THE BASIS IN LEGAL THEORY FOR THE RELATIONSHIP OF BANKER AND SELLER UNDER THE BANKER'S COMMERCIAL CREDIT

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by

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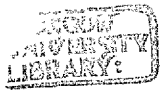

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PREFACE

This dissertation has been done with reference to books and material available in the library of the University of Glasgow. Those concerning the banker's commercial credits are mostly of foreign sources since this type of mercantile instrument has been little discussed in the light of Scots law and apparently there seems as yet to be no case decided in the Scottish courts. Much recourse must therefore be made to citation of foreign authorities. Such authorities have no force in Scotland but can show how foreign courts have dealt with problems arising under the banker's credit and are of assistance to the discussion in this dissertation. The U.C.P. have now been adopted internationally by trading nations and by British banks since 1963 though some points are not supported by legal authorities. However the judges in dealing with the problems involved in this discussion seemed to approach the question with the practical use of the credit in mind more than its conformity with the existing legal authorities.

ABBREVIATIONS

1.	Gutteridge and Megrah	: The Law of Bankers Commercial Credit (5th ed. 1976)
2.	Davis	: The Law Relating to Commercial Letters of Credit (3rd ed. 1963)
3.	Gilbart Lecture (1951)	: Documentary Credit (Megrah)
4.	Rodger, David	: Institute of Bankers in Scotland : Foreign Business (Pamphlet 12) 5th ed. 1963
5.	Baget	: Law of Banking (8th ed. 1973)
6.	Gow	: Mercantile and Industrial Law of Scotland (1900) pp. 466-471
7.	Chorley	: Law of Banking (6th ed. 1974)
8.	Miller, J. Bennett	: A Casebook on Bankers' Commercial Credits (1967)
9.	Stoufflet, Jean	: Le Credit Documentaire, Paris, 1957
10.	Ellinger, E. P.	: Documentary Letters of Credits, Singapore, 1970
11.	Finkelstein, Herman N.	: Legal Aspects of Commercial Letters of Credit, New York, 1930
12.	Kozolchyk, B. I.	: Commercial Letters of Credit in America, Albany, San Francisco, New York, 1966
13.	McCurdy	: Commercial Letters of Credit, 35 Harv. L.R. (1922)
14.	Hershey	: Letters of Credit, 32 Harv. L.R. 1 (1918)
15.	Mead, C. A.	: Documentary Letters of Credit (1922) 22 Col. L.R. 297 at pp. 302-5

Abbreviations (cont.)

16.	Thayer	: Irrevocable Credit in International Commerce: Their Legal Nature (1936) 36 Col. L.R. 1031 at p. 1056
17.	Gloag	: The Law of Contract (2nd ed.) 1929.
18.	Smith T. B.	: Short Commentary on the Law of Scotland 1962.
19.	Walker, D. M.	: Principles of Scottish Private Law (2nd ed.) 1945.
20.	Diab, Hassan A.	: The Tender of Forged Documents under a Banker's Commercial Credit, a thesis submitted for the Degree of Ph.D. at the University of Glasgow, 1972
21.	U.C.P.	: Uniform Customs and Practice for Documentary Credits (1974 Revision)
22.	Schmitthoff	: The Export Trade (6th ed.) 1945.

SUMMARY

The banker's commercial credit, an important device for payment, has become much in use nowadays in world trade to finance foreign business. From a businessman's point of view the credit looks simple but the study of the legal relationship engendered by this mercantile instrument has caused much difficulty among lawyers. The present dissertation is concerned to set out attempts to fit the banker-seller relationship arising under the irrevocable credit into a theory and to examine and criticise these in the light of their national law and Scottish law.

The first chapter takes consideration of the theories which see the credit in terms of contracts involving all three parties. This brings us to examine seven main theories:

1. The Guarantee Theory : It is suggested that the banker's promise to the seller merely amounts to a guarantee by him of payment by the buyer. The main objection is that in the credit the banker has a primary obligation and not secondary or accessory to other obligation as in a guarantee.

2. The Delegation Theory : The buyer (délégant) requests the bank (délégué), his debtor under the contract for the arrangement of the credit, to pay the debt to the seller (délégataire). This theory cannot/

cannot answer all the requirements of the credit in view of the fact that the seller's acceptance is needed to make the banker bound by his undertaking.

3. The Personal Bar or Estoppel Theory : The irrevocable credit represents that the banker has in his hand from the buyer sufficient funds to pay the seller's drafts and, consequently, he is barred from denying this. This view is not in line with the practice of the credit and was rejected in Morgan v. Larivière (1875) L.R. 7 H.L. 423.

4. The Assignment Theory : The irrevocable credit is regarded as constituting a contract between the banker and the buyer which is assigned simultaneously by the latter to the seller. In considering this it is hard to bring the facts into line with the theory and moreover the theory will render the seller subject to any defences the bank has against the buyer.

5. The Novation Theory : There is a novation of the sale contract, i.e. the buyer drops out of the contract and it becomes binding between the banker and the seller. This argument would lead to the loss of the buyer's right to reject the goods which are not conform to the contract of sale and also the banker would be involved with the dealings with the goods.

6. The Agency Theory : (a) The buyer is acting as the seller's agent in arranging for the credit according to the terms laid down in the contract of sale. According to this theory the seller would be liable for/

for the fraudulent acts of his agent, the buyer, in performing his duty within his authority.

(b) The banker, acting according to the buyer's instructions, may be deemed to act as the buyer's agent. The objection to this argument is that the banker undertakes a primary obligation towards the seller and is not acting as the buyer's agent.

7. The Jus Quaesitum Tertio Theory : It is suggested that there is a contract between the buyer and the banker conferring the benefit of it to the seller, a third party. This theory cannot stand in the light of English law which does not recognise a right arising from jus quaesitum tertio contract. Jus quaesitum tertio is a well-established principle in the law of Scotland and presents some similarities with the credit but it cannot satisfy the requirements of the credit regarding its origin and legal consequences.

The second chapter concerns the Mercantile Speciality theory. It is favoured by many authors of common law countries since it is the only solution to help them to overcome the problem of consideration encountered in the credit.

The third chapter considers the ordinary contractual theories. Unlike the first chapter it takes consideration of the relationship between the banker and the seller only. This brings us to examine four theories.

1./

1. The Seller's Offer Theory : The seller enters into a contract with the banker offering to surrender the documents to the banker instead of to the buyer in return for the banker's undertaking to honour his drafts. This theory would bring the buyer into the scene to communicate the seller's offer to the banker and also it may not comply with practice in that the seller's offer is required to bind the banker.

2. Mead's Theory : It is suggested that the contract entered into between the bank and the seller under an irrevocable credit is one in which the banker is an offerer and the seller offeree with consideration given by the buyer to the banker on behalf of the seller. The objection to this theory is that the seller's acceptance is required to make the banker bound, moreover the validity of the credit would depend on an adequate consideration from the buyer. If the latter fails to provide a good consideration, the banker-seller relationship would not stand.

3. The Offer and Acceptance Theory : The relationship between banker and seller is seen to be of the form of an ordinary contract. The credit is an offer which the seller may accept. Objections arise concerning the ascertainment of the act of acceptance by the seller and the elimination of time-lag during which the banker would be justified in revoking an irrevocable credit.

4./

4. The Offer-held-open and Unilateral Voluntary Obligation Theories : According to the offer-held-open theory the banker makes an offer to the seller and undertakes to keep it open for a period of time. In the unilateral voluntary obligation theory the banker promises to pay the seller's draft provided that the latter acts in accordance with the letter of credit. The discussion of these reveals that in Scots law they are able to answer all the requirements of the relationship of banker and seller under the banker's commercial credit.

Among the attempts discussed in this dissertation the offer-held-open and the unilateral voluntary obligation theories seem to be the only ones which can provide an adequate solution. These arguments have still far to go to become accepted as a general theory. It would meet severe objections especially in the common law countries due to their attitude towards the doctrine of consideration and privity of contract.

INTRODUCTORY AND GENERAL

1. Introduction

International commercial transactions have existed in the past and will develop in the future according to usage and practice of commerce and different factors conditioning them. These transactions have led to the appearance of various modes of financing trade and as the latter has developed the old modes of financing tend to be inappropriate to the trade of modern times and that is why this has progressively led to the appearance of a new device of payment.

The banker's commercial credit[1] is a device for payment which is very commonly used nowadays for foreign trade transactions and for domestic negotiation within certain countries, for example the United States of America, but as yet not in Britain.

A clear distinction should be made between letters of credit and modern commercial credits, both of which are frequently used in banking practice[2]. The former has been long known in business. It was used as long ago as the twelfth century by Popes, princes, and other rulers who wished to procure advances/

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1. or documentary credit
2. The older form of letter of credit is handed to the customer (the buyer), who, in his turn, produces it or hands it to the seller. The modern letter of credit is sent directly by the issuing or intermediary banker to the seller.

advances for their servants. The latter is of recent growth and gained tremendously in importance between the two wars when world trade began to increase enormously.

Concerning the original form of credit Bell stated: "A letter of credit is a mandate authorising the person addressed to pay money, or furnish goods, to another, on the credit of the writer."[3] Commenting on this point Gloag pointed out: "A letter of credit is not merely a contract between the bank and the party to whom it is issued, but an offer by the bank to anyone who may take a cheque or a bill under it, and therefore the bank cannot refuse acceptance of a bill drawn under the letter of credit, on the plea that the party to whom the letter was issued is otherwise indebted to them."[4]

As for the banker's commercial credit, the General Provisions and Definitions of the Uniform Customs and Practice for Documentary Credits (1974 Revision) stipulate as follows:

(a) These provisions and definitions and the following articles apply to all documentary credits and are binding upon all parties thereto unless otherwise expressly agreed.

(b) For the purposes of such provisions, definitions and articles the expressions 'documentary credit(s)' and/

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3. Bell Princ. 279 Com. I 388-9. See also Walker p. 998
4. Gloag p. 23 ~~Walker pp. 905-6~~

and 'credit(s)' used therein mean any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and in accordance with the instructions of a customer (the applicant for the credit):

(i) is to make payment to or to the order of a third party (the beneficiary), or is to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary, or

(ii) authorises such payments to be made or such drafts to be paid, accepted or negotiated by another bank,

against stipulated documents, provided that the terms and conditions of the credit are complied with.

(c) Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts.

(d) Credit instructions and the credits themselves must be complete and precise. In order to guard against confusion and misunderstanding, issuing banks should discourage any attempt by the applicant for the credit to include excessive detail.

(e) The bank first entitled to exercise the option available under Article No. 32(b) shall be the bank authorised to pay, accept or negotiate under a credit. The decision of such bank shall bind all parties concerned.

A/

A bank is authorised to pay or accept under a credit by being specifically nominated in the credit.

A bank is authorised to negotiate under a credit either:

(i) by being specifically nominated in the credit, or

(ii) by the credit being freely negotiable by any bank.

(f) A beneficiary can in no case avail himself of the contractual relationships existing between banks or between the applicant for the credit and the issuing bank[5].

The nature of the older form of letter of credit involves three parties: a person (usually a merchant or a banker) guarantees payment to another person for advancing money or furnishing goods to a third person on the strength of the credit. The commercial letter of credit, however, in spite of their similarity in their transaction, are provided to be a separate transaction involving banker and seller only[6].

With the use of the banker's commercial credits, the banker plays a very important role in facilitating the transactions and overcoming difficulties such as lack of knowledge, confidence in the solvency of the buyer/

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5. The last revision of the U.C.P. was made in 1974 with collaboration between the International Chamber of Commerce, the United Nations and the foreign trade banks of the socialist countries. This definition is internationally accepted. The U.C.P. are not law but a body of rules of behaviour binding on banks and applicants alike who have accepted them.

6. See Rodger 31-32 See Appendix.

buyer or the political instability of the country of the buyer and solving the conflicting economic interests of the parties to the contract of sale. "The interest of the exporter is to obtain the purchase price as soon as possible, but not to part with the documents of title to the goods, notably the bill of lading, before having received payment or, at least, being certain that his draft[7] has been accepted, while the buyer wishes to postpone payment of the price until he has had an opportunity of reselling the goods."[8]

The credit looks simple to a businessman. It is a device for financing transactions on which the seller can rely. The banker, by issuing or confirming the credit, has an obligation to negotiate the seller's drafts provided that the terms of the credit are complied with. However, it is a difficult task for the lawyer who endeavours to determine the different rights and obligations arising under it and fit it in a legal theory[9].

Before discussing the different theories advanced to determine the banker-seller relationship, it is necessary to consider the different elements which will help in the analysis of the various problems involved/

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7. Bill of exchange
8. See Schmitthoff p. 205
9. See Mead pp. 300-301

involved in this particular subject. This will include a brief survey of firstly the object and the operation of the credit, secondly the different types of credit, and thirdly the businessman's point of view and the lawyer's attitude concerning the relationships arising from the operation of the credit.

2. The Purpose and the Nature of the Banker's Commercial Credit

The operation of the banker's commercial credit was explained by Scrutton, L. J. in Guaranty Trust Co. v. Hanny & Co.[10] in the early period of the use of the modern credit as follows:

"The enormous volume of sales of produce by a vendor in one country to a purchaser in another has led to the creation of an equally great financial system intervening between vendor and purchaser, and designed to enable commercial transactions to be carried out with the greatest money convenience to both parties. The vendor, to help the finance of his business, desires to get his purchase price as soon as possible after he has despatched the goods to his purchaser; with this object he draws a bill of exchange for the price, attaches to the draft the documents of carriage and insurance of the goods sold and sometimes an invoice for the price, and discounts the bill, that is, sells the bill, with the documents attached, to an exchange house. The vendor thus gets his money before the purchaser would, in ordinary course, pay; the exchange house duly presents the bill for acceptance, and has, until the bill is accepted, the security of a pledge of the documents attached and the goods they represent. The buyer, on the other hand, may not desire to pay the price until he has resold the goods. If the draft is drawn/

10. (1918) 2 K.B. 623 at p. 659

drawn on him, the vendor or exchange house may not wish to part with the documents of title till the acceptance given by the purchaser is met at maturity. But if the purchaser can arrange that a bank of high standing shall accept the draft, the exchange house may be willing to part with the documents on receiving the acceptance of the bank. The exchange house will then have the promise of the bank to pay, which, if in the form of a bill of exchange, is negotiable and can be discounted at once. The bank will have the documents of title as security for its liability on the acceptance, and the purchaser can make arrangements to sell and deliver the goods. Before acceptance the documents of title are the security, and an unaccepted bill without documents attached is not readily negotiable. After acceptance the credit of the bank is the security."

Later, the same learned judge, discussing the course of business in Equitable Trust Co. of New York v. Dawson Partners Ltd.[11] said:

"The system is intended to allow the seller to obtain money as soon as he ships the goods by discounting bills drawn on the purchaser, while the purchaser has not to pay for the goods until some time after he has sold them. To do this the discounting/

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11. [1925] 25 Ll.L.Rep. 90 at p.93. See also Guaranty Trust Co. of New York v. Van Der Berghs (1926) 22 Ll.L. Rep. 447 at p. 452 per Scrutton, L.J.

discounting bank must be furnished with some security satisfactory to it that if the shipment complies with certain conditions it will be paid for. This is obtained by the promise of the bank giving the ... credit to accept bills for the price if the shipment complies with the specified conditions. These conditions generally involve attaching to the bill certain documents, such as a bill of lading for the contract goods, a policy of insurance on these goods, and sometimes some form of certificate that goods shipped comply with the contract description."

Also Gutteridge and Megrah, setting out the object and the nature of commercial credits, said:

"The object, from a business point of view, of the so-called banker's commercial credit is usually to facilitate dealings between merchants domiciled in different countries, by ensuring payment to the seller on the one hand and delivery to the buyer of the contract goods on the other ...

Broadly speaking the method which is often adopted to finance overseas trade is to insert in the contract for the sale of the goods a provision that payment of the price shall be made by a banker, and preferably a banker carrying on business in the country of export. The banker, in other words, acting on behalf of the buyer and either directly with the seller or through the intervention of a banker in the seller's country, assumes liability for payment of the price, in consideration/

consideration, perhaps, of the security afforded to him by a pledge of the documents of title to the goods or of his being placed in funds in advance or of an undertaking to reimburse, and of a commission."

While explaining the realisation of the credit nowadays they continued:

"Today the normal, though by no means the exclusive, operation, as will be seen, takes the form of payment as negotiation, possibly acceptance, by a correspondent banker in the country from which the goods emanate, acting on behalf of the banker issuing the credit or perhaps for himself. Or the credit may call for drafts on the issuing bank or on the buyer and be available for negotiation by either a specified, or any, bank. Except where the same bank is operating both in the country of export and the importing country, almost invariably two banks at least are concerned in contracts of documentary credit."[12]

The credit bears different names in different circumstances. It is important to take into consideration the classifications of these various types which have legal and banking primordial importance.

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12. Gutteridge and Megrah pp. 1-2.
See also Rodger pp. 31-32

3. Types of Credits

In business, credits are usually named or labelled in various ways depending on their use and function. Underlining these different types of credit and showing their legal effect Miller says: "Bankers' commercial credits are in practice distinguished by descriptive names e.g. revocable, irrevocable, documentary, transferable, revolving and so on. The application of a descriptive label of this kind is not of itself of paramount legal significance since the court will arrive at the legal effect of any credit from a consideration of the terms, including implied terms, of the letter of credit as a whole and will not assign it automatically to a legal category suggested by the bankers' descriptive label for it."[13]

In spite of these various ways of naming them, however, credits are classified according to banking practice into two main categories. They are either revocable or irrevocable. They are so called at their issue by the issuing bank but they can be called unconfirmed or confirmed at a later stage depending on the intermediary banker's undertaking. This reflects the character of the banker's undertaking which is of fundamental importance in the banking and legal point of view. Apart from these types of credit it seems that the court does not see any importance in other labels/

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13. See Miller p. 3

labels given to the credit as Davis says: "None of these forms of credit has apparently been the subject of judicial consideration in this country."[14]

The classification of the credits is stipulated in article 1 of the U.C.P.[15]

Article I

a) Credits may be either

(i) revocable, or

(ii) irrevocable.

b) All credits, therefore, should clearly indicate whether they are revocable or irrevocable.

c) In the absence of such indication the credit shall be deemed to be revocable.

Following the classification of the credits, article II of the U.C.P. describes a revocable credit in these terms:

"A revocable credit may be amended or cancelled at any moment without prior notice to the beneficiary. However, the issuing bank is bound to reimburse a branch or other bank to which such a credit has been transmitted and made available for payment, acceptance or negotiation, for any payment, acceptance or negotiation complying with the terms and conditions of the credit and any amendments received up to the time of payment, acceptance or negotiation made by such branch or other bank/

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14. Davis p. 32. See also Gutteridge and Megrah p. 11

15. A form and notification of credits

bank prior to receipt by it of notice of amendment or of cancellation."

The main idea behind articles I and II of the U.C.P. concerning a revocable credit is that a credit is revocable if it is written on the face of it, when there is no indication as to whether it is revocable or irrevocable or when it can be revoked or cancelled at any time without notice to the beneficiary. However, the issuing banker is bound by his obligation if the credit is realised before the cancellation. Explaining a case of a revokable credit Miller says: "The most frequent instance in commercial practice of the revocable credit arises when the purchaser's bank instructs a correspondent in another country to open a credit in favour of the seller and to advise the seller of the terms of the credit without confirming it ... In such cases the correspondent, the advising bank, makes it clear to the seller that it is merely advising the credit and does not accept liability thereunder, usually adding the words "the credit is subject to cancellation at any time without notice"[16].

This is illustrated by the decision of a wellknown case Cape Asbestos Co. v. Lloyds Bank[17] where the Banque de l'Est, Warsaw, issued a credit to the beneficiary through Lloyds Bank. The latter advised the beneficiary of the credit in these terms:

"We/

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16. See Miller p. 4
17. [1921] W.N. 274

"We beg to inform you that we have received advice by telegraph from the Banque de l'Est, Warsaw, of the issue of a credit in your favour for £1,620 ... on account of Stubicki and Felsze, Warsaw, to expire ... and to be availed of meanwhile by your draft on us at sight accompanied by invoice. Bill of lading in complete set to order of Lloyds Bank Ltd., covering shipment of 30 tons asbestos sheets consigned to Stubicki and Felsze, Warsaw ... This is merely an advice of the opening of the above-mentioned credit, and is not a confirmation of the same."

On 4th August 1920, Lloyds Bank was informed of the cancellation of the credit but did not inform the plaintiffs, beneficiary of this fact. On 30th September 1920 the plaintiffs shipped the goods under the credit and presented to Lloyds Bank for payment which was refused. The plaintiffs sued Lloyds Bank on the ground that it was the banker's duty to give notice of cancellation of the credit and asked for damages. Lloyds Bank admitted it was their practice to notify the beneficiary of the cancellation as a matter of grace, not of legal duty. It was held that "as the credit was revocable in form, there was no legal duty on the bank to notify Cape Asbestos Co. Ltd. of its cancellation."

A revocable credit, being subject to cancellation at any time without prior notice to the seller beneficiary, is considered to be a very weak security for the/

the latter to rely upon[18]. Nonetheless it is better than having no credit whatsoever. So long as it remains uncancelled, the beneficiary can make use of it and the issuing bank becomes liable for his undertaking under the terms of the credit.

Normally the intermediary bank does not confirm a revocable credit. Concerning this Gutteridge and Megrah say: "A revocable credit is never confirmed, this would be a contradiction in terms."[19] Similarly Rodger said: "It is possible to have an irrevocable credit which is not confirmed, but very unlikely to have a confirmed credit which is not irrevocable, as no advising bank would be likely to undertake an obligation which the issuing bank is apparently not willing to shoulder."[20] The confirming bank will not be foolish enough to undertake the obligations directly to the beneficiary unless there is an error since he cannot withdraw his obligations towards the seller after the credit is cancelled by the issuing bank.

An irrevocable credit, one of the two main types of the credit, is described in article 3 of the U.C.P. in the following terms:

a) An irrevocable credit constitutes a definite undertaking of the issuing bank provided that the terms/

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18. Rodger p. 34
19. Gutteridge and Megrah, p. 19
20. Rodger, p. 34

terms and conditions of the credit are complied with:

(i) to pay, or that payment will be made, if the credit provides for payment, whether against a draft or not;

(ii) to accept drafts if the credit provides for acceptance by the issuing bank or to be responsible for their acceptance and payment at maturity if the credit provides for the acceptance of drafts drawn on the applicant for the credit or any other drawee specified in the credit;

(iii) to purchase/negotiate, without recourse to drawers and/or bona fide holders, drafts drawn by the beneficiary, at sight or at a tenor, on the applicant for the credit or on any other drawee specified in the credit, or to provide for purchase/negotiation.

b) An irrevocable credit may be advised to a beneficiary through another bank (the advising bank) without engagement on the part of that bank, but when an issuing bank authorises or requests another bank to confirm its irrevocable credit and the latter does so, such confirmation constitutes a definite undertaking of the confirming bank in addition to the undertaking of the issuing bank, provided that the terms and conditions of the credit are complied with:

(i) to pay, if the credit is payable at its own counters, whether against a draft or not, or that/

that payment will be made if the credit provides for payment elsewhere;

(ii) to accept drafts if the credit provides for acceptance by the confirming bank, at its own counters, or to be responsible for their acceptance and payment at maturity if the credit provides for the acceptance of drafts drawn on the applicant for the credit or any other drawee specified in the credit;

(iii) to purchase/negotiate, without recourse to drawers and/or bona fide holders, drafts drawn by the beneficiary, at sight or at a tenor, on the issuing bank, or on the applicant for the credit or any other drawee specified in the credit, if the credit provides for purchase/negotiation.

c) Such undertakings can neither be amended nor cancelled without the agreement of all parties thereto. Partial acceptance of amendments is not effective without the agreement of all parties thereto.

The above article gives a clear statment about the legal position and the purpose of an irrevocable credit. The banker binds himself by his outright undertaking in favour of the seller-beneficiary provided the terms stipulated in the credit are complied with.

The nature of the definite undertaking which emanates from the issuing bank can be confirmed by the intermediary/

intermediary bank. Thus the latter undertakes directly an absolute obligation towards the beneficiary. Rodger describes an irrevocable and confirmed credit in these terms: "Where the issuing bank gives an outright undertaking to honour drafts drawn in terms of the credit, the credit is irrevocable as the part of the issuing bank, and where the advising bank also gives its outright undertaking the credit is 'confirmed' by the advising bank."[21]

The irrevocable and confirmed credit is a very convenient and reliable security for the seller. It is of common use in the modern export trade. The seller beneficiary is sure that the confirming bank is the place of payment for him, and that he will receive the price of the goods under the credit when tendering the right documents and at the correct time. A confirmed credit is more expensive than an unconfirmed one because the buyer has to pay an extra charge for the confirmation of it.

If the credit is irrevocable but unconfirmed, the definite undertaking by the issuing bank is advised to the beneficiary by the intermediary bank only. The latter does not take any obligation in meeting the drafts presented by the seller-beneficiary. From the business point of view, the irrevocable and unconfirmed credit is a very unsatisfactory mode of payment for the beneficiary/

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21. Rodger, p. 34. See also Schmitthoff, p. 228

beneficiary since the place of payment is not sure to him. If the advising bank refuses to negotiate the drafts, problems will arise for him in taking steps for the payment of drafts in the buyer's country. However in the economic point of view this type of credit is cheaper for the buyer since the charge of confirmation is excluded.

As said above, it is of fundamental importance that the terms of the credit should be complied with before the banker is justified in negotiating the seller's drafts drawn under the credit. This reveals the doctrine of strict compliance. "The bank is under obligation to its customer to observe the terms of its mandate from the customer and accordingly to reject any documents tendered by the beneficiary which are not conform to those stipulated for in the instructions for the opening the credit."[22] This point is illustrated by Bailhache J. in English, Scottish and Australian Bank v. Bank of South Africa[23] where he said: "It is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless these drafts with the accompanying documents are in strict accord/

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22. See Miller, p. 62
23. (1922) 13 Ll.L.Rep. 21

accord with the credit as opened." Also concerning the exact documents, Lord Sumner ~~L.J.~~ said: "There is no room for documents which are almost the same, or which will do just as well."[24]

24. Equitable Trust Co. of New York v. Dawson Partners (1927) 27 Ll.L.Rep. pp. 49-52; see also Gutteridge and Megrah p. 84.

4. Businessman's View and Lawyer's Attitude

According to the businessman's point of view the main purpose of credit is to facilitate the carrying out of the contract of sale into effect and to give protection to the seller against possible risks. The difficulties concerning the legal aspect of the credit are largely ignored. It is quite true to say that "to a businessman nothing is simpler than the nature created by an irrevocable banker's documentary letter of credit. The seller of goods believes that, if he has such an instrument, he has the direct obligation of the issuing bank, running in his favour, enforceable by him against the bank, that it will pay his drafts if drawn in compliance with the terms of the letter of credit."[25] Lawyers, however, do not see the credit operation in such a simple way. They endeavour to interpret the precise nature of different relationships arising under it which is a very hard task for them since "the practice of commerce is, as a rule, somewhat in advance of the development of legal doctrine and this is particularly true of the kind of mercantile instrument with which we are here concerned."[26] Showing the difficulty arising under the credit Gutteridge and Megrah continue: "... both Anglo-American and Continental lawyers have been hard pressed to define the exact nature of the legal relationships/

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25. See Mead, pp. 300-301

26. See Gutteridge and Megrah, p. 21

relationships created by these transactions. In the case of jurisdictions governed by the common law the problem is two fold, i.e. (i) to define the nature of the contract created by the issue of the credit, and (ii) to surmount the obstacle presented by an apparent lack of consideration for the banker's promise to pay the drafts of the beneficiary. Either (it is argued) there is no consideration for the promise, or, if there is, then the consideration is insufficient because it does not move from the promisee (the beneficiary) but from a stranger (the customer of the issuing banker, usually the buyer)"[27]. The difficulty above mentioned will not be encountered by Scots lawyers. This will be discussed in the ~~next~~ last chapter[28].

Where payment under a documentary credit is arranged, four stages can normally be distinguished.

(i) The buyer (importer, applicant for the credit) and the seller (exporter, beneficiary) residing in different countries enter into a contract of sale in terms of which it is stipulated that payment of the goods must be made under a banker's commercial credit.

(ii)/

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27. See Gutteridge and Megrah, pp. 21-22.

28. See the offer-held-open and the unilateral voluntary obligation theories, infra

(ii) Following the contract of sale, the buyer instructs a bank in his country (known as the issuing bank) to arrange a credit in favour of the seller in his own country on the terms stipulated by the buyer in his instructions to the issuing bank.

(iii) The third stage is the contract between the issuing bank and the intermediary bank (normally a bank at the seller's country named as advising, confirming, negotiating, etc. The issuing bank asks the intermediary bank to advise, negotiate, accept and pay the draft upon delivery of specified documents by the seller.

(iv) The fourth and final stage is the communication of the intermediary bank to the seller-beneficiary that the credit has been opened for him and that his draft will be met on condition of his strict compliance with the terms of the credit. Depending on the circumstances the intermediary bank may add its confirmation to the credit.

The issuing of the credit by the banker in strict compliance with the buyer's instruction reflects the mandatory character of the buyer and banker relationship. However the nature of the banker's undertaking makes it different from the ordinary case of mandate. This reflects the independence of the credit stated in the general provisions and definitions of the U.C.P. Commenting on this particular point Miller notes: "It will be observed that the decisions in the American courts/

courts proceed on the basis that, once the irrevocable credit has been opened, the contract is with the beneficiary and not with the buyer. In a Canadian case (Sovereign Bank of Canada v. Bellhouse, Dillon & Co. 1911 23 O.R. (K.B.) 413) the Court observed: "When a client induces a bank to give a letter of credit to a third party, he cannot of his own will compel the bank to cancel the letter, for the contract does not exist between the client and the bank, but between the bank and the third party." That dictum was approved in American Steel Co. v. Irving National Bank, supra; but the theory of the contract between the issuing bank and the third party (i.e. the beneficiary) has presented difficulty to English lawyers ... "[29]

In contrast with the previous stages, the last one has created great difficulties to lawyers and academic writers, leading them to speculation and confusion in analysing the banker-seller relationship. The banker is bound by his undertaking as soon as the irrevocable credit he sent reaches the seller's hand. Questions arise as to the manner in which the sending of the credit amounts to a binding contract and to define the legal nature of this obligation. What legal theory will be appropriate to fit this situation? It presents more difficulties to English lawyers who have to confront the problem of consideration./

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29. See Miller, p. 27

consideration. The credit, recognised as the banker's promise to pay, can bind him without any consideration moving from the beneficiary. If there is no consideration, there is, according to the English law, no contract. The banker will be justified in repudiating his presumed obligations. However in all the cases the banker is held to be bound by his undertaking. One has to bear in mind that a distinction exists between the banker's undertaking under the revocable and under the irrevocable credit " ... when a banker issues a revocable credit he does not take upon himself, nor does he intend to take upon himself any legal liability. Until the banker accepts the seller's draft, the seller has no right against him; and even when the banker does accept the seller's draft, his liability arises under the law relating to bills of exchange and not under that relating to letters of credit."[30] As for the banker's undertaking under an irrevocable credit, the question of the exact legal nature of the obligation arising under it is still open.

Regarding problems created by the banker's commercial credit, Miller says: "The difficulties involved in the study of the law of bankers' commercial credits are sumptomatic of the interest which a close examination of the legal principles in relation to the commercial practice affecting such documents can engender. In this field/

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30. See Davis, p. 66. It could be explained in terms of offer and acceptance as pointed out by Davis in the same page: "In this case the legal relationship can be analysed as an offer on the one hand and an acceptance on the other, with consideration moving from the seller, viz. the surrender of the documents of title."

field the law is attempting to regulate a practice of proven commercial worth in terms of legal theories of general mercantile conduct which only imperfectly reflect the true nature of the commercial credit and of the practice and terminology of bankers and others engaged with it. Moreover, the modern commercial credit is almost inevitably a facility devised to operate internationally and thus reflects to a large extent the international character of the law merchant before it was received into the domestic mercantile law systems of the various trading nations. One can see this clearly when one studies the Uniform Customs and Practice for Commercial Documentary Credits which was adopted internationally in regard to the banking practice governing commercial credits with the legal principles so far as these can be discovered from the decision in which such questions have come before the courts."[31]

This dissertation deals mainly with the problems involved in the study of the legal nature of the banker-seller relationship under an irrevocable credit which has led to the putting forward of many theories. However, no definite answer having a general application has yet been found, as will come to light in the following chapters.

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31. See Miller Foreword p. ii

CHAPTER I

The first chapter takes into consideration attempts to solve the difficulties of the credit by way of seeing the different relations in the operation of the credit as forming component parts of one type of contract. This will bring us to examine seven main different theories. Some of these are advanced in both civil and common law countries and similar objections are raised against them.

1. The Guarantee Theory

In both major legal systems it was suggested that letters of credit are guarantees. In the U.S.A. this was put forward as early as 1813[1] and also in France at the beginning of this century[2].

The guarantee theory which was introduced to explain the operation of the commercial letters of credit is put in these terms: "commercial credits are in fact merely contracts by which the banker guarantees the due payment of the price of the goods."[3]

According to this theory the banker, by issuing the credit to the seller-beneficiary, undertakes to guarantee/

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1. Walsh & Beechman v. Baillie 10 Johns (N.Y.) 180 (1813)
2. See Decision of the Cour de Cassation Reg. 26. 1. 1926. Dalloz per 1926. 1. 201. at p. 204 (Note of Hamel); S. 1926. 1. 353 at p. 354 (Note of Rousseau). Both authors disagree with the decision.
3. See Gutteridge and Megrah p. 29; Davis p. 67; Miller p. 29

guarantee the obligations of the buyer to the seller. In other words, the banker guarantees that he will make the due payment of the price of the goods sold and despatched to the buyer in compliance with the terms of the contract of sale.

This theory could well apply to the ordinary forms of credit[4]. However, all text-book writers, as well as recent cases, reject the guarantee theory as a possible solution to the problem raised by the irrevocable credits.

The first objection to the guarantee theory is that this theory ignores the banker's primary obligation towards the seller. In the credit the banker acts independently and his undertaking is absolute, while in a guarantee the guarantor has an accessory obligation. This theory implies that the buyer as principal debtor would have failed to fulfil his obligation before the banker guarantor undertakes his accessory obligation. According to Bell: "Cautionary is an accessory obligation or engagement, a security for another, that the principal obligant shall pay the debt or perform the act for which he has engaged, otherwise, the cautioner shall pay the debt or fulfil the obligation."[5] Criticising this theory Miller said: "If this theory is correct, the banker's obligations to the seller in the credit are accessory to/

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4. According to Bell the Letter of Credit is either mandate or caution, depending on whether or not the party supplying the beneficiary is personally bound with the beneficiary or is merely mandatory of the original debtor. (Comm. 1, 388-9)

5. Bell Prin. p. 245

to the principal obligation of the buyer and conditional on the latter failing to implement his obligations."[6]

In America the difference between a guarantee and a letter of credit is set out in Border National Bank of Eagle Pass, Tex. v. American National Bank of San Francisco, Cal.[7] as follows:

"A guarantee is a promise to answer for the payment of some debt, or the performance of some obligation, in case of the default of another person, who is in the first instance liable for such payment or performance. A letter of credit confers authority upon the person to whom it is addressed to advance money or furnish goods on the credit of the writer."

In France Stoufflet, objecting to this theory, said:

"L'engagement du banquier créditeur a un caractère principal, tandis que celui de la caution est subsidiaire. Le bénéficiaire du crédit irrévocable doit demander son règlement au banquier et non au débiteur du prix et ne peut donc se voir opposer le bénéfice de discussion. Au contraire, aux termes de l'art. 2021 du code civil, la caution n'est obligée de payer le créancier qu'à défaut du débiteur principal qui doit être préalablement discuté, sauf lorsque la caution avait renoncé au bénéfice de discussion ou s'était solidairement engagée."[8]

In the light of Scottish law, the guarantee theory is seen in the term of proper cautionry where the principal/

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6. See Miller p. 29; Davis p. 68; Gutteridge and Megrah p. 29
7. 282 F. 73 at p. 77 (1922)
8. See Stoufflet p. 373

principal debtor is clearly bound as such and the cautioners are bound as cautioners. In Stoufflet's criticism the exclusion of the beneficium ordinis is mentioned; this would be known as an improper caution where "the principal obligant and the cautioner are all, ex facie of the bond, bound as principal, jointly and severally, the cautioner(s) thereby impliedly renouncing as regards the creditor the right of a cautioner, though retaining them as regards the principal obligants."[9] In improper cautionry where there is no benefit of discussion the banker, cautioner of the buyer, can be looked to first without any objection. "The beneficium ordinis had and has no place in improper cautionry, and the creditor can proceed direct against any one or more of the ex facie co-obligants for the whole sum due."[10] Does the fact that the banker's obligation to the seller is direct and ex facie principal show an indication that improper cautionry can give an answer to the objection? Improper cautionry allows the seller to claim the price of his goods from either the banker or the buyer.[10] However, before he can proceed to do so the buyer-principal-debtor must have failed to make his payment. Accordingly even here the banker cannot be said to act primarily and independently of other obligations. Moreover improper cautionry does not mean that the seller has/

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9. ~~See~~ Walker p. 923

10. Mercantile Law Amdt. (Sc.) Act, 1856, Section 8; the benefit is excluded unless stipulated for in the cautionry obligation.

has to sue the banker first. This may leave room for the seller to claim the price of his goods from the buyer in the first place which is not possible according to the law of banker's commercial credit. The seller has to claim payment from the banker initially, and, if the latter fails to implement his obligation, the seller can then look to the buyer[11].

The second objection to the guarantee theory is the independence of the banker's undertaking in such a credit. The guarantee contract is collateral to and conditional on the principal obligation where the guarantor undertakes to pay a sum of money upon default of the main debtor. The guarantor is bound to the creditor provided the same debt remains. He is surety just for the risk he consents to take. Should his position as guarantor be affected by any alteration of the contract between the creditor and the principal debtor he would be discharged. "The cautioner is freed by an essential change, consented to by the creditor without the knowledge or assent of the cautioner, either on the principal obligation or transaction, or in respect to the person relied on."[12] Similarly this point is provided by the English Law: "Any material variation of the terms of the contract between the creditor and the principal debtor will discharge the security ... when/

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11. See Saffron v. Societe miniere Cafrika (1958) 100 L.L.R. 231 at p. 245: It is held that the banker's duty is a principal one.

12. See Bell Princ. 259

when a person becomes surety for another in a specific transaction or obligation, the terms and conditions of the principal obligation are also the terms and conditions of the suretyship contract to the prejudice of the surety, the latter will be free, it being the clearest and most evident equity not to carry on any transaction without the privity of the surety, who must necessarily have a concern in every transaction with the principal debtor, and who cannot as surety be made liable for default in the performance of a contract which is not the one the fulfilment of which he has guaranteed."[13] In addition "the cautioner is entitled to plead any defence against the creditor on which the principal debtor could rely."[14]

In an irrevocable credit, on the other hand, the banker is not released of his obligation if the contract of sale between the buyer and the seller becomes void or altered. This is the consequence of the independence of the banker's undertaking as provided in paragraph C of the General Provisions and definitions of the U.C.P. There is an absolute undertaking to pay by the banker irrespective of alteration or modification of the contract of sale provided the conditions of the credit are fulfilled by the seller. Davis in his criticism of this point said: "Under the law relating to guarantees, the/

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13. Halsbury's Law of England 3rd Ed. Vol. 18 p. 502 No. 922

14. Bell Princ. 251; see also Walker p. 922

the issue of the letter of credit would preclude the seller and the buyer from amending the terms of the original sales contract."[15] Apart from this objection a guarantor can avail himself of possible defences against the creditor upon which the principal debtor can rely. However, this is not the case in the credit where the banker does not have such a right due to the fact that the credit is a separate transaction[16].

Some modern authors raised an objection saying that the guarantee needs to be proved by writing by the guarantor or on his behalf. Being treated as a guarantee the credit which is communicated to the seller seems to be insufficient as such evidence and might be met by defences based on the Statute of Frauds. Regarding this point Davis explained: "the letter of credit could hardly be construed as complying with the provision of section 4 of the Statute of Frauds which requires a guarantee to be evidence by a note or memorandum in writing."[17]

This objection does not seem to be well founded. It is a mere technicality of English law or law of other countries derived from or dominated by English law. It is equivalent to S.6 of the Mercantile Law Amendment (Scotland) Act 1856 in Scots law. In Scotland if the guarantee/

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15. See Davis p. 68; also Gutteridge and Megrah p. 29
16. Art. 3 U.C.P. See Delegation Theory p. 38-39 and also Miller p. 27
17. See Davis p. 68; also Gutteridge and Megrah p. 29

guarantee contract is in writing, signed by or on behalf of the guarantor, that would constitute the contract. No particular words are necessary to make the obligation a guarantee, if it is by its nature an accessory obligation for discharge of another's obligation. Stoufflet was right in rejecting this criticism when he said:

"De plus, le régime de la 'guaranty' détruirait presque l'intérêt commercial du crédit irrévocable non par la possibilité qu'il ouvre au guarant d'opposer au créancier l'absence de 'mémorandum écrit' exigé par le 'Statute of Frauds' mais du fait que la modification du contract originaire emporte libération du guarant." Stoufflet is of the opinion that the condition of form required by this Statute doesmot present any difficulty concerning an irrevocable credit since the banker's undertaking is practically always made in writing[18].

Another criticism in common law countries is that the guarantee, as any other promise, needs to be accepted by the promisee, therefore this would allow the banker to revoke his offer before it is accepted by the seller. The possibility of revocation of the guarantee before it is accepted by the creditor is not in line with the irrevocable credit where it does not need to be accepted and in the other hand it is held that the bank is bound by his promise as soon as it reaches the seller[19].

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18. See Stoufflet p. 374

19. See Dester Ltd. v. Schenker & Co. [1923] 14 Ll.L.Rep. 586

To argue that the seller accepts that guarantee by conduct or antecedent arrangement would lead to difficulty and uncertainty, since it would, in that case, be binding only from the date of such acceptance. Concerning this objection Davis said: "the issue of the letter of credit would amount to a mere offer capable of revocation at any time before its acceptance by the seller."[20]

Another difficulty for common law lawyers in adopting the guarantee theory of the credit is that it fails to overcome the problem of lack of consideration. According to English law a guarantee contract without consideration is void[21]. It is hard to see that there is any consideration moving from the seller to the banker to make the latter bound by his undertaking as soon as it is intimated to the seller[22].

As far as the two objections above are concerned, they do not seem to cause any problem to Scots lawyers. According to Scottish law a person could be bound irrevocably as soon as he grants his obligation and if he expresses this intention that obligation can be enforced without consideration. It is not a prerequisite of a valid contract[23].

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20. See Davis p. 68; also pp. ~~28, 33 and 73~~ 40, 48 and 108, infra

21. French v. French (1841) 2 Man & G 644; Morley v. Boothby (1825) 3 Bing 107

22. See Gutteridge & Megrah Consideration pp. 21-2 and Sub.

23. Paterson v. Highland Railway Co. (1927) S.C.(H.L.) 32 at p. 38; see also Promise and Offer-held-open theory, infra.

In conclusion one can say that to explain the ordinary forms of credit in terms of guarantee could not be an answer to those problems arising under a banker's commercial credit which presented those particular features. Above all, to treat the credit as a guarantee of payment for the goods by the banker would defeat the intentions of the parties, in the sense that the banker undertakes a primary obligation; and the adoption of a theory which does not fully, or necessarily, demand such a result, would entail the destruction of the business utility of the credit.

2. The Delegation Theory

The "delegation theory" is another attempt to provide a solution to the difficulties arising under the irrevocable credits. It was put forward in France by Hamel[24] and presented many similarities to the assignment theory advanced in the common law countries.

In French law a distinction is made between the perfect delegation and the imperfect delegation. Art. 1275 Code Civil reads: "La délégation par laquelle un débiteur donne au créancier un autre débiteur qui s'oblige envers le créancier, n'opère point de novation, si le créancier n'a expressément déclaré qu'il entendait décharger son débiteur qui a fait la délégation."

The perfect delegation does not have a meaning of assignment but a novation which discharges the délégant. In other words the délégant is released from his liability when the délégataire accepts the délégué's undertaking in his favour. The novation takes place when the creditor agrees as such and the intention of novation must be clear otherwise it will fall in the category of the délégation imparfaite. In the latter case the délégataire does not have an intention of a novation of the contract, the délégué is bound to him at the first place but in case when the délégué fails to pay him, he still has right of recourse to the délégant[25].

Hamel/

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24. Hamel in a note on the decision of the Cour de Cassation Rep. 26.1.1926; Dalloz Rev. 1926 1 at p. 201

25. See Stoufflet p. 377; Thayer 1047

Hamel suggested that the délégation imparfaite can be of assistance in giving an answer to the problem relating to the irrevocable credits. There is a great resemblance between the délégation imparfaite and the irrevocable credits in both the functioning and the legal relationship arising thereunder.

The independence of the banker's undertaking which cannot be encompassed by many theories or even by the assignation theory is provided by the delegation theory. Concerning this point Stoufflet explained that in the same way the banker's undertaking in favour of the seller is independent of the buyer and banker relationship, the undertaking of the délégué towards the délégataire is independent of the délégant-délégué relationship. The cause of the obligation which the banker-délégué undertakes in favour of the seller-délégataire is derived from the contract between the banker-délégué and the buyer-délégant. In most of the cases the banker-délégué does not know the seller-délégataire. The latter is a stranger to the relationship between the délégué and délégant and is not concerned with it. He is concerned only with the obligation that the banker-délégué undertook in his favour. Thus, according to the French delegation theory, the banker-délégué cannot raise against the seller-délégataire defences which he has against the buyer-délégant, and the nullity of buyer-seller relationship or non performance of the buyer-délégant's obligation will/

will not give any right to the banker-délégué against the seller-délégataire[26].

The imperfect delegation presents its dissimilarity from a form of guarantee in the sense that it gives a principal obligation to the banker-délégué. The banker undertakes to bind himself regardless of the buyer's failure to pay and in addition this obligation is not ancillary to the validity of the buyer and seller relationship. The view that the seller can look to the buyer in the case when the bank fails to pay differs from joint and several liability because "each debtor is subject to a different cause of action, only inter-related by the same subject matter; upon payment by one the other is liberated."[27]

Although the French imperfect delegation reveals that it can provide a satisfactory answer to the autonomy of the irrevocable credit[28], it is still inadequate to comply with all the fundamental requirements relating to the functioning of the irrevocable credits. The seller-délégataire has to give his acceptance to the delegation of debt before the relationship between délégué and délégataire becomes binding. So, in consequence/

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26. See Stoufflet pp. 378-9

27. See Kozolchyk p. 586; Asquini N.S.S. at p. 239 et seq.

28. It gives rise to a new obligation between the banker-délégué and the seller-délégataire. It resembles novation except it does not extinguish the délégant and délégataire relationship. See Rep. Civ. Délégation pp. 12-3, Dalloz Encyclopedie Juridique.

consequence, the moment of the establishment of the irrevocability of the credit which is of great importance in the banking business would be defeated. Thus it is not only the promise to be bound irrevocably by the banker which constitutes the contract but the seller-délégataire's acceptance must be given. Consequently the délégué can withdraw the delegation before the délégataire's acceptance. However, the irrevocability of the credit takes place only when it reaches the seller[29].

It is suggested that the délégataire's silence after the delegation of debt has been communicated to him can amount to an acceptance, the consent is shown by the lack of protest of the seller[30]. Stoufflet is not satisfied with this suggestion; he said that the time of the irrevocability would not be clearly ascertained. It would come into effect only from the date on which the silence could be so deemed. Stoufflet seems to point out rightly this view although the objection is not very strong.

The difficulty arises from the lapse of time between the communication of the delegation and the seller-délégataire's acceptance. One could say that the/

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29. See Stoufflet pp. 381-2; Thayer p. 1047; G. Fridel Crédit Documentaire; Dalloz, Encyclopedie Juridique. Répertoire de droit commercial, Paris 1956, Vol. I 684 at p. 692 ss 106

30. See Hamel, Note, Sons Req. 26.1.1926 (D. 1926.1.201)

the seller's antecedant acceptance would solve the problem. However a difficulty still arises, if the seller is supposed to communicate his assent in advance that he will accept the delegation, the banker-seller would become binding before the seller is informed of the delegation.

Another objection which is put forward against most of the theories is that the delegation does not correspond to the intention of the parties who do not see the operation of the credit as a délégation imparfaite of a debt[31].

In Scots law the delegation would be a form of the perfect delegation in French law. It is "a species of novation achieved by changing of debtor, discharging the former but in other respects leaving the obligation unaltered."[32] It could not be a help in explaining the credit as will be seen in the novation theory although there is great similarity between them. The conditions and time when the credit contract becomes binding are still open to objection and, in addition, the seller would be subject to all the defences such as fraud, error, duress and undue influence which might have existed between the seller and the buyer. This would defeat the purpose of the irrevocable credit.

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31. See Thayer p. 1047-8; Chevalier, Juris Comm. de Bruxelles (1934) 93, 98 says: "Nous devons reconnaitre que ces systemes compliqués ne repondent ni à la réalité des faits, ni à la volonté des parties."

32. See Walker 2. Ed. (II &L. 670) p. 608; Erk III, 4, 22; Bell Prin s.576; Gloag p. 258

In conclusion it can be said that the French delegation theory can set out in a satisfactory way the independence of the irrevocable credit and give a more satisfactory answer to the problem than the assignment theory. Nonetheless, it is still foreign to the nature of the credit, and it fails to give an answer to the conditions, time or consequences, when the credit contract becomes binding.

3. The Personal Bar or Estoppel Theory

The theory of personal bar by representation was also suggested for the solution to the difficulties arising from the irrevocable credit. This attempt was only put forward in common law countries and was found to be an inadequate solution to the problem[33].

Rankine on Personal Bar remarks[34]:

"It calls up in the mind of the pleader such as rei interventus, homologation, ratification, adoption, acquiescence, taciturnity, mora, delay, waiver, standing by, lying by, holding out, and other phases of conduct ... It may proceed by preventing disclaimer of title, or by preventing repudiation of an agreement instructed aliunde though informally; or it may lead to the inference of implied consent. In each case it operates by conclusively intercepting or shutting out all contrary pleas and proof."

The Earl of Birkenhead L.C. summarized the personal bar principle in Gatty v. Maclaine as follows:

"The rule of estoppel or bar, as I have always understood it, is capable of extremely simple statement. Where A has by his words or conduct justified B in believing that a certain state of fact exists and B has acted upon such belief to his prejudice, A is not permitted/

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33. See Hershey pp. 16-18; McCurdy p. 384

34. P.1

permitted to affirm against B that a different state of facts existed at the same time."[35]

When applying the personal bar theory to the credit it is set out in these terms: "When the banker issues an irrevocable credit, he thereby represents that he has in hand from the buyer sufficient money to meet the seller's draft and that, in consequence, he is thereafter prevented or estopped from denying that he holds his money impressed, as it were with a trust on behalf of the seller."[36]

According to the theory the banker who issues the credit to the seller represents that he has acquired funds or its equivalent from the buyer to meet the seller's draft. Accordingly he is barred from denying this. The banker would be in a position similar to the buyer's agent.[37] It is difficult to say that this argument can give a satisfactory answer to the rights and liability of the parties arising under transaction involving irrevocable credits. Also it is said that the doctrine of personal bar or estoppel is not itself, as a rule, the basis of a cause of action, although it is a principle commonly found in many branches of law, and in both England and Scotland.

Depending/

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35. 1921 S.C.(H.L.) 1 at p. 7
36. See Davis p. 68; see also Gutteridge and Megrah p. 29; Miller p. 29
37. To treat the banker as the agent of the buyer: see objections in the Agency Theory b. infra.

Depending on the terms of the contract entered into between buyer and banker, funds may be lodged with the banker for the purpose of the credit. This constitutes a condition imposed by the banker on the buyer where financial soundness is unreliable. In this case there is an actual receipt of money by the banker and in addition there is an acceptance by the banker to meet the seller's drafts. In practice the buyer does not put the banker in funds, the latter advances his own money and will claim identification from the buyer at a later stage. This is one of the major purposes of the banker's commercial credit. It allows the buyer to take advantage of the facilities provided by the credit. Thus the theory of personal bar is somehow inconsistent with the normal use of the credit. There is a false presumption that, in issuing an irrevocable credit, the banker has in his possession the buyer's money and that there is the banker's acceptance of that money to meet the seller's drafts. This cannot be true in most cases[38]. The issue of the credit gives a right of action to the seller but the terms of the credit are not equivalent to the banker actually having the buyer's money in his possession. "This view is manifestly insupportable in the light of the mercantile use of the credit."[39]

The/

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38. See Davis p. 70; McCurdy p. 584 and sub
39. See Miller p. 29; Gutteridge and Megrah p. 30

The argument of estoppel was illustrated by the case Morgan v. Larivière[40] where it was rejected. The main facts of the case are as follows:

Larivière entered into a contract with the French authority to supply them with ball-cartridges. The French authority arranged a credit with Morgan, the appellants, who acted as financial agents and issued a special credit of the sum of £40,000 in favour of Larivière, the defendant, in these terms: "We are instructed by J, delegate of French authority to advise you that a special credit for the sum of £40,000, equivalent to one million francs, has been opened with us in your favour, and that it will be paid to you rateably as the goods are delivered, upon receipt of certificate of reception issued by the French ambassador or by J." A dispute arose between the French government and Larivière which caused the cancellation of the credit before the residue of £40,000 had been paid. Larivière sued Morgan for declaration that the fact of issuing a credit in his favour was a representation that Morgan had the sum of money stipulated in the credit in his favour and that Morgan was barred from denying this. The plaintiff's counsel argued for an estoppel in these words:

"The declaration that they had opened a credit in favour of the respondent was a declaration that they had control over a fund of a certain specific amount appropriated/

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40. (1875) L.R. 7 H.L.C. 423

appropriated to a certain specified purpose. Surely that is the declaration of a trust as to that specified fund, and show that the fund itself was impressed with a trust. The Appellants could not afterwards deny what they had thus written ... "

Lord Cairns disagreeing with this view said in his decision:

"What is there in this letter which constitutes an equitable assignment, or what is there in it which impresses with a trust any particular sum of money? I can find no expression in this letter which could authorise such a conclusion. It appears to me to be simply a statement by a banker that he has opened a credit under instructions in favour of a particular person ... but a credit of that kind may be operated upon also by means of cheques, or it may be operated upon by simple demands, in any form, for the payment of the sum for which credit has been undertaken to be given ... I read this letter as being nothing more than this: a statement by bankers to a tradesman who supplies goods to a customer of the banker that they, a banker on behalf of their customer, will act as pay-master to the tradesman up to a certain amount of money; but that, in order to call upon them to act as pay-masters, he, the tradesman, must bring with him a certain certificate showing that the goods have been delivered to their customer. In a transaction of that kind there is nothing of equitable assignment, there is nothing/

nothing of trust; and it appears to me that any banker who had given an undertaking of that kind would be very much surprised to find that it was held that certain portion of the funds of his customer in his hands had been impressed with a trust, had been equitably assigned, and had, in fact, ceased to be the money of the customer, and had become the money of the tradesman who was to supply the goods."

Another objection is that according to the estoppel theory, the problem of the time of the irrevocability of the credit arises. The legal relationship will not exist until the credit has been communicated to the seller and the banker knew of the seller's changing position on the faith of the credit. During the period between the issuing of the credit and the acknowledgement of the seller's acceptance there is a time lapse in which there is no juris vinculum between banker and seller so this would allow the banker to revoke his undertaking and free himself from his liabilities. This is not in line with an irrevocable credit where the banker is bound as soon as it reaches the seller's hand[41].

The application of the personal bar theory does not provide a satisfactory answer to the problem. It is unreal and does not correspond to the true intentions of the parties. On the other hand as the personal bar is/

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41. See Davis p. 70 and also p. 34 supra

is not the basis of the cause of action, it would be hard to apply it to the credit constituting by its issue an absolute undertaking and binding the banker at its intimation to the seller.

4. The Assignment Theory

The Assignment theory has also been invoked in order to give an explanation of the banker-seller relationship. This attempt was advanced by McCurdy, an American author, who thought that it was given substantial support in both English and American cases[42]. This theory suggests that when a contract is entered into between the buyer and banker, the benefit of the contract is assigned to the seller with notice to the banker. "There is some indication in the English cases, and in a few American cases, that the direct and indirect types of irrevocable import letters of credit might be treated as contracts between the issuing and drawee banks and the buyer with an immediate assignment by the buyer to the seller."[43]

This theory is said to be illustrated and supported by dicta in an English case Re Agra and Masterman's Bank, Ex parte Banking Corporation[44] where Agra and Masterman's Bank issued a general letter of credit to Dickson, Tatham & Co. in these words: "No. 394, you are hereby authorised to draw upon this bank at six months' sight, to the extent of £15,000 sterling, and such draft I undertake duly to honour on representation. This credit/

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42. See McCurdy p. 583

43. See McCurdy p. 583; also Gutteridge and Megrah p. 31; Davis p. 70; Miller pp. 29-30

44. (1867) L.R. 2 Ch. App. 391

credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to endorse particulars on the back thereof. The bills must specify that they are drawn under credit no. 394, of the 31st of October 1965." Under his letter Dickson, Tatham & Co. drew bills for £6,000 and discounted them with Asiatic Banking Corporation. The transactions were done according to the requisition. Both Agra and Masterman's Bank and Asiatic Banking Corporation went into liquidation. The liquidator of the Asiatic Banking Corporation claimed from the liquidator of Agra and Masterman's Bank for the sum drawn on them by Dickson, Tatham & Co. The liquidator of Agra and Masterman's Bank opposed these claims saying that Dickson, Tatham & Co. were indebted to them to an amount exceeding the amount on the bills. The fact that the liquidator of Agra and Masterman's Bank tried to set off the claims in that way did not find favour from the court. They could not deny their liability because there was a binding contract concluded between Agra and Masterman's Bank and Asiatic Banking Corporation and the debt by Dickson, Tatham & Co. was independent and unaffected by the contract between these two banks.

During the course of his judgment Cairns L.J. said: "But assuming the contract to have been at law a contract with Dickson, Tatham & Co., and with no other, it is clear that the contract was in equity assignable (if assignment were needed) to the Asiatic Banking Corporation, and/

and to have been by the writers of the letter intended to assign them, the engagement of the letter providing for the acceptance of the bills."

The Lord Justice then explained that the defendants could not raise against the indorsees defences which they have against Dickson, Tatham & Co. since the parties intended the assignment to be free from equities: "Generally speaking a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract, but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities." The implication of this statement might seem to be that to separate the assignment from the equities is to take the transaction so far out of the general concept of assignment that by definition the "assignment" is not an assignment at all in the ordinary legal sense. This is commented on by Finkelstein: "It has, however, been held that this rule is sufficiently modified in this type of case as to cut off equities between the original parties. By doing so, the court has destroyed that essential characteristic of an assignment by which it is distinguished from the negotiation of bills and notes. So altered, it can scarcely be considered to constituting any longer a theory of assignment, but rather be deemed an/

an entirely new legal principle."[45]

Although it is said that there is some indication that the assignment theory is supported by dicta in Re Agra, it is not clear how this case could be applied to solve the problem of the banker seller relationship.

The first objection is that dicta in Re Agra deal only with a general credit which is addressed by the issuer to anyone who cares to accept it. However, in the modern operation of the credit, the credit is in practice a special one which is addressed to a named beneficiary and perhaps restricted in its operation to a specific bank. Regarding this point it is said: "while that explanation may be supported by dicta in Re Agra and Masterman's Bank ex parte Asiatic Banking Corporation, that case was concerned with a general letter of credit."[46]

According to the case above the credit is delivered to the seller-beneficiary by the buyer. This is not the ordinary functioning of the credit where the buyer arranges for the credit with the issuing banker who advises or sends it to the named beneficiary directly or through the intermediary bank. The credit does not come to the buyer's hand initially in order to be sent to the beneficiary. The application of this theory will lead to the distortion of the facts of the credit.[47]

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45. See Finkelstein p. 278

46. See Miller p. 30; also Davis p. 71

47. See Davis p. 71; Gutteridge and Megrah p. 31; Miller p. 30; Kozolchyk pp. 586-7; McCurdy p. 583

The second objection is that, as to the effect of the assignation, the assignee is placed in the shoes of his cedent, he is entitled to exercise the right which the cedent had under the contract and is subject to any defence which the debtor had against the cedent: assignatus utitur jure auctoris[48]. Accordingly the seller is provided with the right assigned and subjected to any defence which the bank may have against the buyer prior to the notice of the assignment. Thus frauds by the buyer in the inception would vitiate the transaction between banker and seller to the latter's detriment. This would destroy the independence of the credit and will be incompatible with the true position of the seller in an irrevocable credit.

Considering the effect of the assignment, one may wonder whether according to this theory the seller-assignee is really placed in the shoes of the cedent or not. Is the seller's position towards the banker under the credit the same as the buyer's position toward the banker under the contract for the arrangement of the credit? In the banker-seller relationship, the seller has his right against the banker from the latter's absolute undertaking in his favour/

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48. See Bell, Prin. 1468; Stair I, 10, 16; III, 1, 20; IV, 40, 21; Ersk. III, 5, 10.

favour but according to this theory the seller's right emanates as a result of an assignment subject to any defences available to the banker against the buyer. The seller's right is not identical in these two circumstances. One can say that there is no question of assignment in the credit and it is wrong to say that the contract between banker and seller comes into existence as the result of an assignment.

The assignment theory is still far from providing a good answer to the problem. It strains the facts and places the seller in the buyer's shoes concerning right and liability arising from the buyer-banker relationship. It defeats the parties' intentions since there is no evidence to suggest that the buyer intends to assign the credit to the seller and, furthermore, the letter of credit does not prove it. A similar attempt under the Délégation imparfaite, advanced by Hamel, a French author, is recognised to be a better attempt as seen in the second theory above.

5. The Novation Theory

The main objection to the assignment theory, that the seller would be subject to any defences which the banker has against the buyer, did not escape McCurdy[49]. He, then, advanced another argument under the novation theory. He says:

"In order to preclude the setting up of these defences it would be necessary to go a step further and find a novation assented to in advance by the seller."[50]

Then he explains:

"Defences against the buyer-assignor which exist at the time of the novation could not be availed of against the seller-assignee by the obligor-bank even though the obligor- bank were ignorant of them at the time of novation."[51]

In application of this theory the operation of the credit is described in these following words: "when the contract of sale stipulates for the buyer arranging the issue of an irrevocable credit, it is implied in the contract of sale that on the credit having been issued, the contract of sale is with the seller's consent novated so that the buyer drops out of the contract and/

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49. See McCurdy p. 583
50. See McCurdy p. 584
51. Ibid. p. 584

and his place is taken by the issuing bank which then undertakes his obligations."[52]

This theory shows that the contract of sale as a whole is novated and not just the buyer's obligation to pay the price of the goods. While this theory could give a solution to the independence of the irrevocable credit as McCurdy said above, it produces other problems. The banker, who is only under obligation arising from the credit contract, is involved in the whole contract of sale. It is still very difficult to say that this theory can be accepted as a good answer to the problem.

One of the objections to the adoption of the novation theory comes from the discharge of the buyer's obligation under the contract of sale by the substitution of the banker's obligation. The buyer drops out of the transaction and a new contract is entered into on the same terms between the banker and the seller. The buyer would be completely free from his obligation and therefore the seller will be precluded from seeking recourse against the buyer when the banker fails to pay the price of the goods. However, in the ordinary operation of the credit, the seller does not release the buyer from his liability to pay the price under the contract of sale by demanding payment under a banker's credit[53].

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52. See Miller p. 30; also Davis p. 71; Gutteridge and Megrah p. 31

53. See Newman Industries Ltd. v. Indo-British Industries Ltd. 1956 2 Lloyd's Rep. 219; Davis p. 71; Gutteridge and Megrah p. 31; Miller p. 14; Kozolchyk p. 587

The buyer, in consequence of the discharge, would lose all his rights under the contract of sale and therefore he cannot insist on complete or exact performance of the contract or reject goods sent to him by the seller in a case where they do not conform to the provision of the contract of sale or if fraud exists on the part of the seller[54]. In addition, the buyer will lose his rights against the banker who does not act in strict compliance with his instruction, i.e. makes payment against documents not stipulated in the letter of credit.

This theory would also affect the banker's position. As the buyer drops out of the contract and is substituted by the banker, the latter would become involved with the contract of sale. The goods despatched by the seller under the contract of sale will fall in the banker's hand. The latter would be involved in dealing with the goods. "Further, the theory brings the banker on the scene in the capacity of a dealer in commodities, a role which he should not be called upon, and usually does not wish, to play."[55]

Apart from the above objection it is also difficult to see how the seller's consent is obtained for the novation of the contract. One may argue that the contract/

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54. See McCurdy p. 584; Davis p. 75; Miller p. 30
55. See Davis p. 71; Miller p. 30

contract of sale between buyer and seller could amount to the seller's consent. This cannot be true since the contract of sale normally provides for the payment of the goods by a banker's credit. There is no indication of the seller's consent that the buyer would be freed from his obligations and substituted by the banker[56].

The novation theory is a presumptuon of the facts in order to give an answer to the difficulties arising under an irrevocable credit. It could solve some part of the problem but its adoption would lead to the distortion of the true facts of the credit. The buyer would drop out of the transaction and have no rights against either the banker or the seller, the banker becomes involved with the goods of the contract of sale and the seller loses his right against the buyer to pay the price in a case where the bank fails to do so. In applying this theory the true nature and the purposes of the credit would be destroyed and the intentions of the parties defeated.

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56. See Gloag pp. 250-9, 724-5

6. The Agency Theory

Other attempts to solve the difficulties arising under the irrevocable credits are made under the agency theory. Two suggestions had been advanced: firstly, the buyer acts as the agent of the seller and, secondly, the banker acts as the agent of the buyer.

(a) The buyer : the agent of the seller

Gutteridge and Megrah, who suggested this theory, said that when entering into the contract of sale, the seller may be deemed to authorise the buyer to act as his agent in arranging the payment in the manner stipulated. They explained their argument in these following terms: " ... what is it that is in the contemplation of the parties when a commercial credit is issued? The cardinal feature of the transaction is that the seller is not content to rely on the buyer's ability on readiness to pay the price, but insists on payment being made in such a form as will obviate the possibility not merely of any danger of the buyer's insolvency, but also of any resort to chicanery for the purpose of delaying or defeating payment. The seller, is, therefore, willing to make a contract of sale only on the basis that the buyer will procure an independent promise of payment made by a banker of indisputable integrity and solvency. The burden of arranging for this mode of payment is one which must obviously fall on the buyer. If a contract of sale is entered into in these circumstances there does not seem to be any reason

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why it should not be held that the buyer has the implied authority of the seller to arrange for payment of the price to be made in the manner stipulated for. Therefore a buyer who, at the instance of the seller, procures the issue of an irrevocable credit in favour of the seller, may be deemed to act as the seller's agent for this purpose, and there comes into existence a contract ancillary to the contract of sale, by which the banker promises to pay the price to the seller in consideration of a promise by the seller to place him in possession of the documents of title of the goods."[57]

Apparently this theory fits better with the facts of the operation of the credit from the contract of sale to the issue of the credit than any theories discussed above but nevertheless it still remains open to objections.

According to the General Provisions and Definitions of the U.C.P. it is difficult to see, as in most of the theories, that the theory could solve the problem relating to the independence of the credit. The buyer, according to this theory, is acting in the capacity of the seller's agent and not in his personal capacity in arranging the credit. Should the buyer's delicts or frauds occur in the performance of his duty, the seller would be liable thereunder[58]. This will not be in line with/

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57. See Gutteridge and Megrah pp. 31-32
58. See Gloag pp. 137-8; Walker 197-8

with the credit which, by its nature, is an independent and separate transaction[59].

Another difficulty arises from the time-element. According to Ellinger: "The agency theory conflicts with the element of time. It would render the contract between the banker and the seller complete as from the time of the opening of the irrevocable credit, i.e. when the banker acts on the application form of the buyer-agent, and not from the date of receipt of the irrevocable credit by the seller."[60] According to this objection the time of the irrevocability of the credit comes into existence earlier than the usual time, i.e. before the credit reaches the seller's hand.

In addition to the above criticisms many authors are of the opinion that the agency theory would lead to the most unsatisfactory consequences from the point of view of the seller. The seller would be liable for his agent's delict in performing his duty[61], or if the buyer fraudulently misrepresents the solvency of his principal for the issue of the credit[62]. Regarding this point Davis said: "The objection to this theory is that it does not obviate, but rather encourages, 'resort (on the part of the buyer) to chicanery'. If the/

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59. Section C of the General Provisions and Definitions of U.C.P., supra
60. See Ellinger p. 65
61. See Walker, Delict pp. 137-8; Walker Princs. p. 727
62. See Gloag pp. 197-8; Walker princs. p. 719

the buyer is the seller's agent, then the seller is liable for all torts committed by his agent, the buyer, in the ordinary course of his employment, even though the tort be committed by the agent for his own benefit. Hence, if the buyer, in negotiating this ancillary contract with the banker, were guilty, for example, of fraudulent misrepresentation - it may well be as to the probity or solvency of the seller - the seller would be liable to the banker for that fraudulent misrepresentation, a liability which might offset the liability of the banker to make payment to the seller.[63]

In considering all the difficulties encountered by this theory, one could say that it cannot provide what the parties to the credit bargain for and is unable to answer problems arising under the irrevocable credit.

(b) The banker : the agent of the buyer

The second theory under the agency contract, originally advanced in the civil law countries, suggests that the banker, in acting according to the instructions given by the buyer, is deemed to perform a duty as agent of the buyer.

Like the previous agency theory this theory fits well with the facts of the credit. It is a matter of the construction of the credit itself. It seems equivalent to agency if the banker is following the instructions given/

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63. See Davis p. 72; Thayer p. 1040; Kozolchyk p. 586; Ellinger p. 64; Miller p. 30

given by the buyer when he opens the credit, verifies the documents required thereunder and honours the seller's drafts in compliance with the terms of the credit.

In French law, the agency theory falls in the scope of a "mandat" which is described in Article 1984 of the "code civil" in these terms:

"Le mandat ou procuration est un acte par lequel une personne donne à une autre le pouvoir de faire quelque chose pour le mandant et en son nom.

Le contrat ne se forme que par l'acceptation du mandataire."

It is true that there is a resemblance between these two institutions. However, a difference emerges between an agent performing his duty and the banker's issuing an irrevocable credit. Unlike an agent, the banker acts in his own name as a principal. It is an absolute undertaking on his part in the seller's favour[64]. If there is a contract of agency between the buyer and the banker, the latter would enter into the contract with the seller in the name of the buyer-principal[65].

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64. Art. 3 U.C.P. C

65. See Stoufflet pp. 370-1, op. cit.

In conclusion, one can say that neither approach of the agency theory gives an adequate solution to the problems arising under the irrevocable credits. The application of these theories would defeat the purposes of the banker's commercial credit.

7. The Jus Quaesitum Tertio Theory

In the ordinary case, in contract, the general rule is that parties to the contract alone have a right to enforce it. The third party does not have any title to sue regardless of any benefit he has in it[66]. However, there are exceptions in which the party foreign to the contract can acquire that right such as jus quaesitum tertio. This is recognised differently in the countries of different legal systems. In the discussion of the jus quaesitum tertio theory, an attempt is made to determine how adequate its application would be to give an answer to the problem arising from the commercial credit in England and in Scotland.

(a) The jus quaesitum tertio theory in English law

The significance of the jus quaesitum tertio or the contract for the benefit of the third party theory is that there is a contract entered into by the buyer and the banker for the benefit of the seller who is foreign to it and according to this theory the seller would be allowed to enforce or sue under the contract.

The main difficulty in adopting this theory in England is that the English courts still reject the jus quaesitum tertio as a valid ground to give the third party the right to sue or enforce the contract. An agreement is not a binding contract unless it is made under/

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66. Finnie v. Glasgow & S.W. Ry. [1857] 3 Macq. 75; Walker p. 567; T.B. Smith p. 777; 1956 Jur. Rev. p. 6

under seal or for some consideration and the problem arising in this theory is to show there is a privity of contract and the consideration moving from the seller-promisee. This point is clearly stated by Lord Haldane in the following terms: "In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of jus quaesitum tertio arising by way of contract."[67]

However the theory of jus quaesitum tertio has its origin from the decision of Denning L. J. in Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board[68] where the right of the third party to enforce the contract was discussed. The Lord Justice explained it in the affirmative:

" ... a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise, and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it, subject always, of course, to any defences that may be open on the merits."

Explaining/

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67. Dunlop Pneumatic Tyre Co. v. Selfridge (1915) A.C. 847

68. (1949) 2 K.B. 500; See Ellinger p. 49

Explaining the meaning of a sufficient interest he went on:

"Whilst it does not include the maintenance of prices to the public disadvantage, it does cover the protection of the legitimate property, rights and interests of the third parson, although no agency or trust for him can be inferred. It covers, therefore, rights such as these which cannot justly be denied; the right of a seller to enforce a commercial credit issued in his favour by a bank, under contract with the buyer; ... "[69]

This statement was quoted by Gutteridge and Megrah with approval in 1955[70] but this point was abandoned in 1962[71] in view of Adler v. Dickson and Green v. Russell, McCarthy (Third Party)[72]; in the latter case the Court of Appeal refused to follow Denning L. J., preferring the view of Lord Haldane, L. C. in Dunlop Pneumatic Tyre Co. v. Selfridge[73].

After the decision of the House of Lords in Midland Silicone Ltd. v. Scrutton Ltd.[74] and Beswick v. Beswick[75] it/

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69. Ibid at p. 515
70. Gutteridge and Megrah, Law of Bankers' Commercial Credits 2nd ed., 1955 at pp. 25-26
71. op. cit. 3rd ed., 1962 at pp. 27-28
72. [1959] 2 Q.B. 226
73. supra
74. (1962) A.C. 446
75. [1968] A.C. 58

it was recognised that what Denning L. J. observed in Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board[76] about the right of the third party to the contract cannot be regarded as good law. The general principle concerning this argument stated by Viscount Haldane, L.C.[77] was reaffirmed in Scruttons Ltd. v. Midland Silicone Ltd.: " ... If the principle of jus quaesitum tertio is to be introduced in our law, it must be done by Parliament after a due consideration of its merits and demerits. I should not be prepared to give it my support without a greater knowledge than at present I possess of its operation in other systems of law. No-one who is not a party to a contract can sue or be sued on it or take advantage of the stipulations or conditions that it contains."[78] The English courts are still unwilling and reluctant to adopt the principle of jus quaesitum tertio recognised by the law of other countries which do not adopt the doctrine of consideration or privity of contract.

Some authors tried to set out that the principle of jus quaesitum tertio has been accepted in the law of England by interpreting the decision of the Court of Appeal in Beswick v. Beswick[79] where a deceased Beswick, a/

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76. [1949] 2 K.B. 500, supra
77. Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd., supra cit.
78. Supra, per Viscount Simonds p. 468, 78; ibid. per Lord Denning at p 483.
79. [1968] A.C. 58

a coal merchant, assigned by agreement to his nephew the assets of his business and his nephew, the defendant, undertook to pay him £6.10s. per week during the rest of his life and to pay his widow an annuity of £5 per week after his death. The defendant nephew made one payment of £5 to the widow of the deceased and refused to make further payment.

In an action by the widow both as administratrix of her deceased husband's estate and in her personal capacity for the enforcement of the agreement the Court of Appeal held: " ... no third person can sue or be sued on a contract to which he is not a party ... but where a contract is made for the benefit of a third person who has a legitimate interest to enforce it, it can be enforced by the third party in the name of the contracting party or jointly with him; or - if he refuses to join - by adding him as a defendant."

When the case was appealed to the House of Lords, Lord Reid, ~~Lord~~, made clear the right of the widow of the deceased in stating: "Applying what I have said to the circumstances of the present case, the respondent in her personal capacity has no right to sue, but she has a right as administratrix of her husband's estate to require the appellant to perform his obligation under the agreement."[80]

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80. Beswick v. Beswick, supra, pp 71-73.

It is clear that English law does not know any right of the third party arising from the principle of jus quaesitum tertio. Thus it would be wrong to consider the seller's right under irrevocable credits by this principle as far as English law is concerned. Concerning this point McCurdy said: "Indeed, to construe the letter of credit as a contract for the benefit of the seller would not only ignore the intention of the parties but would be unfortunate in its business results. in England and in some American states the seller as beneficiary could maintain no action against the issuing or drawee bank. Even in jurisdiction where he can maintain an action at law in his own name his rights are derivative, and consequently he would take the benefit of the contract subject to all the defences which the issuing and drawee banks had against the buyer. Thus fraud in the inception, supervening fraud failure of consideration, insolvency of the buyer, would all be defences available to the banks. Both from the seller's and from the buyer's point of view this result would destroy the value and the usefulness of the irrevocable letter of credit."[81]

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81. See McCurdy p. 573; also Thayer pp. 1039-40; Mead p. 302

(b) The jus quaesitum tertio theory in Scottish law

Jus quaesitum tertio, as a striking contrast to English law, is a well known and accepted principle in the law of Scotland. Scottish law recognises that the parties to the contract can agree to confer the benefit of it on the third party and the latter acquires a right to sue for the enforcement of the contract. It is free from the doctrine of privity of contract and consideration.

Regarding jus quaesitum tertio Stair observed: "It is likewise the opinion of Molina, and it quadrates with our customs, that when parties contract, if there be any article in favour of a third party, at any time, est jus quaesitum tertio which cannot be recalled by either or both the contractors, but he may compel either of them to exhibit the contract, and therefore the obliged may be compelled to perform. So a promise, though gratuitous, made in favour of a third party, that party albeit not present or accepting, was found to have right thereby."[82]

Stair's opinion concerning the recovation of the contract for the benefit of the third party was considered in detail and rejected by the House of Lords in Carmichael/

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82. Stair I, 10, 5; Stair quoted four cases to support his argument in which jus quaesitum was recognised: Supplicant v. Nimmo (1627) Mor. 7740; Renton v. Aiton (1634) Mor. 7721; Ogilvie v. Ker (1664) Mor. 7740; Irving v. Forbes (1676) Mor. 7722.

Carmichael v. Carmichael Exrx[83] where the jus[84] is stated to become irrevocable when it is communicated to the third party by any party to the contract or in some other way. In his judgment Lord Dunedin said: "The only rule to be deduced is that the mere expression of the obligation as giving a 'jus tertio' is not sufficient."[85] Thus, accordingly, the jus becomes irrevocable in various circumstances such as by delivery of the contractual document to the tertius, by registration for publication in the Books of Council and Session, by intimation to the tertius or by the tertius assuming an onerous undertaking on the faith of having or being promised a jus quaesitum. This conflicts with the view of Stair who is of the opinion that the irrevocability of the jus follows the concluded contract to the benefit of the tertius.

According to J. T. Cameron there are two distinct types of case. "In one, the third party has no right except by the donation of the original creditor: the original creditor acquires a bond or similar obligation, but although that bond is taken in name of the third party, that fact alone confers no jus quaesitum; in such cases, the original creditor is in some sense the owner of the sum in the bond until he transfers it to the tertius. To these cases Stair's dictum does not apply/

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83. [1920] S.C.(H.L.) 195
84. the right
85. Ibid. at p. 203

apply because, it appears of the operation of the rule 'traditionibus non nudis pactis.' In the other class, that is, in all other cases, the third party acquires a right from the completion of an agreement in his favour and intended to benefit him. It is important to keep these classes distinct, since it is the failure to do so which gives rise to the conundrum "is it the existence of a jus quaesitum which makes the contract irrevocable or the irrevocability which creates the jus quaesitum?" The true position is that in the first class of case it is the donation, the traditio or its equivalent, which gives the third party an irrevocable right: in the second class, it is the completion of the contract which has this result. A revocable jus quaesitum is a contradiction in terms."[86]

Although the doctine of jus quaesitum tertio stated by Stair was not entirely accepted by the Scottish courts, it is, nevertheless, a well settled principle in the law of Scotland and has long been recognised. The earliest case cited by Stair goes back to 1591.[87]

The question involved here is whether the jus quaesitum tertio theory can give a satisfactory answer to the problems arising under the irrevocable credit or not. The significance of this theory is that the buyer enters/

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86. J. T. Cameron (1961) Jur. Rev. pp. 117-8 Jus Quaesitum tertio : true meaning of Stair I,x,5; See also Walker pp. 568-9; T.B. Smith pp. 778-9

87. Wood v. Moncur (1591) Mor. 7719

enters into a contract with the banker and stipulates that the latter, having the role of a promisor, will undertake to issue the credit in favour of a third party, the seller-beneficiary. The tertius acquires a right from jus quaesitum tertio contract and therefore can sue for the enforcement of his right.

Apparently this theory seems to fit adequately with the credit where the buyer entered into a contract with the banker for the arrangement of the credit in the seller's favour and accordingly the latter acquires a right against the banker for the enforcement of the contract. The different relationships of the credit operation are set out clearly by this theory and it provides a satisfactory explanation to the seller's right arising under an irrevocable credit.

In jus quaesitum tertio the beneficiary is provided with a right of action in his own capacity to sue the promisor in cases where the latter fails to implement his obligation under the contract for his benefit. "In Scotland, if the provision is expressed in favour of C, he can sue and this is often designated by saying he has a jus quaesitum tertio."[88] In the same way the seller-beneficiary would have a right against the banker.

In spite of these similarities between the jus quaesitum tertio and the credit, this theory still fails to/

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88. Carmichael v. Carmichael Excx., supra p. 198

to provide an adequate answer to the problem, as do the previous theories.

It is true to say that according to this theory the tertius has his right of action in hiw own capacity and this right is irrevocable, in some cases, as soon as the jus is communicated or intimated to him[89]. Nonetheless, one may wonder about the origin of his right and the consequences it may have.

The jus of the tertius has its origin in the contract concluded by the stipulator and the promisor. It may not become absolutely vested till a later date. The promisor agreed to undertake to bind himself in favour of the tertius subsequent to the agreement met between the stipulator and himself. In other words the jus is somewhat dependent on the jus quaesitum tertio contract[90]. However it is not the same with the credit where the banker-seller relationship comes into existence, not from the contract for the arrangement of the credit between the buyer and the banker, but by the issue of the credit itself where the banker undertakes to bind himself irrevocably to the seller.[91]

As stated above by Cameron[92] there are two groups of/

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89. Carmichael v. Carmichael Exex., supra

90. There is no banker's absolute undertaking in favour of rhe seller.

91. U.C.P. General Provision and Definition, and Art. 3 supra.

92. J.T. Cameron (1901) Jur. Rev. pp. 117-8; see also Walker pp. 688-9; T.B. Smith pp 779

of cases in which the 'tertius' acquires his right. Firstly the jus is conferred on him when the contract in his favour between the stipulator and the promisor is completed, and secondly when the jus is communicated in some way to him or he has knowledge of the jus in his favour. One can see that the first case does not have any analogy with the irrevocable credit which comes into effect when it reaches the seller's hand. The second one, however, presents some similarity only when the tertius's right becomes irrevocable at the moment of its communication to him by the promisor, since in practice the credit is advised to the seller by the banker[93].

The jus acquired by the tertius is seen differently by different authors. Regarding the tertius's title to sue, Glegg stated: "That principle, though it may entitle a tertius to sue on nonfeasance of a contract, will not entitle him to damage for misfeasance, because the real foundation of his title to sue is that the debtor/

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93. The credit is normally advised to the seller either by the issuing bank or the intermediary bank. The jus quaesitum tertio theory would allow the credit to be communicated to the seller in many ways which are not conform to the normal functioning of the credit, e.g. the banker may be personally barred by rei interventus if, with his knowledge, the seller alters his position on the strength of the anticipated credit, their obligation arising from the rei interventus and not the issue of the credit. As regards time, this will be inconsistent with the credit. On the other hand personal bar could render the bank similarly liable whatever theory of the credit is used.

debtor in the contract has agreed to be liable to him, and it is not to be presumed that the debtor in a contract has agreed to be liable to a tertius in respect of his defective performance."[94] Similarly, Gloag and Henderson laid down: "It has been authoritatively stated that although a third party may have a title to enforce an obligation under a contract he can never have any contractual right to sue for damages for the defective performance of the contract."[95] According to the above authors, the tertius's right is restricted within certain limits. He is not entitled to sue for damages for misfeasance. This shows a great difference between the third party's and the seller's right. In the credit the latter has an absolute right against the banker to exact the contract, provided he complies with the terms of the credit.

However, some authors do not agree with the view that the right of the tertius is so restricted. Smith is of the opinion that: "It is accepted in Scots law that general damages may be awarded for breach of a unilateral and gratuitous promise in cases where the jus quaesitum tertio is not under consideration. The most familiar example possibly is breach of a promise to keep open an offer for acceptance within a particular time. It is difficult to appreciate why in principle the/

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94. See Gloag, The Law of Contract, p. 239

95. Gloag and Henderson, Introduction to the Law of Scotland, 6th ed. p. 91. Also reproduced by Professor Walker in Law of Damages in Scotland, p. 87

the preliminary intervention of a stipulator to secure the promise in favorem tertii should reduce the liability of the promisor to the promisee (tertius) when the promisee claims by virtue of a jus quaesitum tertio. Indeed any such distinction seems quite inconsistent with those doctrines of consensual obligation which were recognised in Scotland even before Stair restated them. Since the promisor in the Stipulatio alteri relationship may well have accepted some consideration from the stipulation, it would be surprising if his liability to the promisee were less in such a situation than if he had merely spontaneously and gratuitously promised some benefit to the promisee ... "[96] This argument seems to be stronger than Gloag's statement so if the right of the tertius under the contract in his favour is not limited or restricted due to the promisor's misfeasance, it would have a great resemblance to the credit. On this point, therefore, the objection to the seller's right would not be a good one.

Another objection to the jus quaesitum tertio is that as the consequence of the dependence of the jus on the contract between the stipulator and the promisor, the right of the tertius would be recognised only subject to any defences which could have been valid against the stipulator, e.g. fraud. Concerning this point Lord Keith/

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96. T.B. Smith, 1956 Jur. Rev. pp. 20-21; see also Walker p. 669

Keith said: "I see no reason in principle why it should not operate as part of the law of jus quaesitum tertio."[97] This is not the case in the irrevocable credit where the banker-seller contract is provided to be independent from other contracts and the seller is free from any defences that the banker has against the buyer[98].

In view of the failure to correspond exactly to the facts of the credit and to provide the independence to the banker-seller relationship, one could say that the jus quaesitum tertio is still inadequate to provide a solution to the problem under the irrevocable credit.

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97. Spirit of the Law of Scotland p. 28; also T.B. Smith Studies p. 197

98. U.C.P. General Provisions and Definition, supra and Article 3

CHAPTER II

The second chapter concerns the theory which treats the irrevocable credits as established by and based on a general mercantile usage. Due to difficulties caused by the doctrine of consideration and privity of contract, this theory is favoured by some authors of common law countries because it would be the only ground to assist them to solve the problem arising under the irrevocable credit.

The Mercantile Specialty Theory

The second category of discussion to be seen in this dissertation is the mercantile specialty theory which treats the irrevocable credits as a mercantile specialty. It is considered to be somewhat of the nature of a negotiable instrument, the banks having a position similar to that of an acceptor of a bill of exchange[1].

In most civil law countries, due to the separation of the civil and commercial code, negotiable instruments, known as mercantile specialty in common law countries, are treated separately as part of the commercial code.

In the Anglo-American world, the use of the term 'specialty', as applied to mercantile instruments, was used to denote exceptions to the traditional rules in the/

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1. See Finkelstein op. cit. at p. 289; Thayer p. 1041; McCurdy p. 563

the usual common law contract obligations. Thus the bill of exchange, the promissory note and cheque are known as mercantile specialties. These exceptions were justified by proof of customs of merchants.

Regarding the influence of the law merchant Bell states: "The law-merchant is universal. It is part of the law of nations, grounded upon the principles of natural equity, as regulating the transactions of men who reside in different countries, and carry on the intercourse of nations, independently of the local customs and municipal laws of particular states. For the illustration of this law, the decisions of courts, and the writing of lawyers in different countries, are as recorded evidence of the application of the general principles; not making the law, but handing it down; not to be quoted as precedents or as authorities to be implicitly followed, but to be taken as guides towards the establishment of the pure principles of general jurisprudence."[2]

The mercantile instruments were adopted in both major legal systems, having their own characteristics although partaking of the nature of the existing institutions. The irrevocable creditshave their own particular features in their form, certainty or transfer partake of the contractual nature which resembles agency, cautionry, delegation or jus quaesitum tertio.

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2. Bell Com. Preface to Author's Edition p. 41; see also Miller Preface p. ii

Many authors favour the mercantile specialty theory since a proper legal theory cannot be found to fit the credit. Accordingly Finkelstein is of the opinion that: "There can be little doubt that in practice the irrevocable credit is regarded as in the nature of a mercantile specialty. The seller in fact regards the bank's promise as irrevocable because of the manner in which it is made. The average business-man, though ignorant of legal technicalities, is conscious of the fact that bills, cheques, and notes are sui generis, that they are contracts peculiar to themselves, and that they have little in common with usual contract. He would be inclined to classify letters of credit with this group rather than with the usual type of contract. There can also be little doubt that this reaction to the nature and use of letters of credit is sound. Nor can it be denied that this has also been the attitude of the courts in adjudicating rights under irrevocable commercial credits. It has been recognised that they are a definite class of promise to extend credit or to pay money, made under certain conditions and with a certain essential uniformity. If any formal theory be needed as to the rights of the seller under this type of instrument, clearly such right must be regarded as based on the view that the irrevocable credit is a new type of mercantile specialty."[3]

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3. See Finkelstein pp. 289-90; also Thayer p. 1041

In considering the letter of credit to be a mercantile specialty, this theory is somehow satisfactory at first glance since the credit is construed as it is expected to be by the businessman in the usual practice of world trade as agreed by many countries and set out in the Uniform Customs and Practice. He is of the view that the seller acquires the right against the banker under the irrevocable credit because it is deemed to be so in the world of business transactions.

The objection may arise that this theory does not make any attempt to explain the legal nature of the obligations of the parties arising under the credit.

To accept a new principle in a legal system, it must be considered that the principle in question, in spite of its international usage as in the case of commercial credits, should not contradict any principles of law existing in that country.

Some authors are opposed to this theory, which treats commercial credits as a mercantile specialty somewhat in the nature of the bill of exchange, due to their lack of uniformity " ... these letters have not reached that point of uniformity that bills of exchange and promissory notes have attained. There are many types, some of which are considered in the business world as creating binding obligation upon issue, and others of which are looked upon as revocable at will. If business ideas on the subject are not uniform, judicial ideas are chaotic. Moreover, letters of credit/

credit vary in formality from telegraphic communications and simple memoranda of letters written in ordinary epistolary form. There is considerable variation in the form and in the transaction which gives rise to the latter. For an instrument to be a specialty it must have reached a high degree of formality."[4] However, in view of the increasing use of commercial credit in overseas trade nowadays, attempts to standardise it have been made or are in the making. It is well known that due to the adoption of the Uniform Customs and Practice, the practice regarding documentary credits has reached a certain level of certainty and uniformity.

While agreeing that letters of credit are well established in practice, some writers do not think that this in itself overcomes the lack of consideration in common law. Concerning this McCurdy says: "... Even if a letter of credit be recognised as a mercantile specialty, it does not follow that consideration is unnecessary. The trend of common law has been to give effect to the custom of merchants which makes certain choses in action negotiable, but not to give effect to the custom of merchants which makes specialty promises binding without consideration. There is an essential difference between recognising, in furtherence of commerce, that certain choses in action are assignable so as to confer upon the assignee original in distinction to derivative/

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4. See McCurdy p. 564; also Finkelstein pp. 293-4

derivative rights, and in recognising that certain promises need no consideration to be legally enforceable. In the one case the question relates to the transferability of an existing legal right; in the other case the question concerns the creation of that right. To some extent, to be sure, especially in the matter of negotiable instruments, the common law has expanded and modified its strict conception of what constitutes consideration. But the law has never abolished its necessity."[5]

The common law affected by the law merchant recognises the negotiability of bills and notes but it still requires consideration to exist as between the immediate parties. It does not recognise a promise to be binding without consideration. Under the Bills of Exchange Act ~~(1882)~~, in ~~British~~ the law of the United Kingdom a bill can be created without consideration (e.g. by 'accommodation' under S.28) and may also be negotiated without consideration; however, the holder without value does not have the full rights of holder, particularly of a holder in due course: the full effect of the bill does not come into effect without value, i.e. consideration. The fact that the usage and practice of world trade provide that the irrevocable credits are binding from the date at which they reach the seller's hand[6] means that such usage/

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5. See McCurdy p. 565; Finkelstein p. 290; Thayer p. 1041

6. See ~~Art. 3 of U.C.P.~~ P 34 Note 19 Supra.

usage would be contrary to the common law principles which require for the enforcement of a promise the presence of consideration from the promisee. This would be ex nudo pacto non oritur actio. Concerning this difficulty Gutteridge and Megrah say: "No apology is needed, therefore, for an attempt to analyse the legal characteristics of a banker's commercial credit in the light of the rules of the Common Law of England."[7] By those rules of common law consideration is still necessary to constitute an obligation. The term 'mercantile specialty' has until now been appropriated to a class of obligation in which consideration still has a place. Thus before a credit can be legitimately described as a 'mercantile specialty' in the technical sense, either the application of the doctrine of consideration must be modified or the term 'mercantile specialty' extended to make it possible for it to apply to a further type of obligation not requiring consideration. Neither position has yet been reached by English law, and so in that sense the 'mercantile specialty' theory does not explain the commercial credit[8].

In summary it is recognised that the mercantile specialty theory could be an answer to the problem. The commercial/

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7. See Gutteridge and Megrah p. 22

8. The theory may equally have force if there is some other concept available capable of explaining the credit in established legal terms. It will be argued that in Scots law there is indeed such a concept.

commercial credits have been governed by the law merchant through its whole history, recognised internationally and are free from the constraint of the domestic law in the same way as a bill of exchange. It is well known that the courts in common law countries have recognised and enforced the legal rights of the parties to the credit regardless of their well-established doctrine of consideration.

Finkelstein, who favours this theory, is of the opinion that commercial letters of credit will soon be recognised as a mercantile specialty, He states: " ... To view the irrevocable commercial letter of credit as a mercantile specialty of a new type, most clearly, simply, and satisfactorily explains the right of the parties, harmonises the decisions of the past, and makes more dependable the future development of the law, thus enabling both banker and merchant to proceed with their activities with confidence and assurance. The theory that the irrevocable letter of credit is a mercantile specialty has now for some time been acted upon and has been functionally adopted. The ability of the law to develop with the needs of commerce has not yet disappeared, and with the growing consciousness on the part of the courts of the true status of the commercial credit, its formal recognition as a mercantile specialty cannot be long delayed."[9]

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9. See Finkelstein pp. 294-5; also McCurdy p. 564

It was also argued that only instruments known to the ancient law merchant could achieve negotiability by commercial usage. However, Cockburn C. J., in delivering a judgment of the Court of Exchequer Chamber explained that modern mercantile usage can create a new type of negotiable instrument: "Usage, adopted by the courts, having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances, is to be less admissible than the usage of past time? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory inactment?"[10] Also a recent decision of the Court of Appeal in Malas v. British Imex Industries Ltd.[11] shows an indication to support this argument where Jenkin L. J. said: " ... the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods which imposes upon the banker an absolute obligation to pay ... An elaborate commercial system has/

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10. Godwin v. Roberts (1875) L.R. 10 Exch. 337 at p. 352

11. [1958] 2 Q.B. 127 1 All E.R. 262

has been built upon the footing that banker's confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice."

CHAPTER III

The third chapter deals with theories under the form of ordinary contractual relationship. Unlike the first chapter the banker-seller relationship is here set out separately. It is suggested that there is an offer by the seller which is accepted by the banker or vice versa. Accordingly four attempts would be examined in the following discussion.

1. The Seller's Offer Theory

Another attempt was advanced by Thayer[1] to which he gave no name but subsequently it has been named the seller's offer theory by Davis[2]. It is a variant of the offer and acceptance theory[3]. The position of the banker and seller are reversed, the seller becomes offeror and the banker the offeree. The seller's offer is presumed to be contained in the contract of sale offering to surrender the documents of title to the goods to the banker and which the banker accepts by opening an irrevocable credit. Miller described the theory in these terms: "By stipulating in the contract of sale for an irrevocable credit the seller made an offer to surrender the documents of title to the banker instead/

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1. See Thayer pp. 1056-7
2. See Davis p. 72
3. infra

instead of to the buyer, in exchange for the banker's undertaking to honour the seller's drafts."[4]

According to this theory the seller's offer given in the contract of sale is presumed to be communicated to the banker through the buyer in arranging for the credit as at this stage there is no communication yet between the seller and the banker. The contract between banker and seller would become binding at the time when the banker accepts the offer, i.e. when he issues an irrevocable credit to the seller. This is expressed by Thayer in these terms: "From the moment that the letter of credit is issued by the bank a contract arises between the bank and the seller whose terms are evidenced by a letter sufficiently understood in accordance with the custom of merchants to warrant such conclusion."[5] Unlike the offer and acceptance theory discussed in the following chapter, Thayer's theory would help to solve problems regarding the act of acceptance and lapse of time where the offerer can cancel his offer. However this theory is rejected by some authors who consider it to be inadequate to give a good answer to the difficulties of the banker-seller relationship under an irrevocable credit.

The first objection is that "this theory is not applicable to clean credits, in which the banker does not/

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4. See Miller pp. 30-1; also Davis pp. 72-3
5. See Thayer p. 1057

not require the surrender of the documents to him."[6] It is true that in some cases the contract of sale provides that the buyer should arrange for a clean credit. The banker following the arrangement with the buyer would undertake to honour the seller's drafts without any documents attached[7]. Hence there would not be any documents which will constitute the seller's offer, to comply with the theory. This is an interesting argument, but it does not seem to be a strong objection, since in the ordinary dealing of an irrevocable credit the transaction normally involves delivery of documents.

Another objection to this theory is that "it is perhaps also slightly unreal in that it involves that the seller may be regarded in law as under contract to a person of whom he is unaware, since the contractual relationship would commence from the issue of the credit."[8] If the buyer is presumed to be the seller's agent, would this argument still stand? The seller in the normal trade transactions wants to be sure that the price of his goods will be paid. He does not seem to worry much about the banker except for his solvency and integrity. Therefore/

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6. See Davis p. 73; also Miller p. 31
7. This occurs when the customers are financially reliable or the banker has been put in funds, so that the documents are not necessary for the banker's security.
8. See Miller p. 31; also Davis p. 73

Therefore if there is a term in the contract of sale that the buyer should arrange an irrevocable credit with a banker of indisputable integrity and solvency and the buyer (seller's agent) arranges for the credit according to the instructions of the seller, his principal, then the above argument would not be a strong one. However, according to section C of the General Provisions and Definitions of the U.C.P. for Documentary Credits (1974 Revision) it is not possible to argue that the buyer is the seller's agent. This would be subject to criticisms discussed in the agency theory.

Some authors oppose this theory because it could not give an adequate answer to the time of the formation of the credit contract. The seller would be bound to the banker when acceptance is made, i.e. when the credit is issued. Regarding this criticism Davis states: "The theory also requires that the seller is bound by the contract to the banker from the moment the credit is issued."[9] However, the irrevocability of the credit comes into existence when it reaches the seller's hands.[10]

It could be argued that according to some technical rules relating to offer and acceptance, the acceptance does not need to reach the offerer for the conclusion of/

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9. See Davis p. 73

10. This point is illustrated by an English case Dexter Ltd. v. Schenker & Co. (1923) 14 Ll.l Rep. 586

of the contract. This may be the case when the parties agree to use the Post Office as their agent or the Post Office could be assumed to be one of the parties' agent. Thus the acceptance does not need to reach the offeror. The banker-seller relationship becomes binding as soon as the banker posts the letter of credit[11]. Thayer explaining this situation says: "In view of the prior stipulation for the credit by the seller in the contract of sale, it seems fair to say that its communication is completed when it is entrusted by the bank to the post or to the telegraph office, as the case may be."[12] If there is such a term in the contract of sale or the Post Office could be presumed to be the seller's agent in this case, the above objection could fall. However, in practice, the Post Office is not considered to be party to the credit, and indeed if it were, this might cause great difficulties where the letter of credit, although posted, fails to reach the seller; and the business purpose of the credit would be frustrated because the seller would not be entitled to ship the goods until receipt of the credit.

According to this theory it is not clear how the offer is communicated to the banker to make him bound before the tender of documents by the seller. It is not possible that, at this stage of the credit operation, there/

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11. Bell, Comm. I, 344
12. See Thayer p. 1057, note 129

there is communication of the offer by the seller himself to the banker. One could assume that the buyer acts as the seller's agent in communicating the seller's offer to the banker or is his del credere agent in guaranteeing payment by the bank. In so assuming, this argument would defeat the independence of the credit and be open to objections raised against the agency theory.

The seller, according to this theory, offers to surrender the documents of title to the goods in return for the banker's undertaking to issue an irrevocable credit in his favour. The contract is concluded when the banker accepts his offer. Following the formation of the contract, the parties are under obligation to perform their duty. The theory would compel the seller to perform his duty. Failure to do so will put him in breach of contract. However, in the credit, the failure to surrender the documents does not put him in breach of contract. The banker would not have any right against him for such.

The seller's offer theory, one of the variants of the offer and acceptance theory, is of help to give an explanation to certain problems which the other variants fail to solve. However, as seen above, the theory is still not adequate to provide a satisfactory answer to the problem. It may not give to the credit its independent nature, defeats the parties' intentions and/

and leads to distortion of the facts. Moreover, it seems to provide the banker with a right (above) which does not exist in practice.

2. Mead's Theory

The problem of validity of the irrevocable credit due to the lack of consideration is the most troublesome to overcome for common law lawyers. Mead[13] in his theory gives an explanation that the seller's right under the credit contract can be solved on the basis of an ordinary contractual obligation. He suggested that there is a contract between the banker and the seller under an irrevocable credit in which the seller is offeree and consideration is furnished by the buyer to the banker on behalf of the seller. In other words the consideration for the banker's undertaking is given in the arrangement for the credit when the buyer promises to indemnify the banker against the issue of an irrevocable credit. To support this theory Mead cited a number of cases which show that there is a binding contract between the banker and seller but not all of them clearly support his argument[14].

In Gelpeke v. Quentell[15] the plaintiff banker issued an irrevocable credit in the seller's favour on the buyer's/

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13. See Mead pp. 302-5

14. Gelpeke v. Quentell (1878) 74 N.Y. 599; Sovereign Bank v. Bellhouse Dillon & Co. (1914) 23 Omb. K.B. 413; American Steel Co. v. Irving Nat. Bank (C.C.A. 1920) 266 Fed. 41; Frey v. National City Bank (1920) 193 App. Div. 849, 184 N.Y. Supp. 661; Doelger v. Battery Park Nat. Bank 201 App. Div. 515, 194 N.Y.S. 582 at 587

15. Supra

buyer's request. Subsequently the buyer ordered the banker to revoke the credit; the banker declined and paid the seller's drafts. The buyer refused to indemnify the banker who, accordingly, brought an action for payment. It was held by the Court of Appeal of New York that "By the terms of the plaintiff's agreement (with the seller) which they made on the faith of the defendant's implied promise to indemnify, they ... were entitled to perform the contract and look to the defendant for indemnity." By these terms the court seems to be of the opinion that the buyer furnished the consideration for the banker's undertaking in the seller's favour.

In Sovereign Bank of Canada v. Bellhouse Dillon & Co.[16] the banker revoked an irrevocable credit on the instruction of the buyer. The seller took an action against the bank and succeeded. It was held by the court that no rule of law prevents a person, furnishing consideration in favour of another person, from binding the latter with a third. The buyer can, therefore, furnish a consideration for the promise given by the banker to the seller.

Mead's theory resembles the offer and acceptance theory[17]. The banker is treated as offeror and the seller as offeree. The difference is that Mead sees the/

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16. Supra
17. Infra

the consideration for the banker's undertaking moving from the buyer instead of from the seller. As for the lawyers of the countries where the doctrine of consideration is not a problem, this theory would not be more adequate to explain the validity of the credit contract than the offer and acceptance theory. This view is acceptable in the light of common law principles of some states in America which allow a third party to give consideration instead of the parties to the contract and accordingly the buyer's promise to indemnify the banker for his undertaking would be regarded as a good consideration.

Mead's theory is adequate to solve the problem of consideration for some countries but it cannot apply generally in common law countries. In England[18] the law requires consideration to move from the promisee to the promisor and accordingly the consideration given by the buyer for the banker's undertaking in favour of the seller would not be a valid one and therefore the contract between banker and seller would not be enforceable[19].

According to this theory it can be said that the credit contract is dependent on the contract entered into/

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18. See Thayer pp. 1039-40

19. See decision of Viscount Haldane L.C. in Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd. 1915 A.C. 847; also Gutteridge and Megrah pp. 24-8

into by the buyer and the banker. There must be a valid consideration for the banker's undertaking. Failure to give consideration by the buyer would affect the validity of the credit contract. Questions can be asked regarding the seller's position when it happens that some circumstances affect the credit contract. As Ellinger pointed out: "The question, however, arises as to what would be the position of the seller, if, for example, the buyer became insolvent or if his contract with the banker became frustrated. Similarly, one cannot help wondering, if this theory were accepted, what the seller's position would be if the buyer induced the banker to open the credit by fraud. Could the bank in such cases revoke the credit on the ground that the consideration supplied by the buyer had failed?"[20] If such circumstances happen, the credit contract could not stand and the seller's right would be subject thereto. However there is not such a question of the seller's position under an irrevocable credit where the credit contract is a separate transaction from other contracts.[21]

In application of this theory the buyer has an important role to play in the credit contract. One may wonder/

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20. See Ellinger p. 80; also McCurdy pp. 579-81; Thayer p. 1040

21. General provisions and definitions of the U.C.P. for Documentary Credits (1974 Revision) supra

wonder in what capacity the buyer is acting in giving consideration to the banker's undertaking instead of the seller. If he be treated as the seller's agent, this argument could not be a good answer as discussed in the agency theory[22].

Mead's theory is of assistance to overcome the problem of consideration, in some common law countries, in order to explain the validity of the seller's right against the banker under the irrevocable credit. However, it could not be regarded as applicable generally; it leaves problems unsolved in the matter of compliance with the true nature of the irrevocable credit.

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22. Supra

3. The Offer and Acceptance Theory

An attempt to explain the banker-seller legal relationship under the credit was also advanced by Davis, contending that the relationship is in the form of an ordinary contract and can be explained by the offer and acceptance theory in these terms:

"The basis of this theory is that the issue by the banker of the letter of credit is an offer which the seller, being the person to whom it is directed, may accept. According to some authorities, the acceptance is constituted by the act of the seller in tendering the documents and a draft to the banker."[23]

Davis quoted a number of English and American cases to support this argument.

In Urquhart Lindsay & Co. Ltd. v. Eastern Bank Ltd.[24] there was a contract of sale between Urquhart Lindsay & Co. Ltd., the plaintiffs, and Benjamin Jute Mills, the buyer, under which the former undertook to manufacture certain machinery and deliver it f.o.b. Glasgow to Calcutta against payment to be made by a confirmed irrevocable credit. At the request of the buyers, Eastern Bank Ltd., the defendants opened an irrevocable credit in the seller's favour in these terms: "We beg to advise you that under instructions received from our Calcutta branch, we are prepared to pay you the amount of/

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23. See Davis p. 73
24. (1922) 1 K.B. 318

of your bills on B. N. Elias, managing agent, the Benjamin Jute Mills Co. Ltd., Calcutta to the extent of but not exceeding 70,000. The bills are to be accompanied by the following complete documents covering shipment of the machinery to Calcutta ... " The credit covered several shipments. The total amount of the drafts exceeded the amount mentioned in the contract price but did not exceed the amount provided in the credit. The drafts and the shipping documents were accepted and paid for the first two shipments. Knowing of the excess amount of the previous drafts the buyers instructed the defendants to pay only the amount in the sale contract. Accordingly the defendants refused to pay the drafts since they exceeded the amount agreed in the contract price. The plaintiffs treated this as refusal and as repudiation of the whole contract and brought an action for damages.

In the course of his judgment Rowlatt, J. pointed out the nature of the credit and the legal position of the parties in these terms: "There can be no doubt that upon the plaintiffs acting upon the undertaking contained in this letter of credit consideration moved from the plaintiffs, which bound the defendant to the irrevocable character of the arrangement between the defendants and the plaintiffs."

Similarly/

Similarly in Dexter Ltd. v. Schenker & Co.[25] it was held by Greer J. that there was consideration for the banker's undertaking in these words: "Now it is clear that, until they (the plaintiffs) get a form of banker's credit which would comply with the terms of the contract, plaintiffs were not bound to send the goods forward at all; and therefore, not having got the banker's credit, until there was a substituted arrangement for some other credit elsewhere, they were under no obligation to anybody to send forward the goods. Therefore, it is quite clear that there was full and ample consideration for this undertaking and I am not surprised that (counsel for the defendants) withdraw the contention which appears in the pleadings that there was no consideration."[26]

This argument, showing that there is a valid contract entered into between the banker and the seller, is based on cases and is not a very recent argument. While it is still supported by Davis, it is rejected by many writers[27].

When/

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25. (1923) 14 Ll.L.Rep. p. 586

26. See also American Cases: Banco National Ultramarino v. First National Bank of Boston 289 F. 169 (1923); American Steel Co. v. Irving National Bank 266 F. 41 at p. 43 (1920); Second National Bank of Hoboker v. Columbia Trust Co. 288 F. 17 at p. 21 (1923); Moss v. Old Colony Trust Co. 246 Mass B9 140NE 803 (1923)

27. See Finkelstein p. 279 et seq; Thayer p. 1039; McCurdy pp. 566-70; Mead p. 301

When considering the offer and acceptance theory, the question arises as to knew what exactly constitutes the seller's acceptance of the banker's offer. In Urquhart Lindsay & Co. Ltd. v. Eastern Bank Ltd. Rowlatt J. commented about the validity of the contract between banker and seller that there is the seller's acceptance by "acting upon the undertaking" stipulated in the letter of credit, but the learned judge did not make it clear what he meant by these terms, nor in Dexter Ltd. v. Schenker was the act of acceptance pointed out by Greer J.[28] In this theory Davis says that "according to some authorities, the acceptance is constituted by the act of the seller in tendering the documents and the draft to the banker."[29] Gutteridge and Megrah disagreeing with the view that the credit is an offer and the seller's tendering the documents and a draft an acceptance say: "The objection to this suggestion appears to be obvious because it does not meet the situation which arises in the case of an irrevocable credit. If the credit in such a case is merely an offer there must be an intervening space of time (i.e. until the documents are tendered) during which the banker can withdraw the offer and cancel the credit, thus defeating the very object for which it was issued."[30] They are of the opinion/

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28. Supra
29. See Davis p. 73
30. See Gutteridge and Megrah p. 28; and also see Miller p. 31

opinion that there is no other conduct of the seller which can constitute the seller's acceptance, accordingly the problem of time-lags would arise. Davis, answering to this objection, said that the seller's conduct or behaviour toward the contract of sale is to be considered as acceptance; he explained: "But such authority as there is on the point would seem to suggest that the acceptance takes place at some time anterior to the tender of the documents, at the latest when the goods are shipped."[31] Apart from the tender of documents and the drafts there remain two other circumstances which can be said to constitute the seller's acceptance in the credit. Firstly, the seller's making of the contract of sale with the buyer, stipulating that the payment of the goods would be made by an irrevocable credit. The contract of sale was concluded before the issue of the credit and therefore cannot be considered as an act of acceptance on the part of the seller. Secondly, the seller's performance of the contract of sale can hardly be argued to be an act of acceptance since it is the seller's obligation under the contract of sale[32]. However, it was suggested that the latest view could be an act of acceptance. It was said that even if the contract of sale is concluded before the issuance of the credit, the buyer has under his contract an/

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31. See Davis p. 78

32. See Gutteridge and Megrah pp. 24-28; McCurdy p. 569; Finkelstein p. 282

an obligation to provide an irrevocable credit and the seller is under no obligation to perform his duty before the credit reaches him. The credit and the beginning of the performance of the contract of sale take place simultaneously so there can be deemed to be both the performance of the contract of sale and the "seller's acting upon" the banker's offer[33]. This does not seem to be a strong argument because in the ordinary transaction of the credit, this is not in the contemplation of the parties[34].

Regarding the problem of the seller's acceptance, one may wonder whether it can be assumed that there is the seller's anticipatory acceptance communicated to the banker before the tender of documents. E.g. the contract of sale providing for the payment of the goods to be made by an irrevocable credit could be taken to imply that the seller is willing to accept the credit when it is arranged and issued in the terms specified, say an irrevocable credit with a banker of good repute. Alternatively, the seller's acceptance could perhaps be assumed by the intimation of the credit to him and the absence of any objections thereto on his part[35].

The first suggestion - invoking the contract of sale in order to presume the seller's acceptance of the credit/

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33. See Ellinger p. 89
34. See Gutteridge and Megrah pp. 21/22, 24-28
35. See supra p. 40, Delegation theory

credit - would face the same objections as the previous argument. If the contract of sale implies the seller's acceptance, this would not be consistent with the independence of the credit. It is seen that the banker's undertaking is separate from other contracts involving the operation of the credit[36].

Regarding the second suggestion - that failure to intimate refusal and the absence of any objection to the credit on issue - can amount to acceptance. It is known that mental acceptance is not sufficient when an offer requires acceptance; there must be a communication of the assent to the offerer[37]. However, it is said that in some circumstances of trade dealings it may be held that failure to refuse an offer amounts to acceptance.[38] If silence amounts to acceptance in the case of the credit, a problem will then arise to ascertain the time when the irrevocability comes into existence. According to circumstances, the acceptance can be deemed to be given as soon as the credit reaches the seller or after that time[39].

The discussion of the offer and acceptance theory reveals that it is not satisfactory to treat the credit as an offer to be accepted by the seller. The difficulty of/

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36. This could bring the buyer into scene to communicate the seller's acceptance to the banker. See C of General Provisions and Definitions cited supra
37. See Gloag, p. 28; Walker p. 533
38. See Gloag, p. 28 supra
39. See supra p. 40, Delegation theory

of ascertaining the seller's acceptance remains to be solved. In Scots law the offer held open shows an indication that it could perhaps overcome this problem. Could the offer held open theory or a theory similar to this be a remedy to the difficulty?

4. The Offer-held-open and the Unilateral Voluntary Obligation Theories

Having examined and criticised different theories advanced to interpret the legal nature and consequences of the banker-seller relationship under the irrevocable credit, it is seen that not one of them has provided a satisfactory solution. In the last chapter, the offer and acceptance theory, the objection remains to ascertain the seller's acceptance to make the banker bound by his undertaking. As has been indicated[40], however, Scots law may afford a means of avoiding the difficulties in the way of the offer and acceptance theory[41]. In that system, an intimated promise can constitute a unilateral voluntary obligation enforceable in its terms by the party in whose favour it is given. Similarly, because of the absence of the doctrine of consideration, Scots law permits a unilateral obligation to hold an offer open[42]. Either of those positions could be used to explain the irrevocable credit. In Scots law, if the credit is interpreted as an offer kept open by the banker, the latter would be bound by his undertaking to keep the credit open after he has communicated his offer/

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40. See supra p. 110

41. See Diab p. 72 and sub: The Obligatory Offer Theory

42. Of course in Scots law a promise must contain certain prescribed legal elements before it can amount to a legally enforceable pollicitatio, i.e. a unilateral voluntary obligation.

offer to the seller. The latter does not have to accept or change his position to make that undertaking binding in his favour. So the banker is bound initially by his promise to keep the offer open, and subsequently by the acceptance of the seller of the underlying or separate obligation of the bank to pay. Equally, if the credit is treated as a unilateral voluntary obligation - a pollicitatio - it would be binding upon the banker as soon as intimated to the seller, without any need for acceptance, real or constructive. It could not be unilaterally revoked, after that intimation, except so far as permitted by its terms. If given irrevocably for a specified period, or to a specified date,[343] it could not be revoked within that time without the agreement of the seller. Indeed even if the credit were treated as merely an offer held open, the obligation to hold it open would itself be pollicitation, so that in the end the offer-held-open theory would in Scots law depend upon that system's device of binding unilateral obligations. If the credit is interpreted as a binding promise by the requirements of Scots law, then the presentation of the documents is seen to be merely a necessary term of the obligation of the promisor, a condition of its enforcement, but not a condition of its constitution.

In England, the law does not recognise even the offer held open unless it is supported by consideration or made under seal. Such an undertaking is revocable, an offer is binding when it is accepted and a simple promise/

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343. Concerning the expiry of the credit see U.C.P. in the Appendix - Expiry Date Art. 37

promise cannot hold the promissor to his undertaking. Concerning this point James L. J. in Dickinson v. Dodds observed: "It is clear settled law, on one of the clearest principles of law, that the promise being a mere nudum pactum, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer Dodds was as free as Dickinson himself."[43]

Concerning this point of law Scots law contradicts English law. Once intimated, a promise cannot be revoked unless it is either refused, or expires naturally before being acted upon[44]. According to Bell: "If a time be limited for acceptance, the offer is held to subsist, and not to be revocable during that time, and to be withdrawn by the expiration of that time without acceptance,"[45] and in section 63 "Unilateral obligation may be either gratuitous or for valuable consideration. It is not necessary that an obligation shall proceed upon a valuable consideration, adequate or inadequate. It is effectual if an engagement be proved by such evidence as law requires in the special case."[46] Lord Fraser explained the offer kept open in Little John v. Hadwen in these terms: "The defendant was not entitled to withdraw his offer before the expiry of the/

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43. (1876) L.R. 2 Ch.Div. 463; see also Routledge v. Grant (1828) 4 Bing. 653

44. See Gloag p. 42 and footnote no. 7; Walker vol. I pp. 524-8; T.B. Smith pp. 742-3

45. Bell Prin. 29

46. Bell Prin. 63

the ten days; that it was an obligation no doubt unilateral, but still binding upon the offer during the appointed period. According to the law of England, such an offer as this was revocable before acceptance."[47]

Viscount Dunedin pointed out clearly the difference between Scots and English law concerning this point in Paterson v. Highland Railway Co.[48] in these terms: "Great stress was laid on the distinction between Scottish and English law in respect of the doctrine of consideration. I have on more than one occasion had to deal with this topic, and I do not think I have ever shown my desire to introduce the doctrine of consideration in the law of Scotland. Nay, more, I am prepared to say that the opinion of Lord Ordinary Fraser, expressed in the now old case of Little John v. Hadwen[49] in which I was counsel many years ago, is right, i.e. if/

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47. (1882) 205 L.R. 5. It seems that such an offer is to be regarded as a promise or unilateral voluntary obligation contrast the bilateral gratuitous contract, "where one party alone is bound to do something and the other is bound merely to accept but not to do or pay anything in return," Walker Prins. 521. See also Walker p. 529, "If an offerer undertakes to keep his offer open for a stated time, the undertaking is a separate voluntary obligation, and withdrawal of the offer before the stated time is an actionable breach of contract."

48. cit. supra

49. (1882) 205 L.R. 5, cited supra

if I offer my property to a certain person at a certain price, and go on to say: 'this offer is to be open up to a certain date', I cannot withdraw that offer before that date, if the person to whom I made the offer chooses to accept it. It would be different in England, for the case supposed there would be no consideration for the promise to keep the offeroppen." Those dicta concerned the situation where offers were made which required acceptance if they were to become contracts between the parties. The maker of the offer does not unilaterally oblige himself to implement the offer, except if it is in due course accepted by the other party. He does, however, oblige himself to keep the offer open for a specified time. That obligation is binding, as a promise, without acceptance; it is not itself an offer.

The credit being interpreted in Scots law as an offer held open, or directly as a binding promise, such an interpretation is free from the difficulties inherent in the only corresponding theory available in English law, namely the offer-held-open explanation. Such an interpretation depends upon a well recognised and settled principle in Scots law finding its legal foundation in precedents and authorities. It seems to answer this aspect of the problem concerning the banker-seller relationship under an irrevocable credit.

Unlike many theories discussed which tend to give a fictitious picture to the credit, the offer-held-open or/

and the unilateral voluntary obligation theories as thus translated into Scottish concept provide a more realistic explanation and seem to give an adequate answer to the nature of the relationship and its legal consequences.

In the same way that the offerer or promisor is bound by his offer or promise until the expiry of a fixed period of time and not being entitled to revoke it, the banker is bound by his issuing the credit to the seller until the expiry of the credit.

The banker's obligation comes from his absolute undertaking and is not dependent on the seller's acceptance. This theory would avoid not only the difficulty of want of consideration, but also the objections relating to the need for the seller's acceptance[50].

In this theory the banker's undertaking is independent and primary and hence the theory would not conflict with the independence of the credit which has often been stressed[51]. The seller has a direct right against the banker as the result of the latter's undertaking, which does not derive from other contracts. This/

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50. Silence, conduct, antecedent arrangement, or other forms of personal bar. See supra, pp. 35 and 40.

51. Section C of the General Provisions and Definitions of the U.C.P. cited supra

This seems to be the legal position[52] although, in business or practical terms, the issue of the credit must surely have been prompted by the terms of the contract of sale[53].

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52. Hamzeh Malas v. British Imex Industries Ltd. [1957] 2 Lloyd's Rep. 549; 1958 2 Q.B. 127. See also Societe Metallurgique d'Aubive & Villerupt v. British Bank for Foreign Trade (1922) 11 Ll.L.R. 168 and also Section C of the General Provisions and Definitions of the U.C.P.; also Miller p. 27

53. See Gutteridge and Megrah, p. 44 "Credit a Term of Sales Contract" and "Conclusion" infra

CONCLUSION

The banker's commercial credit, a valuable financial device, is greatly used nowadays in world transactions. Its practical functioning does not seem to present any complication but the study of its legal nature has engendered problems for lawyers who endeavour to fit it into existing legal theory. This has led to many theories, some of which tend to modify its true operation and nature.

The business purpose of the credit is clearly to carry the contract of sale into effect by means of at least two further contracts, being ancillary to the contract of sale itself. In other words the buyer and seller enter into a contract of sale in the terms that payment of the goods should be made by an irrevocable credit. The buyer, as a result of this, arranges for the credit with the banker. The banker, following the buyer's instructions, issues the credit offering to honour the seller's drafts in accordance with the buyer's instruction, i.e. the terms of the credit. In business and practical terms the issue of the credit must have originated from the contract of sale. This seems to be one of the reasons why theories involving all three parties have been invoked to solve the problem[1]. Not one of them/

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1. The main problem could be the failure to make a distinction between old forms of credit and banker's commercial credit.

them has been found to be a good answer. The banker's credit has its particular feature, it stands on its own.

If it is intended that the banker's undertaking be independent or that credit be a separate transaction, could the credit possibly be considered of the nature of an offer? The difficulties which the courts have found in employing this theory arise from the need to identify an acceptance by the seller before the credit can be binding upon the bank and to overcome the apparent lack of consideration. The latter point has been the most troublesome problem for the discussion of the banker-seller relationship in common law countries.

Miller, observing difficulties arising from the banker's commercial credit, remarked: "The English courts have not shown any marked enthusiasm for theorising as to the legal foundation of the relationship of seller and banker under an irrevocable letter of credit. Such dicta as can be cited from the judgments in English cases are often difficult to apply since they tend to seek to explain the legal principles so as to preserve a consistency with principles laid down in earlier cases dealing with out-moded types of credit, such as the general credit. They are also in difficulty in explaining any resultant contractual relationship without first disposing of the tortuosities of/

of the English law of consideration. That particular difficulty does not present itself in Scots law ... "

"Gutteridge and Megrah (op. cit. pp. 17-18) recognise the inadequacy of most of the theories advanced to explain the irrevocable commercial credit in terms of legal principle and advocate the 'realistic approach' that these credits are justified by their existence in commerce and their practical use, and that little purpose is served by hacking them up to fit a Procrustean bed of legal theory. They approve the recommendation of the Law Revision Committee that the validity of such credits in law should be clearly stated."[2]

In Scots law, however, to explain the banker-seller relationship under an irrevocable credit in terms of an offer and acceptance and hence as in the end a binding unilateral obligation or pollicitatio could be an answer to the problem and its consequences. It would solve objections concerning the independence of the credit, the seller would have a direct right against the banker as soon as the credit were advised to him and also, in the case where the banker failed to pay, the seller would have a right against the buyer for the payment of the price of the goods under the contract of sale.

The/

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2. See Miller pp. 31-32 . As for the legal relationship arising under an revocable credit, see Davis P. 66 and p 25 supra.

The offer-held-open and the unilateral voluntary obligation theories are able to answer the questions of difficulty concerning the legal nature and the consequences of the banker-seller relationship under an irrevocable credit, as far as Scots law is concerned. However, it has far to go to be adopted generally, due to conflict with the laws of other countries and particularly with those which are influenced and dominated by English law, where the doctrine of consideration is strongly followed.

In the modern commercial context, where English law faces the necessity of coming to terms with the European legal tradition within the European Economic Community, this Scottish solution to an English problem may perhaps be a point at which the common lawyer may begin to draw from the civilian heritage still available in the law of England's partner in the United Kingdom.

APPENDIX

Uniform Customs and Practice for Documentary Credits
(1974 Revision)

General Provisions and Definitions

(a) These provisions and definitions and the following articles apply to all documentary credits and are binding upon all parties thereto unless otherwise expressly agreed.

(b) For the purposes of such provisions, definitions and articles the expressions 'documentary credit(s)' and 'credit(s)' used therein mean any arrangement, however named or described, whereby a bank (the issuing bank) acting at the request and in accordance with the instructions of a customer (the applicant for the credit)

(i) is to make payment or to the order of a third party (the beneficiary), or is to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary, or

(ii) authorizes such payments to be made or such drafts to be paid, accepted or negotiated by another bank, against stipulated documents, provided that the terms and conditions of the credit are complied with.

(c) Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts.

(d)/

(d) Credit instructions and the credits themselves must be complete and precise. In order to guard against confusion and misunderstanding, issuing banks should discourage any attempt by the applicant for the credit to include excessive detail.

(e) The bank first entitled to exercise the option available under Article 32b shall be the bank authorized to pay, accept or negotiate under a credit. The decision of such bank shall bind all parties concerned.

A bank is authorized to pay or accept under a credit by being specifically nominated in the credit.

A bank is authorised to negotiate under a credit either

(i) by being specifically nominated in the credit, or

(ii) by the credit being freely negotiable by any bank.

(f) A beneficiary can in no case avail himself of the contractual relationships existing between banks or between the applicant for the credit and the issuing bank.

A. Form and notification of credits

ARTICLE 1

(a) Credits may be either

(i) revocable, or

(ii) irrevocable.

(b) All credits, therefore, should clearly indicate whether they are revocable or irrevocable.

(c) In the absence of such indication the credit shall be deemed to be revocable.

ARTICLE 2/

ARTICLE 2

A revocable credit may be amended or cancelled at any moment without prior notice to the beneficiary. However the issuing bank is bound to reimburse a branch or other bank to which such a credit has been transmitted and made available for payment, acceptance or negotiation, for any payment, acceptance or negotiation complying with the terms and conditions of the credit and any amendments received up to the time of payment, acceptance or negotiation made by such branch or other bank prior to receipt by it of notice of amendment or of cancellation.

ARTICLE 3

(a) An irrevocable credit constitutes a definite undertaking of the issuing bank, provided that the terms and conditions of the credit are complied with:

(i) to pay, or that payment will be made, if the credit provides for payment whether against a draft or not;

(ii) to accept drafts if the credit provides for acceptance by the issuing bank or to be responsible for their acceptance and payment at maturity if the credit provides for the acceptance of drafts drawn on the applicant for the credit or any other drawee specified in the credit;

(iii) to purchase/negotiate, without recourse to drawers and/or bona fide holders, drafts drawn by the beneficiary, at sight or at a tenor, on the applicant/

applicant for the credit or on any other drawee specified in the credit, or to provide for purchase/negotiation by another bank, if the credit provides for purchase/negotiation.

(b) Anirrevocable credit may be advised to a beneficiary through another bank (the advising bank) without engagement on the part of that bank, but when an issuing bank authorizes or requests another bank to confirm its irrevocable credit and the latter does so, such confirmation constitutes a definite undertaking of the confirming bank in addition to the undertaking of the issuing bank, provided that the terms and conditions of the credit are complied with:

(i) to pay, if the credit is payable at its own counters, whether against a draft or not, or that payment will be made if the credit provides for payment elsewhere;

(ii) to accept drafts if the credit provides for acceptance by the confirming bank, at its own counters, or to be responsible for their acceptance and payment at maturity if the credit provides for the acceptance of drafts drawn on the applicant for the credit or any other drawee specified in the credit;

(iii) to purchase/negotiate, without recourse to drawers and/or bona fide holders, drafts drawn by the beneficiary, at sight or at a tenor, on the issuing bank, or on the applicant for the credit or on any other drawee specified in the credit, if the credit provides for purchase/negotiation.

(c)/

(c) Such undertakings can neither be amended nor cancelled without the agreement of all parties thereto. Partial acceptance of amendments is not effective without the agreement of all parties thereto.

ARTICLE 4

(a) When an issuing bank instructs a bank by cable, telegram or telex to advise a credit, and intends the mail confirmation to be the operative credit instrument, the cable, telegram or telex must state that the credit will only be effective on receipt of such mail confirmation. In this event, the issuing bank must send the operative credit instrument (mail confirmation) and any subsequent amendments to the credit to the beneficiary through the advising bank.

(b) The issuing bank will be responsible for any consequences arising from its failure to follow the procedure set out in the preceding paragraph.

(c) Unless a cable, telegram or telex states 'details to follow' (or words of similar effect), or states that the mail confirmation is to be the operative credit instrument, the cable, telegram or telex will be deemed to be the operative credit instrument and the issuing bank need not send the mail confirmation to the advising bank.

ARTICLE 5/

ARTICLE 5

When a bank is instructed by cable, telegram or telex to issue, confirm or advise a credit similar in terms to one previously established and which has been the subject of amendments, it shall be understood that the details of the credit being issued, confirmed or advised will be transmitted to the beneficiary excluding the amendments, unless the instructions specify clearly any amendments which are to apply.

ARTICLE 6

If incomplete or unclear instructions are received to issue, confirm or advise a credit, the bank requested to act on such instructions may give preliminary notification of the credit to the beneficiary for information only and without responsibility; in this event the credit will be issued, confirmed or advised only when the necessary information has been received.

B. Liabilities and responsibilities

ARTICLE 7

Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit.

ARTICLE 8/

ARTICLE 8

(a) In documentary credit operations all parties concerned deal in documents and not in goods.

(b) Payment, acceptance or negotiation against documents which appear on their face to be 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 which has effected the payment, acceptance or negotiation.

(c) If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms and conditions of the credit, that bank must determine, on the basis of the documents alone, whether to claim that payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit.

(d) The issuing bank shall have a reasonable time to examine the documents and to determine as above whether to make such a claim.

(e) If such claim is to be made, notice to that effect, stating the reasons therefor, must, without delay, be given by cable or other expeditious means to the bank from which the documents have been received (the remitting bank) and such notice must state that the documents are being held at the disposal of such bank or are being returned thereto.

(f)/

(f) If the issuing bank fails to hold the documents at the disposal of the remitting bank, or fails to return the documents to such bank, the issuing bank shall be precluded from claiming that the relative payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit.

(g) If the remitting bank draws the attention of the issuing bank to any irregularities in the documents or advises such bank that it has paid, accepted or negotiated under reserve or against a guarantee in respect of such irregularities, the issuing bank shall not thereby be relieved from any of its obligations under this article. Such guarantee or reserve concerns only the relations between the remitting bank and the beneficiary.

ARTICLE 9

Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents, or for the general and/or particular conditions stipulated in the documents or superimposed thereon; nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented thereby, or for the good faith or acts and/or omissions, solvency, performance or standing of the consignor, the carriers or the insurers of the goods or any other person whomsoever.

ARTICLE 10/

ARTICLE 10

Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any messages, letters or documents, or for delay, mutilation or other errors arising in the transmission of cables, telegrams or telex. Banks assume no liability or responsibility for errors in translation or interpretation of technical terms, and reserve the right to transmit credit terms without translating them.

ARTICLE 11

Banks assume no liability or responsibility for consequences arising out of the interruption of their business by Acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control or by any strikes or lockouts. Unless specifically authorized, banks will not effect payment, acceptance or negotiation after expiration under credits expiring during such interruption of business.

ARTICLE 12

(a) Banks utilizing the services of another bank for the purpose of giving effect to the instructions of the applicant for the credit do so for the account and at the risk of the latter.

(b) Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank.

(c)/

(c) The applicant for the credit shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws and usages.

ARTICLE 13

A paying or negotiating bank which has been authorized to claim reimbursement from a third bank nominated by the issuing bank and which has effected such payment or negotiation shall not be required to confirm to the third bank that it has done so in accordance with the terms and conditions of the credit.

C. Documents

ARTICLE 14

(a) All instructions to issue, confirm or advise a credit must state precisely the documents against which payment, acceptance or negotiation is to be made.

(b) Terms such as 'first class', 'well known', 'qualified' and the like shall not be used to describe the issuers of any documents called for under credits and if they are incorporated in the credit terms banks will accept documents as tendered.

C.1 Documents evidencing shipment or dispatch or taking in charge (shipping documents)

ARTICLE 15

Except as stated in Article 20, the date of the Bill of Lading, or the date of any other document evidencing shipment or dispatch or taking in charge, or the date indicated/

indicated in the reception stamp or by notation on any such document, will be taken in each case to be the date of shipment or dispatch or taking in charge of the goods.

ARTICLE 16

(a) If words clearly indicating payment or prepayment of freight, however named or described, appear by stamp or otherwise on documents evidencing shipment or dispatch or taking in charge they will be accepted as constituting evidence of payment of freight.

(b) If the words 'freight pre-payable' or 'freight to be prepaid' or words of similar effect appear by stamp or otherwise on such documents they will not be accepted as constituting evidence of the payment of freight.

(c) Unless otherwise specified in the credit or inconsistent with any of the documents presented under the credit, banks will accept documents stating that freight or transportation charges are payable on delivery.

(d) Banks will accept shipping documents bearing reference by stamp or otherwise to costs additional to the freight charges, such as costs of, or disbursements incurred in connection with, loading, unloading or similar operations, unless the conditions of the credit specifically prohibit such reference.

ARTICLE 17

Shipping documents which bear a clause on the face thereof such as 'shipper's load and count' or 'said by shipper/

shipper to contain' or words of similar effect, will be accepted unless otherwise specified in the credit.

ARTICLE 18

(a) A clean shipping document is one which bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or the packaging.

(b) Banks will refuse shipping documents bearing such clauses or notations unless the credit expressly states the clauses or notations which may be accepted.

C.1.1 Marine Bills of Lading

ARTICLE 19

(a) Unless specifically authorized in the credit, Bills of Lading of the following nature will be rejected:

(i) Bills of Lading issued by forwarding agents.

(ii) Bills of Lading which are issued under and are subject to the conditions of a Charter-Party.

(iii) Bills of Lading covering shipment by sailing vessels.

(b) However, subject to the above and unless otherwise specified in the credit, Bills of Lading of the following nature will be accepted:

(i) 'Through' Bills of Lading issued by shipping companies or their agents even though they cover several modes of transport.

(ii) Short Form Bills of Lading (i.e. Bills of Lading issued by shipping companies or their agents which indicate some or all of the conditions of carriage by reference to a source or document other than the Bill of Lading).

(iii)/

(iii) Bills of Lading issued by shipping companies or their agents covering unitized cargoes, such as those on pallets or in Containers.

ARTICLE 20

(a) Unless otherwise specified in the credit, Bills of Lading must show that the goods are loaded on board a named vessel or shipped on a named vessel.

(b) Loading on board a named vessel or shipment on a named vessel may be evidenced either by a Bill of Lading bearing wording indicating loading on board a named vessel or shipment on a named vessel, or by means of a notation to that effect on the Bill of Lading signed or initialled and dated by the carrier or his agent, and the date of this notation shall be regarded as the date of loading on board the named vessel or shipment on the named vessel.

ARTICLE 21

(a) Unless transhipment is prohibited by the terms of the credit, Bills of Lading will be accepted which indicate that the goods will be transhipped en route, provided the entire voyage is covered by one and the same Bill of Lading.

(b) Bills of Lading incorporating printed clauses stating that the carriers have the right to tranship will be accepted notwithstanding the fact that the credit prohibits transhipment.

ARTICLE 22/

ARTICLE 22

(a) Banks will refuse a Bill of Lading stating that the goods are loaded on deck, unless specifically authorized in the credit.

(b) Banks will not refuse a Bill of Lading which contains a provision that the goods may be carried on deck, provided it does not specifically state that they are loaded on deck.

C.1.2 Combined Transport Documents

ARTICLE 23

(a) If the credit calls for a combined transport document, i.e. one which provides for a combined transport by at least two different modes of transport, from a place at which the goods are taken in charge to a place designated for delivery, or if the credit provides for a combined transport, but in either case does not specify the form of documents required and/or the issuer of such document, banks will accept such documents as tendered.

(b) If the combined transport includes transport by sea the document will be accepted although it does not indicate that the goods are on board a named vessel, and although it contains a provision that the goods, if packed in a Container, may be carried on deck, provided it does not specifically state that they are loaded on deck.

C.1.3/

C.1.3 Other Shipping Documents, etc.

ARTICLE 24

Banks will consider a Railway or Inland Waterway Bill of Lading or Consignment Note, Counterfoil Waybill, Postal Receipt, Certificate of Mailing, Air Mail Receipt, Air Waybill, Air Consignment Note or Air Receipt, Trucking Company Bill of Lading or any other similar document as regular when such document bears the reception stamp of the carrier or his agent, or when it bears a signature purporting to be that of the carrier or his agent.

ARTICLE 25

Where a credit calls for an attestation or certification of weight in the case of transport other than by sea, banks will accept a weight stamp or declaration of weight superimposed by the carrier on the shipping document unless the credit calls for a separate or independent certificate of weight.

C.2 Insurance Documents

ARTICLE 26

(a) Insurance documents must be as specified in the credit, and must be issued and/or signed by insurance companies or their agents or by underwriters.

(b) Cover notes issued by brokers will not be accepted, unless specifically authorized in the credit.

ARTICLE 27/

ARTICLE 27

Unless otherwise specified in the credit, or unless the insurance documents presented establish that the cover is effective at the latest from the date of shipment or dispatch or, in the case of combined transport, the date of taking the goods in charge, banks will refuse insurance documents presented which bear a date later than the date of shipment or dispatch or, in the case of combined transport, the date of taking the goods in charge, as evidenced by the shipping documents.

ARTICLE 28

(a) Unless otherwise specified in the credit, the insurance document must be expressed in the same currency as the credit.

(b) The minimum amount for which insurance must be effected is the CIF value of the goods concerned. However when the CIF value of the goods cannot be determined from the documents on their face, banks will accept as such minimum amount the amount of the drawing under the credit or the amount of the relative commercial invoice, whichever is the greater.

ARTICLE 29

(a) Credits should expressly state the type of insurance required and, if any, the additional risks which are to be covered. Imprecise terms such as 'usual risks' or 'customary risks' should not be used: however, if such imprecise terms are used, banks will accept insurance documents as tendered.

(b)/

(b) Failing specific instructions, banks will accept insurance cover as tendered.

ARTICLE 30

Where a credit stipulates 'insurance against all risks', banks will accept an insurance document which contains any 'all risks' notation or clause, and will assume no responsibility if any particular risk is not covered.

ARTICLE 31

Banks will accept an insurance document which indicates that the cover is subject to a franchise or an excess (deductible), unless it is specifically stated in the credit that the insurance must be issued irrespective of percentage.

C.3 Commercial Invoices

ARTICLE 32

(a) Unless otherwise specified in the credit, commercial invoices must be made out in the name of the applicant for the credit.

(b) Unless otherwise specified in the credit, banks may refuse commercial invoices issued for amounts in excess of the amount permitted by the credit.

(c) The description of the goods in the commercial invoice must correspond with the description in the credit. In all other documents the goods may be described in general terms not inconsistent with the description of the goods in the credit.

C.4/

C.4 Other Documents

ARTICLE 33

When other documents are required, such as Warehouse Receipts, Delivery Orders, Consular Invoices, Certificates of Origin, of Weight, of Quality or of Analysis etc. and when no further definition is given, banks will accept such documents as tendered.

D. Miscellaneous provisions

Quantity and Amount

ARTICLE 34

(a) The words 'about', 'circa' or similar expressions used in connection with the amount of the credit or the quantity or the unit price of the goods are to be construed as allowing a difference not to exceed 10% more or 10% less.

(b) Unless a credit stipulates that the quantity of the goods specified must not be exceeded or reduced a tolerance of 3% more or 3% less will be permissible, always provided that the total amount of the drawings does not exceed the amount of the credit. This tolerance does not apply when the credit specified quantity in terms of a stated number of packing units or individual items.

Partial Shipments

ARTICLE 35

(a) Partial shipments are allowed, unless the credit specifically states otherwise.

(b)/

(b) Shipments made on the same ship and for the same voyage, even if the Bills of Lading evidencing shipment 'on board' bear different dates and/or indicate different ports of shipment, will not be regarded as partial shipments.

ARTICLE 36

If shipment by instalments within given periods is stipulated and any instalment is not shipped within the period allowed for that instalment, the credit ceases to be available for that or any subsequent instalments, unless otherwise specified in the credit.

Expiry Date

ARTICLE 37

All credits, whether revocable or irrevocable must stipulate an expiry date for presentation of documents for payment, acceptance or negotiation, notwithstanding the stipulation of a latest date for shipment.

ARTICLE 38

The words 'to', 'till', and words of similar import applying to the stipulated expiry date for presentation of documents for payment, acceptance or negotiation, or to the stipulated latest date for shipment, will be understood to include the date mentioned.

ARTICLE 39

(a) When the stipulated expiry date falls on a day on which banks are closed for reasons other than those mentioned in Article 11, the expiry date will be extended until the first following business day.

(b)/

(b) The latest date for shipment shall not be extended by reason of the extension of the expiry date in accordance with this Article. Where the credit stipulates a latest date for shipment, shipping documents dated later than such stipulated date will not be accepted. If no latest date for shipment is stipulated in the credit, shipping documents dated later than the expiry date stipulated in the credit or amendments thereto will not be accepted. Documents other than the shipping documents may, however, be dated up to and including the extended expiry date.

(c) Banks paying, accepting or negotiating on such extended expiry date must add to the documents their certification in the following wording:

> 'Presented for payment (or acceptance or negotiation as the case may be) within the expiry date extended in accordance with Article 39 of the Uniform Customs'.

Shipment, Loading or Dispatch

ARTICLE 40

(a) Unless the terms of the credit indicate otherwise, the words 'departure', 'dispatch', 'loading' or 'sailing' used in stipulating the latest date for shipment of the goods will be understood to be synonymous with 'shipment'.

(b)/

(b) Expressions such as 'prompt', 'immediately', 'as soon as possible' and the like should not be used. If they are used, banks will interpret them as a request for shipment within thirty days from the date on the advice of the credit to the beneficiary by the issuing bank or by an advising bank, as the case may be.

(c) The expression 'on or about' and similar expressions will be interpreted as a request for shipment during the period from five days before to five days after the specified date, both end days included.

Presentation

ARTICLE 41

Notwithstanding the requirement of Article 37 that every credit must stipulate an expiry date for presentation of documents, credits must also stipulate a specified period of time after the date of issuance of the Bills of Lading or other shipping documents during which presentation of documents for payment, acceptance or negotiation must be made. If no such period of time is stipulated in the credit, banks will refuse documents presented to them later than 21 days after the date of issuance of the Bills of Lading or other shipping documents.

ARTICLE 42

Banks are under no obligation to accept presentation of documents outside their banking hours.

Date Terms/

Date Terms

ARTICLE 43

The terms 'first half', 'second half' or a month shall be construed respectively as from the 1st to the 15th, and the 16th to the last day of each month, inclusive.

ARTICLE 44

The terms 'beginning', 'middle' or 'end' of a month shall be construed respectively as from the 1st to the 10th, the 11th to the 20th, and the 21st to the last day of each month, inclusive.

ARTICLE 45

When a bank issuing a credit instructs that the credit be confirmed or advised as available 'for one month', 'for six months' or the like, but does not specify the date from which the time is to run, the confirming or advising bank will confirm or advise the credit as expiring at the end of such indicated period from the date of its confirmation or advice.

E. Transfer

ARTICLE 46

(a) A transferable credit is a credit under which the beneficiary has the right to give instructions to the bank called upon to effect payment or acceptance or to any bank entitled to effect negotiation to make the credit available in whole or in part to one or more third parties (second beneficiaries).

(b)/

(b) The bank requested to effect the transfer, whether it has confirmed the credit or not, shall be under no obligation to effect such transfer except to the extent and in the manner expressly consented to by such bank, and until such bank's charges in respect of transfer are paid.

(c) Bank charges in respect of transfers are payable by the first beneficiary unless otherwise specified.

(d) A credit can be transferred only if it is expressly designated as 'transferable' by the issuing bank. Terms such as 'divisible', 'fractionnable', 'assignable', and 'transmissible' add nothing to the meaning of the term 'transferable' and shall not be used.

(e) A transferable credit can be transferred once only. Fractions of a transferable credit (not exceeding in the aggregate the amount of the credit) can be transferred separately, provided partial shipments are not prohibited, and the aggregate of such transfers will be considered as constituting only one transfer of the credit. The credit can be transferred only on the terms and conditions specified in the original credit, with the exception of the amount of the credit, of any unit prices stated therein, and of the period of validity or period for shipment, any or all of which may be reduced or curtailed.

Additionally, the name of the first beneficiary can be substituted for that of the applicant for the credit/

credit, but if the name of the applicant for the credit is specifically required by the original credit to appear in any document other than the invoice, such requirement must be fulfilled.

(f) The first beneficiary has the right to substitute his own invoices for those of the second beneficiary, for amounts not in excess of the original amount stipulated in the credit and for the original unit prices if stipulated in the credit, and upon such substitution of invoices the first beneficiary can draw under the credit for the difference, if any, between his invoices and the second beneficiary's invoices. When a credit has been transferred and the first beneficiary is to supply his own invoices in exchange for the second beneficiary's invoices but fails to do so on first demand, the paying, accepting or negotiating bank has the right to deliver to the issuing bank the documents received under the credit, including the second beneficiary's invoices, without further responsibility to the first beneficiary.

(g) The first beneficiary of a transferable credit can transfer the credit to a second beneficiary in the same country or in another country unless the credit specifically states otherwise. The first beneficiary shall have the right to request that payment or negotiation be effected to the second beneficiary at the place to which the credit has been transferred, up

to/

to and including the expiry date of the original credit, and without prejudice to the first beneficiary's right subsequently to substitute his own invoices for those of the second beneficiary and to claim any difference due to him.

ARTICLE 47

The fact that a credit is not stated to be transferable shall not affect the beneficiary's rights to assign the proceeds of such credit in accordance with the provisions of the applicable law.