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ESTABLISHING PURCHASE OF DOCUMENTS UNDER A NEGOTIATION LETTER OF CREDIT

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This article deals with the traditional conception of purchase of a conforming tender of documents under a negotiation letter of credit and the extent to which that understanding has evolved in the courts in recent years to meet the changing needs of bankers involved in credit operations. In particular, it provides a thorough analysis of the conventional view of negotiation as the purchase of complying presentation by a nominated bank. Along the way it tackles thorny problems involving a nominated bank's promise to pay upon receipt of funds from the issuing bank; the legal nature and effect of the bank's discounted payment of the amount of a credit after having been advised by the issuing bank that the documents are complying; the question of ascertaining the conformity of a negotiation with the negotiation period stipulated in a credit; and finally the vexed issue of what amounts to good faith purchase by a nominated bank.

I. Introduction

When letters of credit are classified according to the mode by which they are usually expressed to be realisable, negotiation is one of the four basic forms.[1] A negotiation letter of credit typically embodies a promise by the issuing bank to reimburse a nominated bank that has negotiated the beneficiary's documents[2] in conformity with the terms of the credit and delivered or (if one prefers controversy to precision) forwarded the documents to the issuing bank.[3] Under most negotiation credits, the

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1 The other modes of availability are by cash, deferred payment, and acceptance of the beneficiary's draft drawn in the manner specified in the credit.

2 In this article, document includes draft. In practice, the latter term is commonly used interchangeably with a bill of exchange. In practice, the term "purchase" and "negotiate" are used interchangeably, and are so employed throughout this article.

3 See *UCP 600,* art.7(c), providing that the bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. This clause, read together with the second paragraph of art. 35, says that if a nominated bank receives a tender of documents from the beneficiary and determines that it is complying, and then *forwards* the documents to the issuing bank or confirming bank, the nominated bank is entitled to reimbursement regardless of whether the documents are lost in transit. It is generally accepted that these clauses are

issuing bank's promise is contained in a clause which commonly runs as follows:

> We [the issuing bank] hereby engage with drawers, indorsers, and *bona fide* holders of drafts drawn and negotiated in conformity with the terms of this credit that the same will be duly honoured upon presentation and delivery of the documents herein specified.[4]

In others, no such clause is included but somewhere on the face of the credit it will be conspicuously stated that the facility is "available by negotiation".[5] In that event the reimbursement promise is implied into the credit.

Primarily, the sum to be reimbursed is the amount named in the credit. The reimbursement due date depends on whether the tenor of the draft among the documents tendered pursuant to the credit is drawn at sight[6] or usance (*i.e.*, at time).[7] In the former case, the issuing bank has to reimburse the nominated bank immediately upon the issuing bank's determination[8] that the documents it received constitute a complying presentation. In the latter case, reimbursement is due on the maturity date of the instrument.[9] That date is usually a specified number of days such as 90 days, 180 days, or 360 days from the bill of lading date, after sight, or from the date of presentation. In the latter two situations, the period commences from the very day the issuing bank accepts, or should be deemed to have accepted, the presentation as conforming. But in practice the issuing bank will advise the nominated bank to that effect, in particular its acceptance of the documents and the date on which it will effect reimbursement. At any rate, its failure to do so by the fifth banking day following the day the nominated bank makes the presentation to it may entitle the nominated bank to assume that all is well with the presentation and that at maturity

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unlikely to have effect under a credit in which it is expressly stated that the issuing bank will reimburse upon receipt of the full set of conforming documents. See *e.g.*, *Amixco Asia (Pte.) Ltd. v. Bank Bumiputra Malaysia Bhd.* [1992] 2 S.L.R. 943 at 947 [*Amixco Asia*]. *Cf. UCP 600* Drafting Group, *Commentary on UCP 600: Article-by-Article Analysis* (Paris: ICC Publication No. 680, 2007) at 148-150 [*UCP 600 Commentary*].

4 The wording slightly varies according to the preference of the particular issuing bank, but the substance of the clause is invariably the same. For illustrative examples, see, *e.g.*, *Amixco Asia, supra* note 3; *Sinotani Pacific v. Agricultural Bank of China* [1999] 4 S.L.R. 34 at 40 [*Sinotani*]; *Chinsim Trading (Pte.) Ltd. v. Indian Bank* [1993] 2 S.L.R. 144 at 146 [*Chinsim Trading*]; *Credit Agricole Indosuez v. Banque Nationale de Paris* [2001] 2 S.L.R. 1 at 11 [*Credit Agricole*]; *Algemene Bank Nederland NV v. Soysen,* 748 F. Supp. 177 at 182 (S.D.N.Y. 1990) [*Algemene*]; *Pintel v. Mohamed & Bros.,* (1952) 107 Cal. App.2d 328 at 329.

5 Where there is no clear and unambiguous indication in the credit as to its availability by negotiation, the courts are generally reluctant to treat it as a negotiation credit: See *Sinotani, ibid*. at 40, approving *Southern Ocean Shipbuilding Co. Pte. Ltd. v. Deutsche Bank AG* [1993] S.L.R. 686, esp. at paras. 16-33 [*Southern Ocean Shipbuilding*].

6 See *e.g.*, *Amixco Asia*, *supra* note 3 at 947. See also *Second National Bank of Toledo v. M. Samuel & Sons Inc.*, 12 F.2d 963; *Udharam Rupchand Sons (HK) Ltd. v. Mercantile Bank Ltd.* [1985] HKEC 125 (Supreme Court, now the High Court, of Hong Kong) [*Udharam*]; *Flagship Cruises Ltd. v. New England Merchants National Bank of Boston*, 569 F.2d 699 at 701 (1st Cir. 1978) [*Flagship Cruises*].

7 A negotiation credit involving time draft is the usual type.

8 The issuing bank has up to five banking days to examine the documents and determine whether or not the presentation is regular: see *UCP 600*, art. 14 (b).

9 See *UCP 600*, art. 7(c).

the issuing bank will make payment, of course in the currency designated in the credit.[10]

Essentially, then, the condition precedent to the nominated bank's right to payment under the credit is twofold: first, its presentation to the issuing bank must appear to comply with the stipulations in the credit, and second, that it negotiated the beneficiary's documents pursuant to the credit. The question whether the nominated bank has satisfied the conditions in a manner sufficient to entitle it to have the issuing bank take up the documents and remit the funds covered by the credit at maturity, is governed by the well-known, but much misunderstood[11] and often misapplied strict compliance doctrine.[12] In relation to the conformity of the presentation, the doctrine has over the years built up a considerable reputation for making life difficult for the nominated bank at every turn. Perhaps on account of the amorphousness of its intrinsic character, the precept is easily pressed into service by an issuing bank that is prone to nitpicking or minded to cast about for legitimate, if disreputable, means to escape from its reimbursement undertaking under the credit. For example, the omission of a requisite word in a tendered set of documents can render the entire presentation non-conforming, regardless of whether the omission is obviously a typographical error or purely inadvertent.[13] As ever, the flow of cases implicated in such incidents is continuing unrelentingly especially in the United States, thus making a mockery of most of the solutions that have been attempted thus far to keep a tight rein on the practical application of the doctrine in the specific context of establishing compliance of a presentation.

In comparison to cases of non-conforming documents, judges are seldom confronted with the problem of determining compliance with the mode of availability of a negotiation credit. But when the occasion occurs, the principal question which often arises is: Did the nominated bank purchase the beneficiary's presentation? The same question also arises when the issuing bank pays the nominated bank at maturity of the credit, or notified it that the documents are in order and that it will make payment at that time, but subsequently considers that no negotiation had taken place in relation to the beneficiary, or that it took place but was out of time, or that the tender of the documents by the beneficiary to the nominated bank was made after the expiry date of the credit. In any such situations, proving that the nominated bank did not negotiate the beneficiary's documents is an important hurdle the issuing bank's right to reclaim payment must overcome.

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[10] As to the nominated bank's right to make that assumption, see *UCP 600*, arts. 16(d) and (f).

[11] It is sometimes taken as invariably requiring presentment documents to be a mirror image of the descriptions in the credit. This was expressly denied by L.P. Thean J. in *Indian Overseas Bank v. United Coconut Oil Mills Inc.* [1993] 1 S.L.R. 141 (C.A.) at 151 [*Indian Overseas Bank*] ("the standard of conformity required of the documents tendered under a letter of credit is one of strict conformity to its terms but not one of literal conformity"). It is believed that the subordinate clause in that sentence is to be read as "not one of literal conformity *in all cases*".

[12] It is to be found neatly formulated in the oft-quoted passages in *Equitable Trust Co. of New York v. Dawson Partners Ltd.* (1927) 27 Ll. L. Rep. 49 at 52, *per* Viscount Sumner; *English, Scottish & Australian Bank v. Bank of South Africa* (1922) 13 Ll. L. Rep. 21 at 24, *per* Bailhache J. See also *Indian Overseas Bank, ibid.* at 148, *per* L.P. Thean J.

[13] For an extensive discussion of the leading cases, see Ebenezer Adodo, "Conformity of Presentation Documents and A Rejection Notice in Letters of Credit Litigation: A Tale of Two Doctrines" (2006) 36 H.K.L.J 309.

Reduced to its essentials, the question of what goes to establish negotiation of a beneficiary's presentation, requires the determination of what acts on the part of the nominated bank, *vis-à-vis* the beneficiary, the law will consider to constitute purchase; a careful consideration of whether the purchase took place within the negotiation period specified in the credit; and an inquiry into whether the nominated bank is a *bona fide* purchaser of the documents. The discussion which follows will proceed in order of those questions. As a prelude to the analysis, however, two points need to be highlighted.

First, although the issue as to negotiation is infrequently encountered in disputes, it seems generally recognised in the banking world that the increasing popularity of the negotiation credit especially in Southeast Asia, Canada and the U.K. may witness an increase in the litigation involving them. At present they remain largely an uncharted territory. In addition, much of the initial question is covered by article 2 of the *UCP 600*. This provision will be given particular attention. In particular, the new definition of negotiation by the clause introduces some reform into the subject, but it also has a number of shortcomings that are liable to overshadow the essential value of the initiative and mislead many banks and their legal advisers, and even the judge that may be faced with the task of adjudicating on a matter involving the application of the clause. The scope of the reforms inaugurated will best be understood when we look at the cases bearing on the problem sought to be tackled.

The second point to bear in mind is that a failure by the nominated bank to show that it has negotiated the beneficiary's tender can have potentially considerable consequences. In the main, where there has been no negotiation, in making a tender of documents to the issuing bank the nominated bank is in the beneficiary's shoes and can only recover against the issuing bank so much of the credit as could the beneficiary himself. Put another way, the nominated bank in such an eventuality claims the proceeds of the credit, at the very most, as an assignee of the beneficiary's rights; and at common law an assignee takes subject to equities existing in favour of the debtor. Thus, by virtue of the fraud exception to the autonomy principle, if a fraud on the part of the beneficiary comes to light, the issuing bank has no obligation to honour the nominated bank's otherwise conforming tender. Equally important, since the nominated bank's presentation to the issuing bank is taken as being made not in its own right but on behalf of the beneficiary, the presentation has to comply with the expiry date for presentation stated in the credit.[14] Compliance with that date will not be measured by having regard to the time when the nominated bank received the documents from the beneficiary, but by reference to the date on which the issuing bank received them. If the credit runs out by that time, the issuing bank will be justified in rejecting the tender. Finally, where the credit is still running and the issuing bank is obliged to honour the tender by reason of its being in conformity with the requirements of the credit, a nominated bank that is unable to establish its status as a negotiating bank will be incapable of claiming the proceeds of the credit if the issuing bank in the meantime has notice of their attachment or garnishment by the beneficiary's judgment creditor, whereas a successful proof of that standing will render the amount due under the credit as the nominated bank's property and thus non-attachable.

[14] See *UCP 600*, art. 6(e), which in relevant part provides that a presentation by or behalf of the beneficiary must be made on or before the expiry date.

II. What Counts as Negotiation of the Beneficiary's Tender?

As indicated above, the concept of negotiation is bound up with two further issues, namely the problem of ascertaining whether a negotiation of the beneficiary's conforming presentation occurred within the negotiation time stipulated in the particular credit, and that as to whether the nominated bank advanced the sum of the credit in good faith. This section focuses on the first issue and thus proceeds on a somewhat restricted footing, whilst the latter two will subsequently be considered in the third and fourth sections respectively.

In banking practice relating to letter of credit transactions, *negotiation* and *purchase* are quite easily understood as interchangeable expressions, but the question of what types of acts by a nominated bank *vis-à-vis* the beneficiary of a negotiation credit count as negotiation is not treated as such. It should be pointed out immediately that the meaning attached to the term "negotiation" in the negotiable instrument law[15] affords little assistance. This may perhaps require some explanation.

From the standpoint of that law, negotiation means the transfer of a negotiable instrument, such as a bill of exchange, cheque, or a promissory note, from one person to another by endorsement and delivery (if the instrument is payable to order), or by delivery (if it is payable to bearer). By this definition, anybody—including a thief—can transfer a bearer bill, and the transferee will be perfectly entitled to enforce it so long as the bill qualifies as such having regard to the essential requirements laid down under the *Bills of Exchange Act*.[16] Under the negotiation credit, by contrast, no one can deliver documents to the nominated bank to request payment unless he is the beneficiary of the credit, or someone else acting as his agent, *e.g.*, a collecting bank, or assignee. Similarly, a bank claiming to have purchased a complying tender from the beneficiary must derive its authority to do so from the credit, otherwise there will be no privity of contract between it and the issuing bank. In other words, a purported negotiation in the absence of express authorisation[17] by the credit cannot trigger the issuing bank's reimbursement commitment. A further important point to note is that a draft expressed to be payable upon a contingency is not a bill of exchange and thus incapable of being negotiated by virtue of negotiable instruments law,[18] whereas in negotiation credit practice, such a draft along with a stipulated set of documents is purchasable. And indeed, in theory the credit can require negotiation

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15 See *Bills of Exchange Act*, (Cap. 23, 2004 Rev. Ed. Sing.), ss. 31(2) – (3) [*Bills of Exchange Act*]. Under the respective subsections, a bill of exchange is negotiated when it is transferred from one person to another or, in the case of an order bill, by the endorsement of the holder completed by delivery. Under a negotiation credit, however, such a transfer will be invalid if the transferee is not authorised by the credit.

16 *Ibid*.

17 The authorisation is usually express, but may be imputed by operation of law, for example where the issuing bank's conduct is such as to preclude him from asserting that the bank lacked his mandate to negotiate under the credit. A very good example of the case in which this occurred is *European Asia Bank AG v. Punjab and Sind Bank (N0. 2)* [1983] 1 W.L.R. 642, discussed in Section III below. See also *Banco Santander SA v. Bayfern Ltd.* [2000] Lloyd's Rep. 165 at 172, *per* Morritt L.J., delivering the judgment of the Court of Appeal.

18 See *Bills of Exchange Act,* 1882 (U.K.), c. 61, s. 11(2) [*U.K. Act*], as explained by the Court of Appeal in *Korea Exchange Bank v. Debenhams (Central Buying) Ltd.* [1979] 1 Lloyd's Rep. 548. To the same effect is the very important decision of the Singapore Court of Appeal in *Credit Agricole*, *supra* note 4 at para. 34.

of specific types of documents and leave out a bill of exchange altogether. An inevitable consequence of this distinction is that the basis of a nominated bank's claim for reimbursement under the negotiation credit is not necessarily as a holder of a draft, which may accompany the designated presentation, but as a promisee of the issuing bank's payment undertaking embodied in the credit.[19]

Despite the distinctions just highlighted, a common interface between the negotiable instruments law and the negotiation credit is the requirement that a person seeking to enforce a payment obligation against the promisor must be a *bona fide* holder for value of the instrument on which the action is based. In other words, he must have given value for it. A failure to establish that status inevitably exposes the person claiming payment to any defences available to the promisor against the drawer or previous holder of the instrument. In the specific context of the negotiation credit, it has already been noted that a fraud by the beneficiary drawer is one such defence which an issuing bank promisor may set up against a nominated bank promisee, but the extent to which the defence may take the issuing bank will be demonstrated a little later. For the moment, however, the chief concern is to ascertain what entails *giving value* by a nominated bank for a presentation. It would be useful to begin with the perception of the expression *value* under the negotiable instruments law[20] and some of the cases in point in relation to the meaning of the term under the three *UCP* editions previous to the current regime and then the stance adopted by article 2.

A. *A Taking for Value under Negotiable Instruments Law*

Under section 2 of the *Bills of Exchange Act*,[21] "value" means "valuable consideration". By section 27(1), valuable consideration for a bill is any consideration sufficient to support a simple contract.[22] However, it is made clear under the subclause that a person gives value if he takes a bill in payment of an antecedent debt or liability owed him, the debt or liability being the consideration.[23] It is further provided under section 27(3) that where a holder of a bill has a lien on it arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

As is apparent from the foregoing, whether or not a holder of a bill has given consideration for the bill is essentially a question of fact, depending on the circumstances arising in the individual case.[24] As a rule, "consideration" within the meaning of the provision is not in all respects the same as the consideration that will normally be sufficient to support a contract.[25] For example, an executory promise by a bank in

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[19] This point is elucidated below, subsection B.4.

[20] See *Bills of Exchange Act*, *supra* note 15; *U.K. Act*, *supra* note 18; and the Revised Articles 3 (dealing with negotiable instruments) and 4 (on bank deposits and collections) of the *Uniform Commercial Code of the United States* [*UCC*].

[21] *Supra* note 15.

[22] See *UCC* § 3-303, Revised Article 3 (contains provisions analogous to those of *Bills of Exchange Act*, s. 27, *supra* note 15).

[23] See *Bills of Exchange Act*, *supra* note 15, s. 27(1)(b).

[24] See *Capital and Counties Bank Ltd. v. Gordon* [1903] A.C. 240 at 244, *per* Lord Macnaghten [*Counties Bank*]; *M'Lean v. Clydesdale Banking Co.* (1883) 9 App. Cas. 95 at 115.

[25] See generally *UCC* Revised Article 3, § 3-303(a)(1); Frederick A. Whitney, "Value and the Doctrine of Bona Fide Purchase" (1932-1933) 7 St. John's L. Rev. 188; (1923-1924) 33 Yale L.J. 628 [*Whitney*];

exchange for a bill of exchange does not constitute value. But the picture is altered where the bank has an interest in the bill, which bill it subsequently presents to the drawee for payment. This commonly happens when a customer deposits a bill with his bank with instructions that it be immediately placed to the credit of his account or that of a third party and the bank enters the amount of the bill into the designated account accordingly. It has been held that in such a case the bank is constituted a holder of the bill for value the moment it credited the designated account.[26] Thenceforward, the bill is the bank's property, and the customer's interest in it simultaneously ceases. The basis of this proposition is that the delivery of the bill to the bank is in substance the same as an ordinary lodgement of bank notes by the customer into his account. Similarly, the crediting of the customer's account with the amount of the bill is just as it would have occurred had the customer deposited cash. Either way, what is paid into the account belongs to the bank, and not the customer.[27]

But it may be that the bank does not credit the amount of the bill to the customer's account but merely holds the instrument and allows the customer to overdraw his account. A similar case is where the bank takes the bill in payment of a debt or in exchange for its incurring an irrevocable undertaking in favour of a third party.[28] In each case, the bank's status in relation to the bill is the same as in the situation discussed in the preceding paragraph: it is a holder of the bill for value. When it falls due and the bank presents it for payment, it is acting for itself rather than for its customer. In other words, payment of the instrument becomes due, not to the customer, but to the bank. If the money is not paid, the bank can recover against the drawee on the bill. Of course, that party must pay unless he has a perfectly legitimate defence.[29] But in many cases, instead of resorting to litigation against the drawee, the bank will return the dishonoured bill to the customer and charge back the sum to the customer's account forthwith. With regard to the case where the initial receipt of the bill was for an outstanding indebtedness, the dishonour affords the bank a cause of action on the original debt,[30] and also gives it a right to raise an action on the unpaid bill against the person on whom the instrument is drawn.

Thus far it would seem that the question of whether a bank is a holder of a bill for value hinges upon the character of the taking of the bill by the bank. Once the status

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Frederick A. Whitney, "Value in the Commercial Law of New York", Comments, (1936) 5 Fordham L. Rev. 83.

26 See *Counties Bank, supra* note 24, at 245; *Ex P. Richdale* (1882) 19 Ch. D. 409 at 417, *per* Jessel M.R. [*Ex P. Richdale*]; *Royal Bank of Scotland v. Tottenham* [1894] 2 Q.B. 715 at 717. See also the Ontario Court of Appeal decision in *Bank of British North America v. E.D. Warren & Co.* (1909) 19 Ont. L.R. 257. *Cf. UCC* Revised Article 3, *supra* note 20.

27 The roots of the principle reach back to the decision of the House of Lords in *Foley v. Hill* (1848) 2 H.L. Cas 28 at 36; 9 E.R. 1002 at 1005-1006; *Joachimson v. Swiss Bank Corp* [1921] 3 K.B. 110 at 127.

28 See *Bills of Exchange Act*, s. 27 (1); *UCC* Revised Article §3-303 (a)(5).

29 Such defences as may be raised are reflected in *Bills of Exchange Act*, s. 29 (1).

30 See *Ex. P. Richdale*, supra note 26 at 417, *per* Brett L.J., noting that:

> The giving of a bill of exchange for a debt has the effect of altering the legal of the debtor with the creditor. Instead of the creditor being able to sue the debtor for the debt at the moment, his right to sue is suspended during the currency of the [bill]. The creditor must wait until the [bill] becomes due, and he must then present it for payment, and receive payment on the [bill] and not the original debt, unless the note is dishonoured while it is in his hands. If the note is dishonoured he can then sue for the original debt.

of the taking is ascertained, it will become obvious whether in subsequently claiming payment from the drawee-promisor, the bank is merely an agent for collection, in which case he will be standing in the shoes of the customer, or in its own behalf, in which case it will be acting in its own rights.

In essence, the key to determining whether value has been given for a bill lies in the nature of the circumstances involving the taking of the bill. Logically, therefore, where the act of taking did not amount to a giving of value, the holder of the bill, in presenting it to the drawee for payment, is simply a conduct for conveying the proceeds thereof to its customer, which is another way of saying that the bill is not its property, but the customer's.

B. *The Uniform Customs and Practice ("UCP") Conception of Purchase of Documents*

We turn now to examine the question of what amounts to a purchase in the negotiation credit context under the *UCP*. In dealing with this question, the guiding principle we have just seen under general negotiable instruments law, namely, that the focus of attention is the time when a bank becomes a holder of a bill, was very early recognised in the *UCP*. Under article 10 of the 1951 edition of the Code,[31] "[p]ayment, negotiation or acceptance *against* documents in accordance with the terms and conditions of a credit by a Bank authorized to do so binds the party giving the authorization to take up the documents and reimburse the Bank making the payment, negotiation or acceptance".[32] Implicit in that provision, so far as relates the italicised word, is the requirement that negotiation must be in exchange for a regular tender by the beneficiary. In practical terms, the nominated bank has to switch value for the beneficiary's conforming presentation to trigger the nominating bank's reimbursement obligation. An inevitable corollary of this is that when the nominated bank presents the documents specified in a negotiation credit to the authorising issuing or confirming bank, there is an assumption in favour of the presentee bank that the nominated bank had purchased the documents from the beneficiary and that it is requesting payment not as an assignee of the beneficiary nor as a mere agent for collection, but as a negotiating bank that has acted in perfect adherence to his authority contained in the credit.

To the uninitiated, establishing whether a purchase indeed occurred between the nominated bank and the beneficiary so as to obligate the issuing bank, upon receipt of the documents, to perform its reimbursement promise to the nominated bank should be relatively simple. This is of course true of run-of-the-mill types of transactions, for example, where the beneficiary upon tendering proper documents to a nominated bank leaves the bank's counter with a discounted amount of the credit in his pocket, which documents the bank will in the usual course of business forward to the issuing bank to honour them. Another is where the nominated bank, upon determining that a presentation complies with the credit, puts the amounts of the accompanying drafts in the account of the beneficiary as cash deposits, which the beneficiary is then or thereafter entitled to draw out, and subsequently remits the documents to the issuing bank to claim reimbursement under the credit. Yet another instance of a giving of

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31 *UCP*, Brochure 151 ["*1951 Revision*"].

32 Emphasis added.

value commonly occurs when the nominated bank is the financier of the beneficiary's performance of the sales contract underlying a credit. In this case, there would be a subsisting indebtedness at the time the nominated bank receives the documents, and as previously noted, a debt of that character constitutes sufficient consideration for the tender. The courts have uniformly held that in these types of cases once the proper documents are in the issuing bank's hands, the proceeds of the credit become vested in the nominated bank, and are therefore not the beneficiary's property which may be made the subject of attachment or garnishee proceedings by the beneficiary's judgment creditor.[33]

In cases of the latter two, however, it seems that the state of the entries in the beneficiary's account maintained by the bank is a crucial factor in considering whether a nominated bank has purchased a presentation. In respect of cases of the initial sort, the amount paid to the beneficiary is usually endorsed by the remitting bank on the original text of the credit or on the reverse side of the accompanying draft.[34] Such an endorsement is of the same evidential status as bankers' book entries.

Despite the foregoing, the decision of the United States Court of Appeals for the First Circuit in *Flagship Cruises* quite early demonstrated that in certain circumstances the issue of whether there has been a purchase could be fraught with enormous difficulties. *Flagship Cruises* is doubtless the best-known case in which the problem first received judicial consideration. There, an unrestricted negotiation credit expressed to incorporate the *UCP 222* required, among other things, that sight drafts drawn under it must be negotiated no later than 3 November 1972. On 3 October of that year, the beneficiary's bank, which was a nominated bank in terms of the credit,[35] received the stipulated documents along with the drafts and then transmitted them to the issuing bank. The issuing bank took delivery of the documents on 9 November but advised that it would not honour the tender on the basis, *inter alia*, that the nominated bank did not purchase the drafts before the deadline for negotiation elapsed. The beneficiary, who had in fact not been paid, raised an application for summary judgment against both banks for the amount of the credit. The First Circuit, in affirming the district court's decision in favour of the beneficiary on this point, reasoned that negotiation did take place during the interval between 31 October and 3 November "even though the nominated bank apparently did not give beneficiary value for the drafts".[36] The Court then rejected as unpersuasive the issuing bank's submission that under article 8 of the *UCP*,[37] which formed an integral part of the credit terms, the nominated bank must give value to be considered a negotiating bank.

Clearly, there is no difficulty in seeing why the decision in *Flagship Cruises* is widely viewed as not representing the law so far as concerns the meaning of negotiation. Bearing in mind the established principles earlier examined, it is certainly a paradox that negotiation can take place without giving of value. Had the Court purported to regard negotiation as simply entailing transfer of the required documents

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33 *Standard Bank of Canada v. Allegheny Lumber Co*., 77 Pa. Super. 222, 1921 WL 2294, at *2-3.

34 Some credit, such as the one in *Willow Bend National Bank v. Commonwealth Mortgage Corp*., 722 S.W.2d 12 at 14 (Ct. App., Texas; 1986) may specifically require the nominated bank to do so. Non-compliance with the requirement can justify a denial of payment by the issuing bank.

35 It appeared that the credit was available with any bank.

36 *Flagship Cruises, supra* note 6 at 704.

37 See *supra* note 31 and the accompanying text.

and drafts to the nominated bank on 31 October, one might have thought that the First Circuit was resorting to the negotiable instruments law conception of that term in the absence of a clear-cut clause coming to its aid in the *UCP*. But the short of it is the First Circuit did not claim to do so. The decision was accordingly unsupported by authority. Under the negotiable instruments law, as we have already seen, it is one thing to negotiate a bill, but quite another to actually give value for it; one can occur without the other. However, banking practice respecting negotiation credit contemplates no such possibility, although the instant provision of the *UCP* did not so expressly provide.

In the *UCP* scheme of things, it was not until the *1993 Revision* that what the banking world had understood to be implicit in article 8 of the *1951 Revision*,[38] which the *Flagship Cruises* court apparently denied, found explicit expression in the code. By article 10 (b)(ii) of the *1951 Revision*: "Negotiation means the giving of value *for* documents by the bank authorised to negotiate. Mere examination of the documents without giving of value does not constitute a negotiation".[39] This clause is now superseded by article 2 of the *UCP 600*. It defines negotiation as

> the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank.

This provision, *UCP 600* Drafting Group has explained, is not designed to be a radical replacement for the erstwhile clause, but only aims to "simplif[y]" interpretation of negotiation in letter of credit practice[40] by elaborating on what acts by a nominated bank may legitimately be regarded as constituting a giving of value *for* a conforming presentation. This is certainly a laudable objective.

However, it is not difficult to imagine the types of controversy that the wording of the new clause can generate. What is the position if a nominated bank which also functions as the drawee under an unrestricted negotiation credit advances funds against the beneficiary's drafts? Does a nominated bank's promise to pay upon receipt of funds from the issuing bank constitute a valid negotiation? Would the answer to that question be the same where it takes up drafts and documents as comprising a complying presentation but "subject to final payment",[41] or "subject to issuing bank's acceptance of the documents"?[42] Can the assumption of an irrevocable commitment to a third party by a nominated bank at the instance of a beneficiary count as value for a presentation? Suppose upon conclusion of the examination of a presentation, a nominated bank remits the documents to the issuing bank, and then makes a discounted payment of the amount of the credit after being advised by the issuing bank that "the documents are accepted by us".[43] May such a remitting bank be characterised as having negotiated under the credit, or as having discounted an

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38 Rearticulated by *UCP* 290, art. 8 (b); See also *UCP* arts. 11(d) and 16 (a); *UCP* 400.

39 Emphasis added.

40 See *UCP 600 Commentary*, *supra* note 3 at 22.

41 See *e.g.*, *Wajilam Exports (Singapore) Pte. Ltd. v. ATL Shipping Limited*, 475 F. Supp. 2d 275 (S.D. N.Y. 2006) [*Wajilam*], briefly commented upon *infra* note 51.

42 Such a payment, albeit by a non-nominated bank, is to be found in *Sinotani, supra* note 4 at 37.

43 In practice, that expression is commonly used by issuing banks advising acceptance of tendered documents.

already accepted draft? And finally, what precisely is the nature of the agreement to pay funds that article 2 has in mind? It is intended to look at these points seriatim.

1. Can a nominated bank negotiate under a credit respecting which he is the drawee?

By its wording, the wording of article 2 quoted above appears to preclude purchase by a nominated bank of a draft drawn on him. If it nevertheless does so, is there room for an argument that it is, on this basis, not entitled to reimbursement from the issuing bank? Obviously, whether or not a nominated drawee bank is entitled to negotiate a presentation, including a draft, under a credit depends solely on the terms of the credit. Thus, where a credit is freely available for negotiation in a specified locality, so that any bank operating in that locality may elect to negotiate the beneficiary's drafts and documents, it is not easy to see why a drawee nominated bank under the credit carrying on business in that place cannot choose to do so. It seems misleading to suggest, as the new article does, that a nominated bank in such circumstances has no right to negotiate drafts drawn on it.

The suggestion itself is a throwback to article 10 (a)(iv) and (b)(iv) of the *1983 Revision*, which in relevant parts stated that if a credit is available by negotiation, the issuing bank (and the confirming bank, if any) undertakes to pay without recourse draft(s) drawn by the beneficiary "on any…drawee stipulated in the credit *other than the issuing bank or the confirming bank itself*".[44] By that provision, a confirming bank designated under a credit as the drawee of a draft would be unable to negotiate a document tendered pursuant to the credit, notwithstanding that the credit is stated to be available with any bank.

However, the legal effect of the provision was given some attention in *Union Bank of Switzerland v. Indian Bank*.[45] In this case, the credit at the centre of the dispute was expressed to be subject to the *1983 Revision*; that it was available by negotiation with any bank; and that drafts were to be drawn on UBS, the confirming bank. Referring to article 10(b)(iv) of the *Revision*, Goh Joon Seng J. said that "since the draft was to be drawn on UBS who were nominated bank to accept the draft, the credit was not available by negotiation with [UBS]".[46] It just so happened in the case that the beneficiary presented the documents to his own bank, and not directly to UBS to obtain payment. Hence, nothing turned on the point. Nevertheless, assuming the contrary transpired, would it be open to the issuing bank to deny reimbursement to UBS by alleging that UBS was not competent to negotiate having regard to article 10(b)(iv)? Of course, if we are inclined to accept the issuing bank's claim, we also have to accept that the claim is available to the applicant *vis-à-vis* the issuing bank. But it is suggested that the commercial justification for upholding such a claim is far from self-evident. As long as a freely available negotiation credit in question does not provide otherwise, an issuing drawee bank or a drawee confirming bank may itself purchase a regular presentation by making, for example, a discounted payment to the beneficiary against a time draft, or a full payment in respect of a sight draft.

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[44] The material provision was not reproduced in the Uniform Customs and Practice for Documentary Credits, ICC Publication N0. 500 ["*UCP 500*"].

[45] [1993] 3 S.L.R. 371 (H.C.).

[46] *Ibid.* at 377.

2. A promise to pay beneficiary upon receipt of funds from the issuing bank

Article 2 in relevant part considers negotiation to have taken place if a nominated bank, upon ascertaining the conformity of a presentation, agrees to advance funds to the beneficiary at a named future date not later than the day a credit falls due. In practice, the course adopted by some nominated banks has been to promise payment to the beneficiary when the nominated bank receives funds from the issuing bank. The promise arises in this manner. When a bank authorised to negotiate under a credit is approached by the beneficiary for that purpose, he will be required to complete a standard application form usually captioned "Application for Negotiation of a Documentary Credit". Two separate boxes commonly included in the form carry headings such as "Credit us upon receipt of funds" and "Discount payment". Which of these boxes is ticked or crossed out depends entirely on the beneficiary's pressing financial needs, and also on the length of time the credit will take to mature. Notably, he will normally express a preference for the former option where the period is relatively short (*e.g.*, 30 days), since in that event the nominated bank will impose no charges or interest on the sum credited other than a comparatively modest commission. If the nominated bank accepts the completed and duly executed application form, it then becomes a binding agreement between the nominated bank and the beneficiary to the effect that payment of the credit is to be deferred until receipt of funds, or to a specified date prior to obtaining remittance of the funds.

On the surface, the nominated bank's promise to pay funds pursuant to that agreement seems to be inconsistent with the essential character of article 2 because fulfillment of the bank's payment commitment is conditional upon remittance of funds by the issuing bank. Effectively, if at maturity of the credit the issuing bank should fail to remit the amount due, for example on the grounds of insolvency, the nominated bank can simply throw up its hands and advise the beneficiary that payment is unobtainable owing to the resulting circumstances. Ultimately, in the worst case scenario, the beneficiary will be obliged to join the queue of creditors looking to realise the issuing bank's assets.

By reason of such an eventuality, is a nominated bank's conditional promise of payment nevertheless entitled to be considered a purchase obliging the issuing bank to make reimbursement at maturity of the credit? This question may easily assume particular significance where the nominated bank's promise was made to the beneficiary on the expiry date for presentation of documents under the credit. If we refuse to take it as negotiation and then resolve the question in the negative, it would mean that the nominated bank's later presentation to the issuing bank was for the beneficiary himself. As such, the tender would be out of time, with the patently undesirable result that the beneficiary would be unable to enforce the credit. But if the issue is resolved in the affirmative, the tender to the nominated bank, so far as the deadline for presentation is concerned, will be timely.[47]

Respecting that question, it has been argued that in Anglo-Saxon system a nominated bank's promise to hand over funds is unlikely to be regarded as a purchase

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[47] The reason being that only the beneficiary has an obligation to present documents on or before the expiry date for presentation or for negotiation: see *UCP 600* 6(c). However, as between a nominated bank and the issuing bank, there is no specific timeframe for forwarding the documents, but the nominated bank must do so within a reasonable time.

of the beneficiary's tender.[48] The reason assigned for this view appears to derive from the common law principle relating generally to negotiable instruments which we intimated earlier, namely that an executory promise in exchange for a bill is insufficient to make the promisor a holder for value. Since 1993, however, it has been accepted as part of Singapore law in the specific context of negotiation credit that such a promise, though executory, does indeed constitutes negotiation.[49] In effect, a nominated bank can give value for a conforming presentation by assuming a liability to advance funds to the beneficiary when received from the nominating bank.[50] Having regard to the commercial circumstances which usually generate a nominated bank's promise to pay when funds are received, it is hard to see why the recognition of this promise as constituting negotiation cannot in practice operate seamlessly with article 2. It is submitted that the Singapore position has much to recommend it in a proper case arising for consideration elsewhere.

Since a promise to advance funds when received counts as purchase of a proper tender, the same must be true about situations where a nominated bank's discounting of the amount of a conforming set of documents is made subject to payment, or acceptance of the documents, by the issuing bank because the element of conditionality in the latter case has the same legal effect as in the former.[51] Surely, the indistinguishability of the one from the other need not be overemphasised. It is worth noting, however, that as a matter of strict legal principle the fraud rule does not (and should not) operate in identical fashion. In particular, where an issuing bank has knowledge of a fraud by the beneficiary prior to maturity of the credit, a nominated bank that merely undertakes to provide funds to the beneficiary will not be allowed to claim payment from the issuing bank, as opposed to his counterpart who can recover so much of the amount of the credit which he had actually discounted to the beneficiary.[52]

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[48] E.P. Ellinger, "The Uniform Customs and Practice for Documentary Credits—the 1993 Revision" [1994] L.M.C.L.Q. 377 at 389.

[49] See *Chinsim Trading, supra* note 4.

[50] *Ibid.* at 151.

[51] *Wajilam, supra* note 41, *per* Rakoff J. The argument that a discounted payment to the beneficiary made "subject to final payment" did not go to vest the sum of the credit in the nominated bank was rejected, and it was held that the proceeds of the credit in question constituted a debt owed to the nominated bank by the issuing bank, which debt arose at the moment the issuing bank accepted the conforming documents. Accordingly, the court vacated an order that had attached the proceeds of the credit as the beneficiary's funds.

[52] The author found no case directly on point, but as to the law on negotiable instruments, generally the position canvassed in the text seems legitimate: see *Capital and Counties Bank Ltd. v. Gordon* [1903] A.C. 240 at 249, *per* Lindley L.J. He emphasised that "the moment a bank places money [or bills] to its customer's credit the customer is entitled to draw upon it, *unless something occurs to deprive him of that right*". The italicised wording suggests that if "something" so reprehensible as the customer's fraud comes to light prior to his drawing out the money credited to his account, the person defrauded can claim back the funds from the bank or repudiate liability under the bills. A similar conclusion will be found in the American case of *Ganjo Inc. v. Tri-Urban Realty Co.,* 261 A.2d 722 (N.J. Super. L. 1969). But see the Ontario Court of Appeal decision in *Bank of British North America v. E.D. Warren & Co.* (1909) 19 Ont. L.R. 257, holding that the claim of the *bona fide* purchasing bank was not limited to the amount actually advanced to a customer who himself could not have recovered under the cheque in question, but included the entire sum originally placed to the customer's account.

3. Assumption of an irrevocable obligation to a third party at beneficiary's instance

We have just seen that a nominated bank's promise to pay the beneficiary a certain sum of money at some future time that is not beyond the due date of a credit makes the bank a purchaser of the beneficiary's tender for value, and *a fortiori*, a bank that has negotiated. The other side of the coin to consider is whether such a promise will nevertheless have that character if it is made to a third party on the beneficiary's instructions. Looking at the issue logically, one can reasonably expect to reach the same conclusion as we did before. One would also believe that that result will be necessarily inescapable if the initial assumption of the obligation to pay is subsequently followed by actual remittance of cash to the third party. There is no authority directly on point, but in the absence of a policy consideration to the contrary, the lead taken in *Chinsim Trading* should be adopted by analogy.

4. Effect of furnishing value upon being advised that the documents are accepted

We have already noted that the expression "negotiate against" apparently conforming documents which featured prominently in the various editions of the *UCP*, from *1951 Revisions* to *1993 Revisions*, contemplated a giving of value by a nominated bank once he has examined the documents and determined that they are perfectly in accord with the requirements of the credit.[53] So far as the provision was concerned, the nominated bank must have discounted the amount covered by the documents at the time the nominated bank tendered the documents to the issuing bank. At all events, that was the common understanding of the clause by the courts[54] and the academic writers that have expressed a view on the matter.[55]

Taken on the surface, it might be thought that article 2 of the current regime has departed from the old position just noted. The reality, however, is that the new clause evinces no such departure. In any event, under article 7(c), performance of the issuing bank's reimbursement obligation depends upon whether the nominated bank has "*negotiated a complying presentation* and forwarded the documents to the issuing bank". It can be reasonably inferred from this clause that, in the eye of the *UCP*, a remittance of drafts and documents by a nominated bank to the issuing bank without having purchased them does not constitute it a negotiating bank. Once the documents are in the hands of the issuing bank, the opportunity for the nominated bank to negotiate the documents falls away accordingly. In that instance, however, the issuing bank has to honour the presentation if it ascertains that the tender complies

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[53] If any irregularity is found in a documents, the nominated bank that is also a confirming bank may nevertheless advance money against the documents under reserve or upon the execution by the beneficiary of a guarantee or an indemnity agreement. A full discussion of the legal implications of such a payment by a nominated bank is, of course, to be found in the leading case of *Banque de L'Indochine et de Suez SA v. J H Rayner (Mincing Lane) Ltd.* [1983] 1 Q.B. 711 (Q.B. and C.A.).

[54] *Amixco Asia*, *supra* note 3 at 947, *per* G.P. Selvam J.C. ("An assertion by a nominated bank that it negotiated [under a] credit without making an advance would be against the spirit and letter of the *UCP* 1983", adding "If such a contention is upheld, it would lead to uncertainty and confusion"). See also *Indian Bank v. Union Bank of Switzerland* [1994] 2 S.L.R. 121 (C.A.) at 127 [*Indian Bank*]; *Rabobank v. Bank of China* [2004] 3 HKC 119 at paras. 74 and 82.

[55] See for example, A.G. Guest, ed., *Benjamin's Sale of Goods*, 7th ed. (London: Sweet & Maxwell, 2006) at paras. 23-183; Raymond Jack, Ali Malek & David Quest, *Documentary Credits,* 3rd ed. (London: Butterworths, 2001) at paras. 2-22 and 6-17.

with the requirements of the credit. The form in which it discharges that obligation depends on whether the draft involved in the presentation is at sight or at time (*i.e.*, at usuance). In the former case, the issuing bank must remit payment to the beneficiary immediately. Where it is the latter case, the practice is that the issuing bank will advise its acceptance of the draft to the beneficiary usually through the nominated bank, especially where this bank is the beneficiary's own bank, which bank will then make a discounted payment of the amount of the draft.

The question which arises is whether such a discounted payment constitutes negotiation entitling the bank to enforce payment of the negotiation credit, or only constitutes it a purchaser of the draft? Two contrasting positions thus immediately suggest themselves. On the one hand, the conventional invitation extended to a nominated bank under the negotiation credit is to provide value *against* a complying set of documents and then remit same to the issuing bank to claim reimbursement. For this purpose, discounting of the amount of a draft and documents already accepted pursuant to a negotiation credit is not the same thing as a negotiation of conforming presentation. So, in order to recover whatever it has paid by way of discount, the purchasing bank should be required to claim on the basis of the draft, rather than on the credit; it must stand or fall on its rights as they exist under the bill, and not under the credit. In other words, it is essentially a purchaser of an accepted bill of exchange, who accordingly has to seek payment of the bill on the day it falls due from whoever is the acceptor,[56] and upon failure to pay on presentation, to exercise its right of recourse under the *Bills of Exchange Act*.[57]

The rival, and of course better view from the point of view of the nominated bank, is that the discounting is nevertheless to be regarded as contemplated by the credit, with the result that it can claim reimbursement in terms of the credit, with no special consideration being given to the draft.

It would seem that the *UCP* does not have any real solution to the problem. Fortunately, however, the matter has been before the courts on two different occasions, initially in 1983 in *European Asian Bank AG v. Punjab & Sind Bank* (*N*0.2)[58] and twenty-four years later in *DCD Factors plc. v. Ramada Trading Ltd*.[59] The second competing position has found favour with the judges. It is instructive to examine the cases to facilitate a proper understanding of the commercial justification for their preference.

The *European Bank* case was a complicated litigation and involved a number of important legal issues, and, as a result, it is also cited as authority for several different propositions in many other branches of the law. One of the issues concerns

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[56] The relevant principles respecting presentment of a bill for payment are set forth under ss. 45 and 46 of the *Bills of Exchange Act*. Regarding liability of the acceptor, see s. 54 (1) of that Act.

[57] Against the beneficiary as drawer of the bill: s. 47(2), after the dishonour has been duly protested and the appropriate notices of the non-payment given him as required by s. 48; or perhaps alternatively sue the acceptor under s. 54 (1). Reference may be made to Ackner J.'s judgment in *Maran Road Saw Mill v. Austin Taylor & Co. Ltd.* [1975] 2 Lloyd's Rep. 156, at 160-61, approved in Singapore *per* Kan Ting Chiu J.C. in *Chinsim Trading*, *supra* note 4 at 150. In the United States, the position is governed by the *UCC* Revised Article 4. See especially § 4-303 thereof. See also *First Commercial Bank v. Gotham Originals Inc.,* 486 N.Y.S.2d 715 (1985) (an issuing bank's strenuous efforts to deny liability as acceptor of a bill failed).

[58] [1983] 1 W.L.R. 642 [*European Bank*].

[59] [2007] EWHC 2820 (Q.B.), [2008] Bus. L.R. 654 [*DCD*].

the question as to the circumstances in which a bank may be regarded as having negotiated documents under a negotiation credit. The facts of the case were briefly as follows. The defendant Indian bank opened a negotiation credit at the instance of one Jian in favour of Bentrex (a Singapore-based exporter) to finance the purchase of a certain quantity of Zanzibar cloves. The credit was stated to be subject to the *UCP 290* and valid for negotiation in Singapore until 15 September 1979. On 7 August, Bentrex tendered to his bank, the plaintiff bank, a set of documents and a time draft in the amount of US$ 2.5 million drawn on Jian as specified in the credit, and payable to the plaintiff's order. It seemed that on 13 August, the plaintiff bank advised Bentrex that it had negotiated the documents. On 16 August, the issuing bank received the documents, including the draft and a covering letter which stated that the plaintiff bank had negotiated the documents under the credit. On the same day, that bank notified the plaintiff bank that the draft and documents had been accepted to fall due on "3.2.1980".[60] On the strength of this advice, the plaintiff bank credited the beneficiary's account with the discounted value of the letter of credit on 20 August, and permitted him to draw down on the account. At the maturity date of the credit, the issuing bank, as did the confirming bank, denied reimbursement to the plaintiff bank on the alleged ground that there had been a large-scale fraud respecting the sale transaction underlying the credit. Of course, this allegation would be sustainable, and its obligation to honour the credit would thus not arise, only if it could show that the plaintiff bank was not a *bona fide* negotiating bank,[61] but a mere agent of Bentrex for collection of the amount named in the credit. On the ensuing hearing of an application for summary judgment against the defendant issuing bank, Staughton J. refused to accept the agent-for-collection status sought to be ascribed to the claimant, but nevertheless granted unconditional leave to defend the action on other grounds.

On appeal, the Court of Appeal affirmed Staughton J.'s conclusion regarding the capacity in which the claimant acted *vis-à-vis* the beneficiary. Robert Goff L.J., delivering the sole judgment of the court,[62] approached the issue by two alternative routes on the basis of present evidence. As to the first, his Lordship said that the matter is plain on the face of the documents which the plaintiff bank had tendered to the issuing bank. He then proceeded to give more details about the situation:

> When Bentrex presented the documents to the defendants on August 7… they completed a standard form of the defendants which could be used whether the documents were sent for collection, for purchase or for discount. Which of these three purposes was intended by Bentrex was not specified expressly in the document; but a very substantial part of the document designed to be completed where documents were sent for collection was left entirely blank, although nearly all the remainder of the document was completed. The draft presented by Bentrex with the documents was made out to the order of the defendants, not to the order of Bentrex. Thereafter…the plaintiffs…wrote to the defendants on August 13, using what was plainly one of their own standard forms. The form was suitable for use by a bank which had already negotiated a letter of credit …. The document

[60] The advice runs thus: "We are pleased to inform you that the above documents are accepted by the party to fall due on 3.2.1980".

[61] The authority in point is the Court of Appeal decision in *Guaranty Trust Co. of New York v. Hannay* [1918] 2 K.B. 623 (C.A.).

[62] Slade L.J. was the other member of the court.

> begins with the words: "we have negotiated documents under your letter of credit as follows…" It refers to the enclosed documents; and there and then typed in the words (which are the most relevant part of the document) "At maturity i.e. 3/2/80 we will reimburse ourselves on Irving Trust New York. Please advise acceptance". This document is wholly inconsistent with agency for collection.[63]

Faced with the overwhelming evidence before the court, the issuing bank apparently conceded that it was in difficulty; but it was nevertheless determined to explore possible escape avenues. Accordingly, it urged that when the plaintiff bank forwarded the documents to the issuing bank on 13 August to inquire whether the issuing bank was willing to accept the documents, it had implicitly admitted that it had yet to negotiate under the credit as at that time. Thus, in forwarding the documents, the plaintiff bank was not acting in its own right as a negotiating banker. Rather, it was an agent for collection of the sum of the credit. This argument also failed because the mere fact that negotiation was yet to be effected as of the date mentioned did not necessarily go towards establishing that the claimant was ever constituted as an agent by Bentrex to collect the proceeds of the credit. Indeed, it might well be that it was still engaged in the decision-making process as to whether the financial position of the beneficiary and of the issuing or confirming bank adequately indicated that the potential commercial benefits of negotiating under the credit outweigh the risks. Notably, banks requested by beneficiaries of negotiation credits to purchase their documents invariably make such decisions as a matter of sound banking practice or basic business prudence.

Significantly, however, taking an alternative route to meet the issuing bank's contention, Robert Goff L.J. said:

> Even if it were a fact that, as at August 13, the plaintiffs had been appointed agents for collection by Bentrex, it is beyond question that by August 20 the plaintiffs had negotiated the letter of credit, and there is no suggestion that they acted otherwise than in good faith in so doing. Thereafter, in February 1980 (i.e. the maturity date of the credit), they claimed payment from the defendants; and this was refused. In our judgment…the issuing bank cannot excuse his refusal to pay on the ground[s] that at some earlier time the negotiating bank was a mere agent for collection on behalf of the seller and allege against him fraud or forgery (if that indeed be the case) on the part of the beneficiary of the letter of credit.[64]

The latter approach adopted by Robert L.J. was applied by Lloyd Jones J. in the comparatively recent case of *DCD*.[65] Here, the plaintiff ("DCD"), at whose request a negotiation credit was issued in London and made available with any bank in Pakistan, was defrauded of sums in excess of £11 million by the beneficiary of the credit in collusion with other persons under the transactions which generated the credit. They applied for and obtained an injunction restraining the issuing bank from making payment on the due date of the credit on the basis of the fraud practiced on them. On the return date, Habib Metropolitan Bank ("HMB"), a nominated bank by virtue of the terms of the credit, requested the court to vacate the injunction and

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63 *European Bank, supra* note 58.

64 *Ibid.* at 658.

65 *Supra* note 59.

argued that the fraud exception was unavailable to relieve the issuing bank from honouring its undertaking under the credit because it was entitled to payment of the credit in its own right and had negotiated in good faith for value long before the beneficiary's fraud was discovered. In support of this argument, HMB advanced the proposition that the obligation of an issuing bank to reimburse a nominated bank arises the moment that the nominated bank negotiates the amount of a negotiation credit to the beneficiary, although in cases such as the instant context reimbursement may not be due until the arrival of the future date specified in the credit. Any fraud on the beneficiary which comes to light after the negotiation had taken place, but prior to the due date for payment, does not affect the issuing bank's liability to reimburse the negotiating bank.

The issuing bank counter-argued that HMB did not negotiate a tender under the credit, but merely made a pure discounting arrangement with the beneficiary outside the contemplation of the credit, and that for this reason the nominated bank was at best in the position of an assignee of the beneficiary that takes subject to equities. Since a fraud by that party has been revealed before the due date for payment, the nominated bank was not entitled to enforce the credit. It cited as supporting its contention the Court of Appeal decision in *Banco Santander v. Bayfern Ltd. SA*,[66] but subsequently appeared to have abandoned reliance on that authority when it was reminded that the instant case involved a negotiation credit, as opposed to the deferred payment credit with which *Banco* was concerned.

In considering whether the essential claim of the issuing bank was made out, Lloyd Jones J. proceeded to review the evidence. On 23 May 2007, Royal Rice tendered to HMB the documents, including a bill of exchange drawn to the order of that bank. The following day, 24 May, HMB sent the documents to the issuing bank, who examined them and consulted DCD about the discrepancies it had identified. Upon receipt of a letter from DCD stating that the documents were acceptable notwithstanding the irregularities contained in them, the issuing bank sent a SWIFT advice to HMB on the same day in the following terms: "Please note the following bill has been accepted and falls due for payment as stated…on which date we shall remit proceeds as per your instructions". On the faith of this advice, HMB credited the discounted amount of the bill of exchange to Royal Rice's (beneficiary's) account. At this point, Lloyd Jones J. pointed out that the case before him was on all fours with the situation that Robert Goff L.J. had confronted in *European Bank*, and thus had to be resolved likewise. In particular, he ruled that the notification of acceptance of the documents created an estoppel in favour of HMB, just as the Court of Appeal had found in respect of a similar notification by the issuing bank in the earlier case of *European Bank.*

Notably, estoppel is a long established rule of evidence[67] which may assist a plaintiff in enforcing a cause of action if he is able to convince the court that (a) a statement of the existence of a fact was made by the defendant or his authorised

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[66] [2000] Lloyd's Rep. Bank. 165 [*Banco*].

[67] Reference may be made to the *Evidence Act* (Cap. 97, 1997 Rev. Ed. Sing.), s. 117, which provides that when one person by his act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, he shall not be allowed in any proceedings between himself and such person to deny the truth of that thing. This provision is to be found in the evidence manual prepared by Sir James Fitzjames Stephen (1829-1894) probably in 1872 and substantially adopted by the legislatures of virtually all the various Commonwealth countries.

agent to the plaintiff or someone acting for him, (b) with the intention that the plaintiff should act upon the faith of the statement, and (c) the plaintiff did act in reliance on the statement to his detriment.[68] In the instant case, as in *European Bank,* all these ingredients were established by the nominated bank against the issuing bank. Lloyd Jones J. accordingly pronounced judgment in its favour.

Quite apart from considerations of estoppel against the issuing bank, which may on the same basis seek recovery from the applicant, there are at least two reasons why such a nominated bank as the one in *DCD* and *European Bank* was entitled to be regarded as having negotiated pursuant to the credit. First, if the nominated banks are denied reliance on the issuing bank's reimbursement undertaking embodied in the credit, they will then be obliged to base their claims on the bill of exchange which they purchased. This will place the banks in a very difficult position because the banks were the original payee of the drafts in question, and so could not be a holder in due course of the bills.[69] The only status they could possibly have in the particular circumstances was that of a holder for value. Regrettably, under the *Bills of Exchange Act* whereas special protection and privileges are afforded to a holder in due course, none is extended to a holder for value; the short of it is that he is left out in the cold by the statute.[70]

Another difficulty that may arise where the nominated bank is shut out from enforcing the ironclad reimbursement promised in the credit, is that other than suing on the rights of the apparently fraudulent beneficiary as an assignee (in which case enforcement of the issuer bank's payment obligation will be denied), the bank may very well have nothing to anchor his claim. That is what often happens in practice, where the form in which drafts are required under many negotiation credits renders the drafts to be anything but bills of exchange as defined by the *Bills of Exchange Act*. Examples of such drafts are to be found in *Wajilam*[71] and in *Credit Agricole.*[72] In point of fact, that was one of the reasons which occasioned the failure of the nominated bank's claim in the latter case.[73]

However much one may look at the matter, the principle established by *European Bank* and re-enunciated by *DCD* that it is perfectly legitimate to consider the provision by a nominated bank of a discounted payment of the amount of negotiation credit upon receiving notification of the issuing bank's acceptance of documents to be negotiation entitling the nominated bank to obtain reimbursement under the credit, is entirely salutary. It might be thought that it would be stretching the traditional meaning of words to view such discounting of the sum covered by the accepted

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[68] See *Nippon Menkwa Kabushiki Kaisha v. Dawsons Bank Ltd.* (1935) 51 Ll. L. Rep. 147 at 150 (col.2), *per* Lord Russell, delivering the advice of the Privy Council on an appeal from a decision of the High Court of Judicature at Rangoon in Burma, now Myanmar since 1989.

[69] See *U.K. Act* ss. 29 (1) and 31(3), as explained by the House of Lords in *Jones (RE) Ltd. v. Warring and Gillow Ltd.* [1926] A.C. 670.

[70] For a discussion of the status of a holder for value, see generally Nicholas Elliot, John Odgers & Jonathan Mark Philips, *Byles on Bills of Exchange and Cheques,* 28th ed. (London: Sweet & Maxwell, 2007), ch.18, esp. at para.18-013; A.G. Guest, *Chalmers and Guest on Bills of Exchange*, *Cheques and Promissory Notes*, 15th ed. (London: Sweet & Maxwell, 1998) at paras. 759-763; Benjamin Geva, "Equities as to Liability on Bills and Notes: Rights of a Holder Not in Due Course" (1980-1981) 5 Can. Bus. L.J. 53.

[71] See *Wajilam*, *supra* note 41.

[72] *Supra* note 4.

[73] *Ibid*. at 13.

documents as a negotiation envisaged by the *UCP*. That may well be, but the least one can say is that so far as concerns the point, case law merely comes in to assist the *Code* and in effect otherwise hapless nominated banks whose customer-beneficiary has fraudulently obtained the amount of a credit and disappeared with the funds, by laying down that circumstances such as those in*DCD* constitute negotiation of complying documents.

It is to be noted, however, that the date on which the nominated bank makes the discounted payment must not be later than the last day of the negotiation period set forth in the credit. For instance, looking at the *European Bank* case, it is certainly unlikely that a recovery would have been allowed had the negotiation time stipulated in the credit expired as of 20 August when the nominated bank discounted the amount of the credit to the beneficiary—The problem of determining whether a negotiation period in a negotiation credit had lapsed at the time a nominated bank makes a discounted payment will be discussed in some detail a little later in this article. We proceed now to examine the last of the five issues we set out to consider under this section, namely the nature of the agreement to pay funds envisaged by article 2.

5. Nature of the 'agreement to pay funds' contemplated under article 2, UCP 600

In certain instances, a nominated bank, upon conclusion of its documents examination task and determining that the presentation is in apparently good order, does not at once discount the sum covered by the credit, but instead promises the beneficiary that it will advance the money to him at a specified future date. At one time, there was much lively debate about whether such an executory promise, which is manifestly denied the character of value under the negotiable instruments law, can nevertheless legitimately claim to be value given in exchange for the beneficiary's tender under the *UCP* scheme. An important view that gained the widest support was that what should suffice to constitute value in the business practice respecting negotiation credit need not necessarily be measured in terms of what will do so under the statutory regime on negotiation instruments.[74] In other words, the concept of negotiating a complying tender under a credit has to be taken to imply that a nominated bank can give value by assuming an obligation to make a future payment of the sum of the credit.

However, in *Chinsim Trading*,[75] Kan Ting Chiu J.C. (as he then was), rightly it is submitted, accepted this general belief without any hesitation. It was also given formal recognition by the ICC Banking Commission in a Position Paper No's released in September 1994. By virtue of the official statement, a nominated bank under a negotiation credit may perform its mandate either by making an immediate payment (*e.g.*, by cash, banker's cheque, or by crediting an account on the beneficiary's instructions), or by undertaking to hand funds over to the beneficiary.

The spirit of that statement has now been upgraded to a seat under article 2 of the *UCP 600*; it has been quoted in full earlier. Nevertheless, for ease of reference (so far as material to the point under consideration), the clause provides that a nominated bank purchases a complying presentation "by advancing or agreeing to advance

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[74] This is amply reflected in § 5-116(c) of the *UCC* Revised Article 5 (Letters of Credit), which defer to the *UCP* and also makes clear that in the event of a conflict between it and the Revised Article 3 (Negotiable Instruments), the former takes precedence.

[75] *Chinsim Trading*, *supra* note 4.

funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank". As noted above, it is thought that this provision has "simplified" the corresponding version of its predecessor; but it is submitted that the wording of the clause is not entirely felicitous and necessitates at least two important qualifications.

The first has already been indicated, *i.e.*, that either of the acts which the clause considers to constitute a purchase must occur once the nominated bank determines that a presentation is apparently perfectly regular. If this view is correct, then it must follow that a nominated bank which simply pays a beneficiary the sum of a credit on the banking day the credit falls due is not acting within its mandate as a negotiating bank, but as collecting bank for the beneficiary, a position which will naturally expose him to the risk of fraud on the beneficiary's part.

Second, whether a payment has to be made against a complying presentation or postponed by agreeing to advance money at a later date is not at the nominated bank's discretion, but depends upon the tenor of the credit. We have earlier intimated that in practice a negotiation credit is customarily drawn payable sometimes at sight, but most often at usance or time. The beneficiary's draft drawn to that effect will usually be required as part of the stipulated documents. Where the draft as drawn in accordance with the credit in question is a sight draft, a nominated bank has no option but to advance the amount of the credit to the beneficiary against a conforming tender; it is not open to him to promise payment at a future time (Kan Ting Chiu J.C.'s decision in *Chinsim Trading* case[76] is very clear on this), save in the unlikely event that the beneficiary himself request the nominated bank to defer payment.

But where the draft involved is drawn at time, for example 90 days after sight, 180 days after bill of lading date, a nominated bank may effectively purchase a conforming presentation in one of three ways: (i) it may, on the beneficiary's instructions, provide a discounted payment of the credit prior to forwarding the documents to the issuing bank, the discounted payment being the amount of the credit less discounting fees and other charges, including interest;[77] (ii) it may engage, either before or well after remitting the documents to the issuing bank, to make a future payment, provided that the set future date for performing the obligation must not be later than the maturity date of the credit, otherwise the negotiation would be invalid;[78] and (iii), by virtue of the *European Bank* and *DCD* cases, the nominated bank may discount a credit after the issuing bank has advised acceptance of the documents, insofar as the discounted payment is not made after the expiry of the negotiation time set forth in the credit. Because of the peculiar difficulties involved in determining the conformity of such discounting, it is perhaps best to deal with the issue separately in the ensuing section.

III. Negotiation Within a Stipulated Period of Time

A nominated bank's compliance with the period of time within which a credit requires the beneficiary's presentation to be negotiated is an essential condition for the issuing

[76] *Ibid.*
[77] These sums afford potential nominated banks a substantial annual turn-over.
[78] Support for this proposition is found in *UCP 600 Commentary, supra* note 3 at 22.

bank's liability to the nominated bank. Such a timeframe is part of the nominated bank's mandate conferred by the credit; it risked being denied payment if he deviates from it, absent a waiver by the issuing bank. An important corollary to performance of that mandate is that the credit must set forth the time in sufficiently precise and unambiguous language. In practice, however, a negotiation credit will be regarded as having satisfied this requirement if, failing explicit provision of that period, it expressly contains an expiry date for presentation or the day on which credit shall lapse. At all events, as a matter of prudent banking practice, no negotiation credit is issued without either of the latter provisions.[79]

The principle that the issuing bank's undertaking to a nominated bank is not engaged where it is shown that the latter purchased the beneficiary's tender outside the time unequivocally authorised in a credit dates back to the first half of the twentieth century.[80] Since that time, it has been so uniformly upheld by the courts that it is taken as a given in modern banking world.[81] Nor has any reasonably diligent and careful bank ever experienced difficulties in complying with the doctrine, not least because proper adherence to instructions is the touchstone of performance under credit transactions. These considerations were apparently disregarded by Vincent Leow J. in *Mizuho Corporate Bank Ltd. v. Woori Bank*[82] when he held that a nominated bank's breach of a term as to the negotiation period in question was not intended by the parties to have such "draconian consequences" as to relieve the issuing bank from reimbursing the nominated bank. It is important to examine the basis for this decision.

In *Woori Bank*, four credits opened by the defendant issuing bank to finance the purchase of a certain quantity of gas oil and made subject to the *UCP 500* contained the following clause: "Negotiation is only allowed … after 51 days from Bill of Lading date but within validity of the letter of credit". The plaintiff nominated bank negotiated the beneficiary's documents prior to the fifty-first day. After the 51 days had elapsed, it sought reimbursement from the issuing bank, who denied liability under the credit. It then filed an application for a summary judgment for the amount of the credits in the High Court of Singapore.

Vincent Leow J. accepted the submission that the nominated bank was in "breach" of the 51 days clause under the credit. This is a finding that would ordinarily be viewed as enabling the issuing bank to dishonour the claim for reimbursement, and thus requiring judgment to be entered in its favour, unless in the particular events that occurred there are exceptional factors (*e.g.*, waiver or estoppel) precluding such a ruling.[83] Curiously, however, the judge proceeded to argue that compliance with

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[79] This is specifically required by *UCP 600,* art. 6(d)(i), which relevantly reproduces *UCP 500*, art. 42(a). See also *UCP 600 Commentary, supra* note 3 at 34, explaining that the former is the "equivalent" of the latter. In the United States, provisions to the same effect are spelt out under 12 C.F.R § 614.4720; 12 C.F.R § 7.1016.

[80] See *e.g.*, *Jaris (G) & Co. v. Banque D'Athenes,* 246 Mass. 546 (1923); *Barde Steel Products Corp. v. Franklin National Bank*, 281 F.814 (3rd Cir. 1922); *Moss v. Old Colony Trust Co*., 246 Mass. 139 (1923); *Anglo-South American Trust Co. v. Uhe,* 261 N.Y.S. 150 (1933).

[81] See, *e.g.*, *Bank of America National Trust & Savings Ass'n v. Liberty National Bank & Trust Co.,* 116 F. Supp. 233 (W.D. Ok. 1953), *aff'd,* 218 F.2d 831 (10th Cir. 1955).

[82] [2004] SGHC 219 [*Woori Bank*].

[83] Unless he is precluded from doing so at common law, as opposed to the preclusion rule under *UCP 600* art. 16, which is inapplicable where non-compliance with a stated deadline is asserted. These points are discussed in Section IV below.

the 51 days clause was not a condition precedent to the issuing bank's obligation to make reimbursement under the credit. His Honour said:

> All that the 51 days clause provided the defendants [issuing bank] was the right to refuse payment prior to the 51st day. Once that day has come and gone, then provided that the letters of credit were still valid, the defendants must make payment upon presentation of the compliance documents.[84]

He concluded that "the breach of the 51 days clause did not entitle the [issuing bank] to refuse making payment to [the nominated bank]".[85]

With respect, Vincent Leow J.'s judgment seems to rest on tenuous ground. In particular, his analysis ran into difficulties when he drew a distinction between a credit stating that negotiation must be done by a specific date (in which case a non-compliance will relieve the issuing bank from his reimbursement undertaking) and a credit that "merely imposed a moratorium" during which negotiation must not take place (in which case a non-compliance will not have "draconian consequences").[86]

It is suggested that the distinction sought to be drawn was unnecessary. Essentially, the issuing bank's reimbursement undertaking towards the nominated bank as stated in paragraph (d) of article 10[87] is conditional upon the nominated bank acting within the scope of its authority embodied in the credit. Once it was found that the nominated bank had deviated from its instructions by reason of its failure to observe the "moratorium imposed" in the instrument, it became obvious that it had forfeited its right to claim reimbursement from the issuing bank—unless, of course, in the material circumstances there is an extremely compelling reason to sustain the right.[88] It should thus be considered unarguable that a time for negotiation or presentation specified in a letter of credit is an essential stipulation, which a nominated bank could disregard only at its peril. In consequence, the *Woori Bank* decision is difficult to support.

One of the major problems associated with ascertaining a nominated bank's compliance with a negotiation period set forth under a credit arises when the required documents tendered to a nominated bank include a transport document such as a bill of lading.[89] Under article 14(c) of the *UCP 600*, a presentation containing one or more particular types of original transport documents must be made "not later than 21 calendar days after the date of shipment". This replaces without any significant changes[90] article 43 (a) of the *UCP 500*.[91]

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84 *Woori Bank*, *supra* note 82 at para. 44.

85 *Ibid*. at para. 48.

86 *Ibid*. at para. 32.

87 The substance of the clause is now contained in *UCP 600* art. 7(c).

88 Such a reason may include estoppel. But it should be noted that the preclusion provisions under *UCP 600* art. 16 are inapplicable in this type of case. This is indicated in the introductory section of this article. However, reference may be made to the decision of G.P. Selvam J.C. in *Amixco Asia, supra* note 3 at 954.

89 The issue of what constitutes an acceptable bill of lading or other specific types of transport documents is beyond the scope of this article.

90 The only change being the specific mention of original transport document, as opposed to transport document. In any event, at a minimum, one original of each document stipulated in a credit must be presented: *UCP 600*, art. 17(a).

91 It provides:

> In addition to stipulating an expiry date for presentation of documents, every credit which calls for a transport document (s) should also stipulate a specified period of time after the date of shipment

Now, as pointed out above, a negotiation credit calling for bills of lading normally indicates the expiry date for negotiation, and sometimes omits to name the time within which the documents are to be tendered. The principal concern respecting such a credit is whether a nominated bank thereunder was to be taken as acting within its mandate if it negotiates the beneficiary's documents after the expiry of the 21-day deadline imposed by the *UCP*, but before the last day of the time set for negotiation passed? It might be thought that a nominated bank in that type of situation is not entitled to reimbursement from the designated drawee bank unless it could show that it received the beneficiary's tender within the 21 days of the date of issue of the bill of lading and that it did so for the purpose of negotiating the documents.[92] Underlying this view appears to be the implicit assumption that the 21-day time operated *in addition to* the negotiation period in the particular type of credit being considered.

This is most likely a faulty assumption. Overall, the prevailing opinion is that the 21-day period is merely a default date and has no application whatsoever in a credit which contains an expiry date for negotiation of documents because in modern banking practice the deadline specified for negotiation is reckoned as the expiry date for presentation of the stipulated documents.[93] But this has broader effects where a nominated bank takes the documents as of that date, but only advanced money to the beneficiary some time afterwards. We have previously suggested that such provision of payment will be outside the negotiation period in the absence of a promise to advance funds made to the beneficiary on the day the nominated bank acquired the documents. The nominating issuing or confirming bank will nevertheless be allowed to withhold reimbursement if in the circumstances the nominated bank did not advance the money *bona fides.* Whether or not the provision of value was not in good faith depends on the facts in the individual cases and is to some extent illustrated by the case law, to which we now turn.

IV. Good Faith Advance of Funds to the Beneficiary

As indicated earlier, a nominated bank has a duty to act in good faith when providing a discounted payment of the amount of a negotiation credit to the beneficiary.[94] This duty is owed solely to the nominating issuing or confirming bank rather than the

> during which presentation must be made…If no such period of time is stipulated, bans will not accept documents presented to them later than 21 days after the date of shipment.

This largely reproduces *UCP 400,* art. 47(a).

92 *Indian Bank, supra* note 54 at 128.

93 *UCP 600 Commentary*, *supra* note 3 at 63; Charles del Busto, ed., *Documentary Credits: UCP 500 & 400 Compared*, (Paris: ICC Publishing S.A., 1993), ICC Publication No. 511, at 112.

94 The issuing bank is also under an obligation to exercise good faith in honouring a conforming presentation alleged by the applicant to be fraudulent: see *AMF Head Sports Wear Inc. v. All*-American *Sports Club Inc.,* 448 F.Supp. 222 at 224 (D.Ariz. 1978); *Bank of Credit and Commerce International SA v. Akhavan,* 836 F.2d 545 [*Bank of Credit and Commerce*]; 1987 WL 30204, at *4 (4th Cir.); *UCC* Revised Article 5, § 5-109(a)(2). Generally, however, in English law, there is no overriding duty to observe good faith in contractual transactions: *Manifest Shipping Co. Ltd. v. Uni-Polaris Ins. Co. Ltd.* [2003] 1 A.C. 469 [*Manifest Shipping*]; *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] 1 Q.B. 433 at 439, *per* Bingham L.J. But the position is different in other common law jurisdictions. For example, in the United States, the *UCC* § 1-203 and Restatement (Second) of Contracts, s. 205 are to the effect that every contract imposes an obligation of good faith in its performance or enforcement. A similar stance prevails in Continental Europe: see, generally, Michael. P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract*, 15th ed. (London: Oxford University Press, 2006) at 32-33; Jack Beatson & Daniel

applicant.[95] In principle, the ambit of the good faith obligation is narrow in that the nominated bank in discounting a credit is only required to act in the honest belief that the beneficiary is plausibly entitled, on the basis of the facial conformity of the tendered documents, to the funds pursuant to the credit.[96] The standard is not objective, but subjective. In this sense, then, in ascertaining whether a nominated bank was in breach of its good faith obligation when it purchased an apparently regular presentation, the inquiry is not whether a reasonable banker in the nominated bank's position would have known the improprieties giving rise to the alleged breach, but about what the nominated bank actually knew.[97] If it is shown that it did not have actual knowledge of some fact which would otherwise have prevented a commercially honest individual from advancing funds against the conforming documents, then its good faith is sufficiently established.[98]

Clearly, therefore, a nominated bank's *bona fide* status would not be denied on the basis of a mere assertion that prior to its discounting a credit, it had been notified by the issuing bank or even directly by the applicant that the documents delivered to the nominated bank by the beneficiary are forged or fraudulent in the sense that they purported to evidence shipment of goods which are in fact non-existent.[99] But it would be an entirely different matter if, on the evidence, the only realistic inference the nominated bank could possibly have drawn from the notification of the fraud was that the beneficiary was acting dishonestly in seeking to realise the credit. In that regard, the nominated bank's claim of having acted bona fide would be unsustainable.

Similarly, a nominated bank does not act in good faith where it negotiates an apparently conforming set of documents that contain a material representation of fact of which it is acutely aware the beneficiary knows to be untrue.[100] Cases concerning

Friedmann, eds., *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995); Elizabeth Peden, *Good Faith in the Performance of Contracts* (Sydney : LexisNexis Butterworths, 2003); Hugh G. Beale, ed., *Chitty on Contracts*, 28th ed. (London: Sweet & Maxwell, 1999) at paras 1-024, 1-019.

[95] This is because there is no privity of contract between him and the nominated bank. Accordingly, the applicant has no right to enforce a breach of the obligation against the nominated bank: see *Courteen Seed Co. v. Hong Kong and Shanghai Banking Corp.*, 216 A.D. 495 (1926); *Bank of Credit and Commerce*, supra note 94. Instead, his remedy is against the issuing bank with which he has a contractual relationship.

[96] *U.K. Act s.* 90 ("A thing is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not"). *UCC* Revised Article 5, § 5-102(a)(7) for all practical purposes, is to the same effect.

[97] *Southern Industries of Clover Ltd. v. Fame Trading Registered,* 1989 WL 82411 (S.D.N.Y.); *Lustrelon Inc. v. Prutscher,* 428 A.2d 518, at 526. Analogous cases involving the establishing of "good faith" in pure negotiable instruments litigation, as opposed to letter of credit context include *Chemical Bank of Rochester v. Haskell,* 51 N.Y.2d 85 at 92 (1980); *Hartford Accident & Indemnity Co. v. American Express Co.,* 1989 N.Y. LEXIS 881, at *12 (N.Y. Ct. App.), emphasising that good faith purchase is to be determined by the simple test of what the purchaser actually knew, and not by speculation as to what he had reason to know, or what would have aroused the suspicion of a reasonable person in his circumstances.

[98] *Ibid.*

[99] *Lustrelon Inc. v. Prutscher*, 428 A.2d 518 (1981); *UCC* Revised Article 5, § 5-109(a)(2).

[100] See, *e.g.*, *Brenntag International Chemical Inc. v. Norddeutsche Landesbank GZ*, 70 F.Supp.2d 399 (S.D.N.Y. 1999) (holding that the nominated bank did not negotiate in good faith because he had knowledge that the statement in the default letter that payment is due and owing from the applicant, "was not true and could not have been true".); *Scarsdale National Bank and Trust Co. v. Toronto-Dominion Bank,* 533 F.Supp. 378 (S.D.N.Y. 1982) (denying good faith negotiation because the nominated bank had actual knowledge at the time he advanced funds to the beneficiary that the performance contemplated by the negotiation standby credit had not yet occurred); *Andina Coffee Inc. v. National Westminster*

such a bad faith negotiation have been considered by the courts comparatively frequently, and the result reached by the judges is uniform and uncomplicated. But it is less clear whether the good faith requirement entails an obligation on the part of a nominated bank to inquire into facts connected with a presentation which it has otherwise ascertained to be conforming if an allegation of fraud against the beneficiary is not entirely convincing. It is also far from self-evident that the bank may nevertheless be seen as acting in good faith when it disregards an unstipulated document which is unmistakably indicative of a fraud in relation to the goods.

Taking the latter point first, article 14 of the *UCP 600*[101] absolves a presentee bank from the obligation to examine a document that is not stipulated in a credit. In practice, the bank will at least look at the documents before it in order to determine whether they are *all* required or complete in terms of the credit, especially when a number of specific types of documents required to be produced are multiple copies. In carrying out that preliminary examination, can it be seriously argued that the bank acts bona fide if it shut its eyes to an unstipulated document which clearly shows that its customer is being defrauded by the beneficiary? That such an argument will almost certainly be looked upon with disfavour by most letter of credit practitioners and commentators alike is revealed once it is remembered that the bank is fundamentally obligated to perform its documents examination task in a reasonably careful and diligent manner.[102]

As to the initial issue, namely, whether a nominated bank has an obligation to make a further inquiry about a mere notification of fraud, it would seem that there is no such duty, since to compel it to do so might embroil it in beneficiary-applicant disputes, an unenviable position from which the autonomy doctrine immunes it. Accordingly, if, in the nominated bank's view, the notification of fraud does not adequately negate the beneficiary's entitlement to payment of the credit, then it should ignore the notice forthwith and negotiate the otherwise complying tender. This approach is, however, not free from difficulty because in the nature of things, there is no guaranty that should the issuing bank consider itself relieved of liability to make reimbursement and litigation ensue the courts will share the nominated bank's opinion, with the consequence that its refraining to make an inquiry will be regarded as evidence of bad faith taking of the beneficiary's draft and documents.

Bank USA, 160 A.D. 104 (1990) (holding there was no good faith when the nominated bank negotiated documents including bills of lading which to his knowledge were dated six weeks into the future); *Daiwa Products Inc. v. NationsBank NA*, 885 So.2d 884 (Dist. Ct. App. Fa. 2004) (holding that the good faith duty was not breached since the nominated bank took up the presentation without knowledge of the beneficiary's fraud); *Barclays Knitwear Co. v. King'swear Enters. Ltd.,* 141 A.D.2d 241 (1988) (where the nominated bank succeeded because there was no "direct evidence that he had actual notice of fraud on the part of the beneficiary"); *Bank of Newport v. First National Bank,* 687 F.2d 1257 (8 th Cir. 1982) (negotiating bank was held not entitled to reimbursement from the issuing bank because negotiating bank had actual knowledge of non-performance of beneficiary's obligation in the sales contract underlying the credit; the fact of the knowledge impaired the negotiating bank's right to claim reimbursement).

[101] As is well known, this provision originated with the *UCP 500* under the second paragraph of art. 13.

[102] This is duty is owed at common law, even though the current *UCP* regime appears to be silent on the matter. As to the former, see *Gian Singh & Co. Ltd. v. Banque de L'Indochine* [1974] 2 Lloyd's Rep. 1 at 11 (col. 2), *per* Diplock L.J., giving the decision of the Privy Council in an appeal from Singapore.

On the other hand, there is a substantial line of authorities[103] which requires the nominated bank to inquire about *highly unusual circumstances* (especially those brought to its attention by the applicant or the issuing bank), which raise serious doubts as to the integrity of the beneficiary or the performance of its obligation in the sales contract underlying the credit before advancing funds to the beneficiary. The logical premise for this requirement is the long established principle that bad faith is implicated where a person takes a bill of exchange for value in willful disregard of suspicious circumstances affecting the bill. Moreover, as pointed out by Lord Hoffmann in his concurring speech in *OBG Ltd. v. Allen*,[104] a conscious decision not to inquire into the existence of a fact is generally treated as equivalent to knowledge of that fact.

On the whole, in this matter as in ordinary life a nominated bank that has been advised of a fraud on the part of the beneficiary would be well advised to err on the side of caution to withhold funds and promptly consult the beneficiary about the allegation. Thereafter, it may decide upon one of the usual range of options;[105] but the ultimate decision will almost inevitably depend on its view of the particular situation and, more broadly, on the character of its adherence to safe and sound banking practices.

V. Conclusion

The right of a nominated bank to payment or reimbursement under a negotiation credit depends upon its proper performance of the requirements of the credit. Establishing proper negotiation of the amount of the credit is inextricably bound up with justifying that right. Naturally, the nominated bank has the burden of showing that it negotiated the amount of the credit as authorised, expressly or by implication of law, under the credit. Various explanations capable of enabling it to discharge the burden have been identified and explored in this article; the possible limitations to them have also been highlighted. In particular, it may present evidence proving that it advanced money in exchange for the beneficiary's conforming tender; second, it may show that upon its conclusion of the documents examination process it committed itself to make payment of the proceeds of the credit to the beneficiary at a specified future time that is not later than the maturity date of the credit; third, it may claim to have negotiated because it took the beneficiary's conforming draft and documents to secure its pre-existing contingent obligation owed to a third party at beneficiary's request. This readily brings to mind the quite common situation where a bank who

[103] See the cases cited *ibid*. See also *Merchants Corp. or America v. Chase Manhattan Bank,* 5 UCC Rep. Serv. 196 (1968), *per* Nunez J., holding that upon notification of a forgery, the issuing bank could have established the veracity of the claim on the basis of the information provided by the applicant buyer and upon reasonable inquiry in the exercise of due care; *Carr v. Marietta Corp.,* 211 F.3d 724 at 732 (2nd Cir. 2000); *Savings Banks Trust Co. v. Federal Reserve Bank of New York*, 738 F.2d 573 at 574 (2nd Cir. 1984); *Manufacturers & Traders Trust Co. v. Sapowitch*, 296 N.Y.S. 226 at 230 (1947); *Otten v. Marasco,* 235 F.Supp. 794 (S.D.N.Y. 1964); *Manufacturers Hanover Trust Co. v. Frymire,* 1991 WL 274972 (N.D.III).

[104] [2007] UKHL 21; [2007] 2 W.R.L. 920 at paras. 39-44, citing *Manifest Shipping, supra* note 94.

[105] For example, it may arrange to negotiate only against a letter of indemnity, or guarantee, or under reserve, or decline to negotiate especially if it assumes no obligation to negotiate under the credit or under a special contractual arrangement with the beneficiary, *e.g.*, as a silent confirmer.

has issued a back-to-back credit takes up a set of documents to meet the terms of a credit respecting which it is entitled to act as a nominated bank.

Fourthly, a nominated bank's provision of discounted payment to the beneficiary upon being advised by the issuing bank that the draft and documents are accepted, would constitute the nominated bank, not necessarily a purchaser of the accepted draft, but of the amount covered by the credit. As has been seen above, commercial convenience, in situations of this type, is the primary justification given by the courts for permitting a recovery on the basis of the credit rather than shunt a nominated bank off to a claim on the draft.

Fifthly, and finally, by the alternative definition of negotiation under article 2, a nominated bank's promise against a complying presentation to advance funds to the beneficiary on or before the banking day that a credit falls due renders the bank a purchaser for value and a fortiori elevates it to the status of a nominated bank that has negotiated pursuant to the credit. Regarding this clause, some commentators seem to entertain the opinion that article 2 is problematic because it purports to convert an executory promise into value, which is patently at variance with *UCC* Revised Article **§** 3-303(a)(1), and the general commercial practice in Europe and probably in the rest of the world. This view can be refuted quite simply. It is true, insofar as with respect to the sub-clause of the *UCC* Revised article, that a transfer for a promise of performance is value only to the extent that the promise has been performed, with the result that an executory promise to give value is not itself value; what matters is the value rendered, not value promised. To that extent, there can be no question that what is envisaged by the new article 2 is at variance with the *UCC* Revised Article 3. But it must be remembered that the *UCP* is part of the *UCC* Revised Article 5 (which governs letters of credit throughout the United States),[106] and in the event of a conflict between it and *UCC* Revised article 3, the latter has to give way.[107]

As to the wider world including Singapore and the U.K., it is highly improbable that a court will refuse to apply article 2 conception of negation should the matter arise in a case brought before it simply because the definition in some respect does not fit in with the general negotiable instruments law. In the nature of things, it is the latter that needs to accommodate itself to the well known peculiarities of the former, and not the other way round. Moreover, the *UCP* is routinely incorporated into letters of credit and standard form applications for the credit by banks and other commercial parties in over 180 countries, territories and regions. The usual consequence of such incorporation by reference is to make the *Code* part of the terms and conditions of the credit or the application, and will accordingly be given effect by the courts as contractual provisions to the extent allowed or presumed to be sanctioned by the parties' mutual expectations. Thus understood, there appears to be nothing in the way of applying article 2's understanding of negotiation. As worded, it is hardly to be doubted that, for the most part, the clause does not speak the same language as the relevant case law we have discussed. Yet, it should not be forgotten that the difference in their stances merely brings variety to the whole issue of the best solution to the problem of establishing the occurrence of negotiation under a negotiation letter of credit, and no one solution can, in essence, have greater appeal than the other.

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[106] With the adoption of the *UCC* Revised Article 5 by the state of Wisconsin on 27 March 2006, almost all the provisions of the code now have statutory force in all the 50 states of the United States.

[107] This is by virtue of § 5-116 (c), *UCC* Revised Article 5.