Of the various ways that can be used to finance an overseas sale, letters of credit are by far the most common and the most efficient one. The operation of this system is simple. Its legal nature and the legal relationship of the respective parties, on the other hand, are involved and complicated. The letter of credit is usually opened in pursuance of a contract for the sale of goods made between an importer and an exporter. This contract of sale includes a stipulation for a special mode of payment. It imposes on the importer a duty to procure a letter of credit in favour of the exporter from a banker. The exporter's duty to ship the goods is conditional upon the opening of the credit.

The corresponding duties of the importer and the exporter and the extent to which these duties can be waived or varied were lately discussed in *Enrico Furst &*

Co. v. *W.E. Fischer Ltd.*[1] In that case the plaintiff, importer, Enrico Furst & Co., and the defendant, exporter, W.E. Fischer Ltd., entered into a contract of sale of cast iron piping, f.o.b. London, shipment in March, 1958. The contract provided for payment by an irrevocable letter of credit to be opened "immediately" in London for 70% of the purchase price, payable against the tender of the usual documents. In pursuance of the contract of sale, the importer requested the Swiss Israel Trade Bank at Geneva to open an irrevocable letter of credit for the benefit of the exporter. The Swiss Israel Trade Bank agreed and instructed the Westminster Bank Ltd., in London to act as their agent. They asked the Westminster Bank to ". . . . .inform the beneficiaries of the opening of the credit without adding your confirmation". On March 15 Westminster Bank notified the exporter of the opening of the credit. On March 18, Westminster Bank issued a notification of the credit to the exporter in its full form. This notification stipulated that the amount of the credit was payable against presentation of certain documents, including, *inter alia, "S.S. Co.* Bills of Lading". The words "*S.S. Co."* were inserted by the Westminster Bank without the knowledge of the importer. The notification concluded with the following passage: —

> Although requested to advise you of the terms of this credit we are not instructed to add our confirmation. Consequently, our letter is solely an advice and conveys no engagement on our part.

On March 20, the exporter wrote to the importer raising objection against the credit. He requested, *inter alia,* an extension of the credit from March to April. This request was complied with. The exporter also made the following request: —

> Please have the credits amended to read — 'Bills of Lading' and not as at present — '*Steamship* Bills of Lading'. Obviously you will be chartering.

This request was not complied with. The exporter refused to ship the goods. On April 30, the extended shipping period expired and the importer brought the present action for non-delivery of the goods. The exporter in defence contended, *inter alia,* that the importer had failed to procure the opening of the letter of credit in the terms specified in the contract of sale.

The first question that Diplock J. had to decide was whether the irrevocable credit opened by the Swiss bank and notified — but not confirmed — by the Westminster Bank, complied with the terms of the contract of sale. The learned judge answered this question in the negative. He said: —

> It was not an irrevocable letter of credit opened in London, because, although irrevocable so far as Swiss Israel Bank Ltd. was concerned, Westminster Bank did not add their confirmation, and could have resiled from the contract at any time. It seems to me that such a contract is not an irrevocable credit opened in London, and, in forming that view (which I should have done even without the assistance of expert evidence) I am confirmed by the expert evidence of the banking witnesses who were called before me for the plaintiffs themselves. [2]

It is submitted that Diplock J.'s application of the existing law to the facts before him is correct. The contract called for an "irrevocable letter of credit in London", *i.e.* the irrevocable undertaking must come from a banker in London. It follows that the opening of an irrevocable letter of credit in France would not have been regarded a compliance with the contract of sale. Generally, the buyer is obliged to procure from the banker a letter of credit of the type designated in the contract of sale. [3]

1. [1960] 2 LI. L. Rep. 340.
2. [1960] 2 LI. L. Rep. 340 *per* Diplock J. at p. 345.
3. Panoutsos v. *Raymond Hadley Corporation of New York* [1917] 2 K.B. 473. In this case Lord Reading held that an unconfirmed credit did not satisfy the terra of the contract which called for a confirmed credit.

Actually, the particular type of credit called for in the case of *Enrico Furst & Co., i.e.* an irrevocable credit in the exporter's country, could present a difficult question. Would a credit that is irrevocable in the country of the importer but confirmed in the country of the exporter fulfil the term of the contract?[4] The answer, it is submitted, depends partly on the intention of the parties and partly on the rights of the confirming banker. If it is the intention of the exporter that only a banker in his country should accept the term of the contract, then it is submitted that an irrevocable but confirmed credit would not fulfil the term of the contract. This is a departure from the normal requirement. It is therefore submitted that the intention should only be drawn where there is an express stipulation or where it is established that it is the usual practice of the parties. It is probable that the exporter could have formed the intention under the belief that a confirming banker who negotiates a draft has a right of recourse to the exporter. But does such a right exist? In the United States of America, it does not.[5] In England, there is no case on this point.[6] Davies agrees and supports the view of the American courts. However, he does not cite any authority. Nevertheless, his explanation is most convincing: to allow the negotiating bank such a right would mean that in any action against the drawer, the latter could counterclaim an equivalent amount from the negotiating bank under the letters of credit. This would lead to a circuity of action.[7] Save, therefore, in exceptional cases, a confirmed and irrevocable credit, it is submitted, is a good credit. This is so because the confirming banker by undertaking to negotiate drafts drawn by the exporter, has served the purpose of Commercial Letters of Credit: to facilitate oversea trade by combining the advantages of ready money to the exporter and credit to the importer with security to both parties.

The second question that the learned judge had to decide regards the time of the opening of the credit. The time of the opening of the credit is only rarely stipulated in the contract of sale. It is, generally, accepted, however, that in the absence of any express stipulation the credit must be opened at the beginning of the shipment period. Thus where a contract provides for shipment of goods by the exporter over a long period, the importer, in the absence of express stipulation, must open the credit and make it available to the exporter at the beginning of the shipment period.[8] Applying the principle of law to the facts of the case Diplock J. had no difficulty in holding that the opening of the credit on March 15 was a late opening for a contract for March shipment.

The importer, Enrico Furst & Co., had, therefore, failed to discharge his fundamental obligations, *i.e.* to open the right type of credit and to open it in time. Diplock J. held that the exporter, W.E. Fischer Ltd., could have objected to both points and could have elected to rescind the contract then and there. However, the learned judge found, on the facts that the exporter had waived his right of rescission. On March 20 the exporter informed the importer that as a result of the late opening of the credit, shipment of the goods in March would be impossible and accordingly requested that the credit be extended to April. The importer complied with this

4. Previously, the courts have used irrevocable and confirmed interchangeably. The modern trend, however, is to restrict the use of the terms irrevocable/revocable in relation to the issuing banker and confirmed/unconfirmed in relation to the confirming banker. . . . . *The Law Relating to Commercial Credit* by A. G. Davies, 2nd Edition 1954 at pp. 39, 40.

5. See Uniform Commercial Code, ss.5-113.

6. In *Sassoon* v. *International Banking Corporation* [1927] A.C. 711, the Judicial Committee of the Privy Council held that a banker who negotiated a draft drawn by the exporter before acceptance, and with the express knowledge that the draft wag drawn in reliance on the letter of credit has a right of recourse on the drawer. In that case, however, the negotiating banker was not the confirming banker.

7. *The Law Relating to Letters of Commercial Credit* by A. G. Davies, 2nd ed. 1954 at p. 99.

8. *Pavia & Co.* v. *Thurnmann Nielsen* [1952] 2 Q.B. 84.

request. The element of time was thus waived. With regard to the specified type of credit the learned judge found as a fact that in their letter of protest the exporters did not complain about the credit not having been opened in London. Following the authorities of *Panoutsos* v. *Raymond Hadley Corporation of New York,*[9] *Bensten* v. *Taylor, Sons & Co.*[10] and the recent case of *Charles Richards Ltd,* v. *Oppenheim*[11] Diplock J. held that the exporter had lost the right to rescind.

The third question that the learned judge had to decide was the construction of the term *"S.S. Co.* Bills of Lading". The exporter thought that it meant *"Steamship* Bills of Lading" but Diplock J. said that that description was "inaccurate". In his opinion, which was based on expert evidence, it meant nothing more than that the bills of lading should be issued by forwarding agents and if they were, the Westminster Bank Ltd., could have refused to accept them. In his Lordship's opinion the presence or absence of the words *"S.S. Co."* did not in any way affect the nature of the documents called for by the credit. To the exporter, unfortunately, it meant a material difference. The exporter knew that the goods would have to be shipped by a chartered vessel and therefore it appeared to them highly undesirable that a credit, which to them seemed to call for liner bills of lading, should be opened. The exporter, therefore, constantly requested the importer to amend the term of the letter of credit concerning bills of lading but this was refused. The exporter then refused to ship the goods. Diplock J. held that the exporter, after waiving the right to rescind the contract, repudiated the contract without any reasonable cause; and must therefore be liable to the importer for wrongful repudiation.

The case of *Enrico Furst & Co.* falls in line with the earlier decisions. It is, however, by no means unimportant. It clarifies the basic obligations of the exporter and the importer towards one another. It serves a warning to exporters not to be too generous. They should be aware that in so far as they waive the rights evolving from a breach of the contract by the buyer, they would remain without a defence if they, subsequently, also repudiate the contract.

The case is very instructive and gives a vivid picture of the operations of the "payment by commercial credit clause in the contract of sale".

TAN KIM SENG.

9. [1917] 2 K.B. 473.
10. [1893] 2 Q.B. 274.
11. [1950] 1 K.B. 616.