BOOK REVIEWS

CURRENT PROBLEMS OF INTERNATIONAL TRADE FINANCING. Edited by C.M. CHINKIN, P.J. DAVIDSON and W.J.M. RICQUIER. [Singapore: Malaya Law Review and Butterworth & Co. 1983. xxiii + 507 pp. including index. S$125.

THIS volume contains the texts of the papers presented at the first Singapore Conference on International Business Law, which was organized by the Faculty of Law of the National University of Singapore and held in August 1982. These Conferences are planned to be held biennially and each Conference, in the words of Professor Pillai in his Preface to this volume, "is designed to focus on a selected area of international business law ranging through international contracts, international loans, international trade, international banking and international economic regulation", the emphasis being "on the practical dimensions and current issues of each selected area".

In selecting international trade financing as the first area, the organizers of this Conference series could not have made a better or more topical choice. As international banks and financial institutions struggle with the problems of long-term lending and the pool of would-be long-term borrowers continues to shrink, international trade financing, which is short-term, self-liquidating and generally secured by documents or goods, provides a growingly attractive alternative for bank financing.

The volume is divided into six parts: Uniformity and Harmonization in International Trade Financing, Conflict of Laws, Fraud and Forgery in International Trade Financing, International Factoring, Export Guarantees, and Banking and International Trade Financing. The utility of the volume is enhanced by an Editors' Introduction, which summarizes the salient features of the 18 papers in the volume, and several useful appendices. The paper-writers comprise some of the most distinguished scholars and specialists in their respective fields and, as they also represent both the common law and civil law systems, the volume has a breadth and comparative scope that are seldom found in similar works.

As the documentary letter of credit is the commonest form of international trade financing, almost half the volume is devoted to it. The ICC Uniform Customs and Practice for Documentary Credits (UCP), which in practice governs virtually all documentary credits, naturally features prominently in this discussion. The other forms of international trade financing that are examined in the volume are standby letters of credit, bills of exchange, bank guarantees and performance bonds, factoring and forfaiting, export credits and guarantees, and countertrade. The techniques and mechanisms of

some of these forms of financing are also discussed in depth. The other topics covered are UNCITRAL's role in the development of international trade law and the modern banker's approach to the problem of financing an overseas sale.

Dr. Rolf Eberth's paper on the UCP sets out the history and the main features of this unique body of rules, which was first adopted in 1933 and last revised in 1974. A new revised version is expected to come into effect from 1 October 1984. Since the UCP was derived from previous banking practice and its formulation was largely influenced by bankers, it was inevitable that it should be weighted heavily in favour of bankers. The protection of the banker is secured by the three fundamental tenets on which the UCP is based, namely, a credit transaction is separate from the trade contract to which it relates and with which the bank has no concern (General provision c), all parties to a credit transaction deal in documents and not in goods (Article 8), and the bank assumes no liability or responsibility for the documents, the goods or the acts or omissions of any other party (Article 9). These tenets have remained unchanged throughout all the various revisions of the UCP.

It is a truism that any contract is good until it needs to be enforced. As long as all the parties act honestly and honourably, the structural weaknesses, if any, in the contract are not exposed. It is presently estimated that more than 50 per cent of the documents utilized in trade credit transactions contain discrepancies and that losses from documentary frauds are running as high as US$1 billion a year. While it is true that victims frequently contribute to their own misfortunes by being careless in selecting the trading partner or the carrier of the goods or in structuring the trade transaction, it is also true that the UCP affords very little protection to the innocent victim of a documentary fraud. Between the present extreme of the banker not being responsible if he makes payment against fradulent documents, so long as the documents appear to be in order and the banker is unaware of the fraud, and the other extreme of the banker being required to undertake the near impossible task of monitoring the trade transaction to which the credit relates, there is surely room for a workable compromise which protects both the banker and the commercial parties. The recent ruling of the House of Lords in the *United City Merchants* case[1] that the banker is obliged to pay, even if he is aware of the fraud, if the fraud has not been committed by and is not known to the beneficiary of the credit, only adds to the victims' woes. When one considers that usually the victim's sole remedy to prevent payment is to sue his own bank, a course of action no merchant likes to take,[2] the need for the UCP to provide some procedure in such cases becomes clear. The number of potential victims of international trade frauds has been increased by the spillover effect given to the UCP by English courts in extending the principles that govern the banker's responsibility under an irrevocable letter of credit to other irrevocable undertakings of a banker, such as a performance guarantee.[3] In view of these and

1 [1983] A.C. 168.

2 For some alternative remedies see p. 195, *infra.*

3 See, e.g., *Edward Owen Engineering* v. *Barclays Bank,* [1978] 1 Q.B. 159.

other problems, it is, in the reviewer's opinion, wishful thinking to say, as Dr. Eberth does (at p. 35), that "to date no serious problems have been encountered in the application and interpretation of the UCP".

A major factor in the growth of documentary fraud is the ease with which a paper document, particularly the marine bill of lading, can be forged. In his interesting paper on the need for amending the UCP in the light of technological advances, Professor Davidson, a co-editor of the volume, who is both an engineer and a lawyer, argues that the UCP should take note of electronic or computerized methods of generating, storing and transmitting documents and suggests (at p. 51) that such documents should be included in the concept of "document" under the UCP, even though "no paper copy of the document may have been produced". The final version of the new UCP[4] provides for acceptance by banks, unless otherwise stipulated in the credit, of documents produced *inter alia* "by, or as the result of, automated or computerized systems", provided that, where necessary, they are authenticated. While this provision goes a long way in meeting Professor Davidson's criticisms, in view of his comments in a post-script to his paper (at pp. 54-55), it is doubtful that he would be entirely satisfied. Unfortunately, Professor Davidson nowhere alludes to the problem of fraud in a "document" which is generated or transmitted by electronic or computerized means. That this is a real problem has been demonstrated by the several instances of computer fraud and the ease with which even the most sophisticated computer security devices have been "penetrated".

The problem of documentary fraud has received detailed treatment in two excellent papers which comprise Part III of the volume. Professor Ellinger, who is an authority on documentary letters of credit and the author of a leading treatise on the subject, sets out "to consider the effect of fraud on the different contractual relationships of the documentary credit transaction". He deals exhaustively with the existing law on the subject and interprets this (at p. 232) to mean that "the effect of the tender of a draft accompanied by forged or fraudulent documents depends on the identity of the person who presents it". While arguing that the present legal position that, of two innocent parties who face loss because of the fraud of a third party, the loss should fall on the party "that has induced the other to participate in the transaction" is justifiable both legally and commercially, Professor Ellinger readily and fairly concedes (at p. 233) that there is force in the contrary view that fraudulent documents should have no effect. Mr. Ho Peng Kee, whose paper is partly based on empirical research into the incidence of documentary fraud in Singapore, makes some useful suggestions (at p. 236), albeit in the Singapore context but equally useful elsewhere, as to how, within the existing legal system, the incidence of documentary fraud can be reduced. Mr. Ho contrasts the English and Singapore judicial approach, which makes no distinction between degrees of fraud or risk assumption, with the American approach which makes such a distinction. He regards the former approach as inflexible and likely

[4] ICC Pub. No. 400 (1983). For a discussion of the main features of the new UCP see Schmitthoff in [1983] J.B.L. 193.

to lead to injustice and advocates the adoption by English and Singapore courts of the more flexible American approach that requires the court to undertake an evaluation of the "risk allocation" in the particular case before deciding on whom the burden of loss should fall. The reviewer whole-heartedly supports Mr. Ho's suggestion but feels that he has thrown in the towel too quickly by stating (at p. 258) that this flexible approach "would call for the injunction to emerge as the dominant remedy". This remedy, which calls for the customer to take the distasteful course of suing his own bank, should, in the reviewer's opinion, be regarded as a course of action of last resort, unless, of course, urgency is involved.

One alternative remedy, which is discussed by Mr. Ho (at pp. 240-241), is the American "elective dishonour" remedy, which permits the issuing bank to refuse to honour the draft in a case of fraud, provided that no innocent third parties are involved, and subject to a court having power to enjoin honour. Mr. Ho rightly points out (at p. 259) that a too liberal application of the American approach would compromise "the commercial utility of letters of credit" but, within perhaps narrower limits, the "elective dishonour" remedy could be usefully adopted in English and Singapore laws. Another possible remedy is for the issuing or confirming bank to pay "subject to reserve", i.e. the bank can claim repayment if its objections to the documents prove justified.[5] As pointed out by another writer,[6] the bank can also take out an interpleader summons, i.e. pay into the court the amount due under the credit and request the court to decide whether the money should go to the beneficiary of the credit or to the customer of the bank.

The documentary letter of credit is a marvellous instrument devised by bankers and merchants to resolve the conflict between the seller's desire not to part with the goods till he is assured of payment and the buyer's desire not to be committed to payment till he is assured that the goods are on their way to him. Its efficacy rests on the banker's promise to pay against proof of shipment and the system would collapse if a banker's word was no longer his bond. At the same time, the system must be constantly adapted to changes in international trade patterns and practices and to the current needs of the mercantile community. After all, it is in the banker's interest for his customer to be prosperous. The shortcomings of the documentary credit system must also be kept in mind. It is usually the most expensive method of trade financing and is unsuitable in certain trades, such as the oil trade, where the goods usually arrive earlier than the documents. Though it is usually the buyer who suffers in the case of fraud, there have been instances of sellers being victimised because of collusion between the issuing bank and the buyer. All these facts of life must be borne in mind when reassessing the documentary credit system. The UCP is probably the most successful endeavour of the ICC in harmonizing international business law and practice. However, it is not perfect. The yardstick for its success should be, as Mr. B.S. Wheble, who, in his capacity as Chairman

[5] See *Banque de l'Indochine* v. *J.H. Rayner,* [1983] Q.B. 711 and 722. In this case, the Court of Appeal recommended that the UCP should deal with the concept of "payment under reserve".

[6] Arora in [1984] L.M.C.L.Q. 81, 89.

of the ICC Banking Commission, had much to do with the formulation of the new UCP, observes (at p. 98) that "the UCP must be acceptable to banks" but "must, nevertheless, also be workable for the commercial parties and... the carrier". Where fraud is concerned, the UCP has certainly not been workable for the commercial parties. Only a thorough re-examination of the banking practice relating to documentary credits and of the three aforesaid tenets on which the UCP is based can achieve this purpose. It is a pity that the opportunity to engage in this exercise, provided by the new revision of the UCP, was lost.

An appraisal of the "living law" of the UCP, which is the theme of Mr. Kim Seah Teck Kim's stimulating paper, is particularly useful in assessing the efficacy of the UCP. Mr. Seah approaches the subject from a practical aspect and with knowledge and experience of banking law and practice. He ranges far and wide over the UCP and examines some of its key provisions in depth. The measure he sets himself (at p. 74) is that the provisions of the UCP "must accurately reflect prevailing practice", must not be ambiguous, and "must also take into account changes resulting from developments in international trade". This is an ambitious measure but Mr. Seah's success in applying it can be gauged from the fact that no one, who is concerned with the UCP in practice or with the revision of the UCP, can afford not to peruse Mr. Seah's paper carefully.

A major innovation in the new UCP is the inclusion of standby credits within its scope. A standby credit is in the nature of a bank guarantee and differs in several material respects from a documentary credit,[7] not least in the nature of the bank's obligation. In a documentary credit the bank is the primary obligor, whereas in a standby credit the bank's promise to pay arises only if the primary obligor, who may be the buyer or the seller, fails to meet his obligations. Since it requires the obligee to accept the promise to pay of a commercial party instead of a bank, its use in international trade is not very common. Mr. Seah notes the objections to the inclusion of standby credits within the scope of the UCP (at p. 59) but feels that they are unjustified because "it would be contrary to banking practice and commercial reality to restrict the operation of the UCP only to credits concerning goods". On the other hand, a noted scholar[8] takes the view that "standby letters of credit are such a different institution from ordinary documentary credits that I consider it unwise and potentially leading to confusion that the new U.C.P. should extend to this type of financial facility". Mr. B.S. Wheble, whose paper deals with standby and documentary credits under the new UCP, has not expressed any opinion on the question but, since he was one of the principal architects of the new UCP, it may be presumed that he is in favour of the inclusion of standby credits. The reviewer feels that a *via media* can be found between these two opposing views by examining the use of the standby credit. It is normally used in connection with a long-term or continuing contract, which involves no payment against documentation and where the obligee is willing to accept a commercial party as the primary obligor

[7] For a list of differences between these two types of credit see Mr. Ho's paper, pp. 236-237, note 2.
[8] Schmitthoff in [1983] J.B.L. 193, 195.

instead of a bank. The ordinary sale of goods transaction is short-term and one-shot with payment linked to presentation of documents and it makes little commercial sense to prefer a standby credit to a documentary credit, unless, of course, cost is a relevant factor. The reviewer feels that a *via media* can be achieved and the basic scope of the UCP, which is to cover documentary payments, can be retained if standby credits under the UCP are restricted to only those that call for payment against presentation of documents. The reviewer would also urge that thought be given to including bankers' acceptances, which is a much cheaper method of financing trade than documentary credits and which is becoming increasingly popular, within the scope of the UCP.

Part II of the volume comprises two papers on conflict of laws issues. It is a pity that both the papers deal only with documentary letters of credit. It would have been enlightening to have had some observations on the conflict of laws issues that arise under some other forms of trade financing. Professor Schmitthoff's paper is a straightforward presentation of the existing English conflict rules (which would be likely to be followed in Singapore) relating to letters of credit. The basic English choice of law rule that applies to all the relationships created under a documentary credit transaction, except that of banker-customer, is that, subject to a different express choice of law by the parties, the governing law is the law of the place where the credit is to be performed, which is in effect the law of the place where the advising bank carries on business. Mr. Mohan Gopal criticizes this approach as being arbitrary and illogical in that it is not based on any methodology, tends to blur the distinctions between the different relationships created under a credit transaction, and leads to a blind application of Anglo-American law, since in practice most credits are performable in London or New York. There is substance in Mr. Gopal's criticism but his own approach, which is to look at each relationship in isolation and develop separate choice of law rules for these different relationships, flies in the face of commercial reality and introduces uncertainty. We have it on the highest authority[9] that all the relationships in a credit transaction are "autonomous" but "interconnected". While the buyer-seller relationship can be treated as separate on the basis of the trade and credit transactions being independent of each other, there is serious doubt about the wisdom of severing all the other relationships from each other. Besides, there are differing views as to the exact legal character of the main relationship, which is that between the seller/beneficiary and the issuing bank or the confirming bank.[10]

As neither Professor Schmitthoff nor Mr. Gopal deals with choice of jurisdiction issues, we do not have the benefit of their views on a jurisdictional problem, which is vexing international banks. Unlike other multinationals, an international bank, because of the nature of its business, cannot establish subsidiaries in the different countries where it operates. Such a bank has to operate through branches as the branch has to ride on the back of the head office in order

[9] The House of Lords in the *United City Merchants* case, [1983] A.C. 168, 182-183.

[10] See Ellinger, *Documentary Letters of Credit,* Part Two; Todd in [1983] J.B.L. 468; Mr. Gopal's paper, pp. 162-165.

to attract public confidence. As a branch is not a separate legal entity in law and physical presence within the jurisdiction [is] sufficient to confer jurisdiction, we have the situation, as a result of *Power Curber*[11] and other cases, of an international bank being forbidden to pay under a credit by a court in one country and being ordered to pay by a court in another country. To be damned if you do and damned if you don't cannot be a pleasing prospect to anyone, least of all a banker. The situation becomes more anomalous when one realizes that one of the branches, as was the case in *Power Curber,* or even both the branches concerned may have had nothing to do with the credit transaction. Here is surely a field for judicial creativity so that something else, such as a factual connection, is necessary besides mere physical presence to confer jurisdiction over the branch of an international bank.[12]

While the documentary credit, being the most popular form of trade financing and the UCP being under revision at the time, takes up the bulk of the volume, some other forms of financing have not been forgotten. There are also two excellent papers of a technical nature. Mr. C.R. Craigie deals with the law and practice relating to the collection of trade bills and his paper includes an in-depth analysis of the ICC Uniform Rules for Collection. Anyone, who has to deal with the highly technical activity of bill collection, needs to read no further than Mr. Craigie's paper for guidance. Mr. Henry Harfield, who is an authority on bankers' credits and acceptances and the author of the leading treatise on the subject, and his colleague, Mr. William Yaro, deal with the use of a negotiable instrument to obtain financial accommodation and describe in detail the background and working of the "eligible acceptance" market in the United States. Any businessman, who is looking for cheap forms of credit, and any lawyer, wishing to understand how the acceptance market operates, will profit from perusing this paper.

Dr. Wolfgang von Marschall brings the civil lawyer's approach to the structure and operation of standby credits, bank guarantees and performance bonds and provides interesting information on how these forms of financing work in West Germany. Mr. Arthur Loke, who is an international lawyer practising in Singapore, looks at standby credits and performance bonds from the viewpoint of the lessons to be learnt from the Iranian experience, which put the system to its severest test. Dr. David Sassoon deals with the legal aspects of international factoring and Dr. Klemens Pleyer explains in detail how factoring operates in West Germany. Mr. John Pillay and Professor Peter Schlechtriem deal respectively with the export credit and guarantee systems operating in Singapore and West Germany. All these forms of financing are looked at from practical aspects and the admixture of common and civil lawyers among the paper-writers provides a very useful comparative flavour to the treatment

11 [1981] *3* All E.R. 607.

12 In the reverse situation between head office and branch, it has been held in the United States that the head office of an international bank can be sued and is responsible for the obligations of one of its foreign branches. See, e.g., *Vishipco* v. *Chase Manhattan Bank,* 660 F. 2d 854 (2nd Cir. 1981), *cert. denied* 103 S. Ct. 313.

of the topics discussed. One can only profit by learning of the experiences of others.

Finally, we have the viewpoints of a merchant banker and a sitting judge on some of the contemporary problems and issues of international trade financing. Mr. Nicholas Ferguson gives us useful and rarely-disclosed insights into the thinking and approach of a modern banker faced with a customer seeking financing help. It is an old adage that one should always know one's enemy and, while treating one's banker as one's enemy is the last thing the reviewer would recommend, this adage can be usefully paraphrased to state that one should always know one's banker. In the reviewer's experience, worthwhile projects have atrophied for lack of financing because of bad presentation of the project to the banker. Mr. Justice Lai Kew Chai of the Singapore Supreme Court, who was Chairman of the Advisory Committee of the Conference, discusses in his inimitable style, among other things, how increasingly, in commercial matters, judges are emphasizing substance over form. It is always useful to know the thinking of a sitting judge and it is a pity that the doctrine of estoppel does not apply to a judge when he speaks outside the courtroom.

The reviewer hopes that he has said enough to underline the value and utility of the volume under review. It is an excellent start to a series, which, to quote Professor Pillai again, "seeks a unique blend of international and regional threads". Anyone, who has undergone the ordeal of getting a host of busy contributors to meet a publishing deadline and then of welding disparate thoughts and approaches into a coherent whole, made more difficult in this case by the variety of legal systems represented, would appreciate how ably and well the Editors have discharged their thankless task. The organizers of the conference deserve kudos for bringing such a distinguished group of speakers under one roof. There is an overlapping between some of the papers and the omission of some other important forms of international trade financing, such as leasing, and there could have been a fuller treatment of bankers' credits and acceptances and of countertrade, which now accounts for as much as 30 per cent of total world trade. Some discussion of trust receipts, which are much used in this region, would also have been useful. However, these are essentially quibbles and do not detract from the value of this work to the international businessman, lawyer or banker.

One looks forward with keen anticipation to the next volume in the series on *Current Issues in International Financial Law,* which is the theme of the second Singapore Conference on International Business Law to be held in August 1984.

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