'Shell International Trading and Shipping Company Limited: General Terms & Conditions for Sales and Purchases of Crude Oil (2010 edition)' <https://www.shell.com/business-customers/trading-and-supply/general-trading-terms-and-conditions/_jcr_content/root/main/section/text.multi.stream/1661865809814/c65ffb5a41871c11c56d42f380b35c23561cd71e/shell-crude-2010-trading.pdf> accessed 29 October 2025. In contrast, the more recent 2023 edition of these terms does not contain a standard form LC.

[316] Repsol: see no 17 of Special conditions at pp 90–91 of 'General Terms & Conditions for Sales and Purchases of Crude Oil & Petroleum Products: 2017 Edition Repsol Trading' <https://www.repsol.com/content/dam/repsol-corporate/es/productos-y-servicios/productos/oil-gas-trading/trading-general-terms-conditions-sales-purchases-crude-oil-petroleum-products.pdf> accessed 29 October 2025.

[317] See, eg, 'section' 60.6 of 'CIF and CFR Deliveries: General Terms & Conditions for Sales and Purchases of Products and Crude Oil' (2023 edition)' <https://www.shell.com/business-customers/trading-and-supply/general-trading-terms-and-conditions/_jcr_content/root/main/section/promo_copy_919813421_62759738/links/item0.stream/1688053843752/14532136bfcc3697ae8cce3b423a8f4faf85e016/cif.pdf> accessed 29 October 2025.

[318] Alistair Feeney, 'Crude oil sale and purchase agreements' in Renad Younes (ed), *Oil and Gas: A Practical Handbook* (3rd edn, Globe Law and Business 2018) 234.

[319] Qatar Energy: The 'confirmed documentary irrevocable letter of credit format' (but not the 'standby letter of credit') provided at pp 52–55 of 'Qatar Petroleum for the Sale of Petroleum Products Company Ltd: General Terms and Conditions for Free On Board ("FOB") Sale and Purchase of Crude Oil Effective 1 January 2019' <https://www.qatarenergy.qa/en/MarketingAndTrading/Documents/QPSPP General Terms and Conditions for Crude Oil - Jan 2019.pdf> accessed 28 October 2025.

[320] Equinor: The 'documentary letter of credit' (but not the 'standby letter of credit') provided at pp 78–82 of 'Equinor ASA General Terms and Conditions for Sales of Crude Oil, Condensate and Petroleum Products including Liquefied Petroleum Gas 2022 Edition' <https://cdn.sanity.io/files/h61q9gi9/global/ca581c73eae51e6700f64f58d82fd29981489702.pdf?equinor-general-terms-conditions-sales-2022-edition.pdf> accessed 28 October 2025.

[321] Nigerian National Petroleum Corporation (NNPC): The specimen LCs found at pp 54–62 of 'General Conditions for Sale and Purchase of Nigerian Crude Oil: Part II of the Contract, COMD/NNPC, February 11'

Furthermore, solutions should be suitable for all LC types, of which confirmed LCs are merely one. The issuer might not request bank(s) in Country B to confirm the LC.[322] The issuer might merely authorise that a bank examine presented documents,[323] forward complying documents[324] and perhaps to make prepayment.[325] Solutions should account for nominated banks, which are significantly different from confirmers,[326] 'freely negotiable' LCs,[327] and transferable LCs.[328]

If the would-be confirmer is not prepared to confirm the LC, then it must inform the issuer immediately and can advise the LC without confirmation.[329] Conversely, if it is prepared to confirm, it should add its confirmation. In contrast, the nominated bank is not required to immediately inform anyone of whether it will, in due course, act 'on its nomination'[330] by the issuer. The nominated bank is only required to examine presented documents if it is 'acting on its nomination',[331] which is determined by its conduct after its nomination. Meanwhile, unlike the would-be confirmer, the nominated bank can remain silent.

A further complication arises when the LC is transferable to a second beneficiary. A transferable LC provides trade finance for the beneficiary (as a middleman) to pay a second beneficiary and for the applicant to pay the beneficiary in one single LC (unlike two LCs in a back-to-back arrangement). The second beneficiary might be in a third country (Country C). The LC might be transferred in favour of the second beneficiary by a transferring bank (which is typically a nominated bank or confirmer in Country B). A transferred LC thus involves three countries instead of the usual two, but the preference for one law remains.

The various types of LCs complicate the task of fashioning solutions. The reluctance to add governing law provisions into the LC or UCP is understandable. It therefore appears that 'the

<https://resourcegovernance.org/sites/default/files/GeneralConditionsforNNPCOilSalesTermContract2011.pdf> accessed 28 October 2025.

322 UCP 600, art 8.d.

323 UCP 600, art 14.a.

324 UCP 600, art 15.c.

325 UCP 600 art 12.b.

326 See UCP 600, arts 8.b, 8.d, 14.a, and 14.b.

327 Markstein (n 32) 139.

328 See generally UCP 600, art 38; Baker and Dolan (n 208) 79–80, 83–84; Malek and Quest (n 54) [13.73]–[13.74]; King (n 109) [10-49].

329 UCP 600, art 8.d.

330 UCP 600, arts 14.a and 14.b.

331 UCP 600, arts 14.a and 14.b.

courts will have to return' to 'the issue of the governing law of the contracts contained in a letter of credit'.[332]

Meanwhile, it remains to be seen whether the *Kuvera* formulation of a LC will gain acceptance beyond Singapore. It is unclear whether this formulation is applicable to the issue of determining the law governing a LC because *Kuvera* was not concerned with this issue. Given the staunch insistence in *Kuvera* that 'there is no contract in existence' until 'the beneficiary makes a complying presentation to the bank',[333] *Kuvera* raises a further problem of determining the governing law of the LC, which is—at the pre-presentation stage—characterized as an 'irrevocable offer of a unilateral contract'.[334] This raises many questions. For example: what is the law governing that supposedly non-contractual offer? How should that offer be characterized for the purposes of the choice of law process under the conflict of laws? A quasi-contract? Would this law then also be the same 'system of law with which the [post-presentation contractual LC] has its closest and most real connection' with?[335] It is hoped that answers to these questions will appear in the near future.

[332] Gwynne (n 62) 456.
[333] *Kuvera (SGHC)* (n 10) [65].
[334] Ibid.
[335] As set out in 'Rule 180' and its sub-rules: see n 28 above.