

Relationship between a Banker and His Customer under a Letter of Credit: A Legal Reflection

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Abstract:-The banker/customer relationship is a relation based largely on contract with well-defined terms. The contract conferred reciprocal rights and duties upon the parties. This is to say that the bank under normal banking operation is supposed to respect only the written terms of the contract between it and the customer. However, banks often intermittently of course perform some other duties which are not spelled out in the contract. The bank at times act as an agent of the customer towards other persons with whom the customer has a transaction. A documentary credit transaction stands out as a clear example of a situation where a bank act as an agent for the customer. The base contract giving birth to the opening of a documentary credit for the customer by the bank is a sale contract between the customer (buyer) and a seller in which they agree payment be made by a documentary credit. The conclusion of payment of goods supply to be made by documentary credit often give rise to three other independent but inter-related legal transactions among which is the transaction between the customer (buyer) and the issuing bank. This article focuses on this relationship between the customer and the bank which lead to the opening of a documentary credit. The credit is opened on the request of the customer for the benefit of the seller. The objective of this article is therefore to examine the content of the relationship between a customer and the issuing bank under a documentary credit transaction.

I. INTRODUCTION

The financing of trade by means of banker's commercial credit is a device which in its modern form has become an integral part of all banking systems worldwide¹. This is to say that this instrument² is a well-known banking instrument. Its main purpose is to finance the sale of goods across international borders. As an aspect of the banking system, banker's commercial credit otherwise referred to as letter of credit is just one of the various means used by bank to enhance or facilitate payment between businessmen in different countries. The use of letter of credit has become necessary in the interdependent trade world where international commerce has greatly narrow the world into a commercially managed size. The used of this instrument by bank has made international trade sometimes easier than domestic trading.

A banker's commercial credit or a banker's letter of credit has been described³ as an undertaking⁴ by a bank to pay a sum of money to the person to whom the credit addressed, or to accept or purchase a bill of exchange drawn or held by that person. The undertaking contained in a letter of credit is either absolute or more usually contained conditions to be fulfilled by the person to whom it addressed, that is, the beneficiary. Judicially, a letter of credit was defined in *Union Bank of Nigeria v. Okwara*⁵ as a banker's confirmed credit in favour of a seller, an irrevocable promise by a banker to pay money to the seller in return for shipping documents.

Basically, a letter of credit gives the seller reassurance that payment for the goods will be made. The basic tenor of the law and practice relating to commercial letter of credit is that parties deal in documents and not goods and ship⁶. In the system of documentary credit as the name implies the parties deal in documents not goods because the transaction involves more than one contract. A documentary letter of credit transaction is of enormous advantage to both the seller and the buyer. First to the seller, since the promise to pay is given by a banker and not the buyer, it gives the seller more or greater security that his goods will be paid. Further, instead of waiting until the goods have been actually delivered to the buyer before he (seller) is paid, the money for the goods can be received immediately upon shipment when the seller present the required document to the banker. The buyer on his part stand to benefit from expert examination of the shipping documents by experience bankers. Further he benefit from the arrangement in that he will be able to differ payment until the goods have arrived or even afterwards, since he can arrange with his banker to reimburse at a later date.

³ Pennington et al (1978): Commercial Banking Law, 1st Ed, McDonald & Evans Estover. Plymouth London. 309

⁴ That a letter of credit is an undertaking by a bank is underscored by Article 2 of the ICC Uniform Customs and Practice for Documentary Credit UCP 600. The Article provide: Credit means any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation.

⁵ (1998) 1 NWLR (pt 532) 118. In *Union Bank of Nigeria v. Sparkling Breweries Ltd* (1991) 5NWLR (pt 505) 334, it was defined as a modern device whereby the buyer requests his banker to open credit in favour of the seller and in pursuance of that the banker or his foreign agent issues a confirmed credit in favour of the seller.

⁶ Article 5 UCP 600 is categorical on the fact that banks in documentary transaction deals with documents and not goods.

¹I. J GoldfaceIrokalibe (2007): Law of Banking in Nigeria, Malthouse Press Limited Lagos, Nigeria. p 311

² Letter of credit or documentary letter of credit or banker's commercial credit.

Documentary credits are not negotiable instruments. The relationships arising from Letters of Credit are governed by the same legal principles as all contracts. The purpose of such credit is to carry into effect the contracts of sale of goods by means of other contracts which are ancillary to the contract of sale. In an ordinary documentary credit transaction four parties are usually involved and they are:

- a) The seller of the goods ,who is the exporter and the prime beneficiary in whose favour the credit is issued ;
- b) The purchaser (buyer) of the goods, who is the importer of goods and the applicant for the issuance of the credit ;
- c) The issuing bank which is the buyer's bank and which issues the credit on the buyer's instruction;
- d) The confirming (correspondent) bank which is the intermediary between the seller and the issuing bank. The correspondent bank may be the advising bank where it only advises the seller on the state of the account.

Under the system of documentary credit transaction, there exist four autonomous though inter-related legal transactions involving four parties as stated above. In *Nasaralai v. Arab Bank*⁷, the position was summarized as follows: there are usually four parties to the transaction and these are the buyer, the seller, the issuing bank and the confirming bank. The transactions among these parties usually involve four contracts as follows: **First**, is the contract of sale of goods to the buyer by the seller; **second** is the contract between the issuing bank and the buyer (customer) for the opening of the letter of credit⁸; **third**, is the contract between the issuing bank and the confirming bank for making payment to the seller; **fourth** is the contract between the confirming bank and the seller (creditor) concerning the document mentioned in the letter of credit. These four separate though inter-connected contracts form the basis of any dealings in documentary letter of credit.

This paper is limited to the second legal relationship, that is, the contract between the issuing bank (banker) and the buyer (customer). The objective of this paper is to examine in detail the content of the relationship as well as obligations (duties) and the rights of the banker and customer (buyer) under a documentary credit transaction. To achieve the objective of this paper I will start by considering documents which constitute the content of a letter of credit (1) this shall be followed by a discussion on the nature of the relationship (2), the elements necessary for the opening of the documentary credit (3), the duties and rights of the parties (4) and a conclusion (5).

⁷ (1986) 4 NWLR (pt 36) 409

⁸ This is the concern of this article

II. DOCUMENTS CONSTITUTING THE CONTENT OF A LETTER OF CREDIT IN A DOCUMENTARY LETTERS OF CREDIT.

There are certain essential documents which constitute an integral part of the documentary credit system which must be tendered for confirmation. Each credit transaction often specifies the documents that must be tendered to the paying bank. The documents must be obtained by the corresponding (confirming) bank from the seller. These documents form the security upon which the issuing bank relies for reimbursement by the buyer (customer of the bank) of any payments made under a particular credit. They are documents of title normally required under a Cost-In Freight (C.I.F) contracts and include: bill of lading, marine insurance policy and the beneficiary's commercial invoice together with any other which may be specified or required in a particular trade⁹.

A. Bill of lading

This is a commercial document with a very long history. (Tracing the origin of the bill of lading is outside the scope of this exercise). It is a certificate signed by a ship owner or by the master of a ship or the agent of a ship owner acknowledging the receipt for shipment, in a particular ship named therein, of goods described therein. A Bill of lading is a written evidence of a contract of carriage of goods by sea but it is not itself a contract. It merely evidences the existence of a contract between the parties named therein. In *Chacharos v. Ekimpex*¹⁰ it was noted that a bill of lading is a receipt for goods stating the terms on which they are to be delivered and to be received by the ship, and provide excellent evidence of those terms but it is not a contract. Under mercantile law or maritime law, a bill of lading is a document of title symbolizing the goods described therein. Under the documentary credit system, the bill of lading is the most important document normally required. This document no matter how it is named must appear to:

i. indicate the name of the carrier and be signed by:

- The carrier or a named agent for or on behalf of the carrier, or
- The master or a named agent for or on behalf of the master¹¹.

Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.

⁹ Documents required under a letter of credit generally include: commercial invoice (article 18 UCP 600), transport documents covering at least two mode of transport (article 19), bill of lading (article 20), non-negotiable seaway bill (21), charter party bill of lading (article 22), air transport documents (23), rail, road or inland waterway transport documents (article 24), courier receipt, post receipt or certificate of posting (article 25), insurance document and coverage (article 28). For want of space I shall in this paper focus on bill of lading under article 20, commercial invoice under article 18 and insurance (marine insurance) policy under article 28. Article 28 covers insurance generally and is not limited to a particular class of insurance.

¹⁰ (1988) 1 WLR 88.

¹¹ Article 20 (a) (i) UCP 600

Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.

ii. Indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit by:

- Pre-printed wording, or
- An on board notation indicating the date on which the goods have been shipped on board¹².

The date of issuance of the bill of lading will be deemed to be the date of shipment unless the bill of lading contains an on board notation indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.

If the bill of lading contains the indication "intended vessel" or similar qualification in relation to the name of the vessel, an on board notation indicating the date of shipment and the name of the actual vessel is required.

iii. Indicate shipment from the port of loading to the port of discharge stated in the credit¹³.

If the bill of lading does not indicate the port of loading stated in the credit as the port of loading, or if it contains the indication "intended" or similar qualification in relation to the port of loading, an on board notation indicating the port of loading as stated in the credit, the date of shipment and the name of the vessel is required. This provision applies even when loading on-board or shipment on a named vessel is indicated by pre-printed wording on the bill of lading.

iv. Be the sole original bill of lading or, if issued in more than one original, be the full set as indicated on the bill of lading¹⁴.

v. Contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (short form or blank back bill of lading). Contents of terms and conditions of carriage will not be examined¹⁵.

vi. Contain no indication that it is subject to a charterparty¹⁶.

The letter of credit will normally require a full set of bills of lading which are normally issued by the shipping company to the shipper in a set of three. The issuance of the bill of lading in set of three is done for business convenience so as to enable the shipper retain one copy while forwarding the original and the other copy to the consignee. The letter of credit will normally call for clean bills of lading. But even if a credit does not so specify, in practice, clean bills must be tendered unless the credit specifically authorises the acceptance of bills which are not.

A clean bill was defined in *British Imex Industries*

*Ltd v. Midland Bank Ltd*¹⁷, as one that does not contain any reservation as to the apparent good order or condition of the goods or the packaging. By virtue of article 27 of the Rules, a clean bill means one that bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or the packing. Banks should therefore refuse such clauses or notations unless the credit expressly states the clauses or notations, which may be accepted.

Important to note is the fact that a bank is not bound to know the custom of a particular trade. A banker will be justified if he refuses to make payments in case of discrepancy¹⁸ in description between the letter of credit and bill of lading. In *Rayner and Co Ltd v. Hambros Bank Ltd*¹⁹, the letter of credit issued by the defendant bank in favour of the plaintiffs covers a shipment of "1,400 tons coromandel groundnuts". The bill of lading presented to the defendant describes the goods as "machine shelled groundnut kernels". In view of the discrepancy in description the bank refused to honour the draft presented in pursuance of the letter of credit. It was argued on behalf of the plaintiff that the two descriptive phrases mean the same thing by custom of oil-seed trade. It was however held that the defendant bank was right in refusing payment, as it was not obliged to know the custom of such a trade.

B. Insurance Policy

This policy is required to cover the risk involved in the transportation of the goods from the port of dispatch to the port of destination, that is from the seller's (vendor) country to the buyers own country. By such policy the buyer is indemnified by the insurance company in the event of loss or destruction of the goods while on transit.

The insurance policy must cover the goods described in the letter of credit and must indicate that risks are covered at least between the place of taking in charge or shipment and the place of discharge or final destination as stated in the credit. By virtue of article 28 (a) of the UCP 600 Rules, the insurance document must not only be specifically described in the credit but also be issued and signed by the insurance company concerned or its agent. Unless expressly provided by the letter of credit, brokers' cover notes and open covers²⁰ are not good tenders and even when they are specifically

¹⁷ (1942) 2 ALL ER 694

¹⁸Relating to discrepancy in description Article 16 of the UCP 600 Rules is to the effect that 'when a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank determines that a presentation does not comply, it may refuse to honour or negotiate' {Art. 16(a)}. By using the word *may* the Rules simply put into the hands of the banker the discretion to accept or refuse to honour or negotiate a bill of exchange drawn by the seller. If the banker decides to honour the bill of exchange despite the discrepancy between letter of credit and bill of lading he has to approach the presenter (seller) for waiver of the discrepancy under the condition stipulated by paragraph (b) of Article 16 UCP 600. The banker may decide to dishonour the bill of exchange as a result of the discrepancy. Where this option is taken the banker must give notice to that effect. Article 16 (c).

¹⁹ (1960) 6 Comm.Cas 1

²⁰ Article 28 (c) state categorically that cover notes will not be accepted.

¹² Ibid (ii)

¹³ Article 20 (a) (iii)

¹⁴ Ibid (iv)

¹⁵ Ibid (v)

¹⁶ Article 20 (a) (vi) UCP 600.

authorized, the paying bank should not accept them until cleared by the costumer. The letter of credit must state the type of insurance required and if necessary the additional risk which are to be covered. The insurance document must also be of the type currently in use in the trade and which no reasonable objection may be taken. Under article 28 of the UCP 600 Rules, banks may accept an insurance certificate, which indicates that the cover is subjected to a franchise²¹, unless it is specifically stated in the letter of credit that the insurance must be issued irrespective of percentage.

The insurance document must indicate the amount of insurance coverage and be in the same currency as the credit. A requirement in the credit for insurance coverage to be for a percentage of the value of the goods, of the invoice value or similar is deemed to be the minimum amount of coverage required²². If there is no indication in the credit of the insurance coverage required, the amount of insurance coverage must be at least 110% of the CIF or CIP value of the goods²³.

For an insurance document to be accepted under a letter of credit, the letter itself must state the type of insurance required and any additional risk covered. The use of precise words in describing the risk(s) to be covered is a core to the operation of the insurance coverage under a letter of credit. So the applicant for the credit should make sure that the insurance policy which is to form an integral part of shipment documents covers precise risk(s). The UCP Rules 600 with regard to imprecise description of risk holds that an insurance document will be accepted without regard to any risks that are not covered if the credit uses imprecise terms such as "usual risks" or "customary risks"²⁴. When a credit requires insurance against "all risks" and an insurance document is presented containing any "all risks" notation or clause, whether or not bearing the heading "all risks", the insurance document will be accepted without regard to any risks stated to be excluded²⁵.

C. Commercial Invoice

An invoice may simply be described as a list containing the description and quantity of goods sold or to be delivered and containing the prices charged thereon. The beneficiary invoice in a documentary credit transaction serves to confirm to the buyer the description of the goods and their prices as agreed in the contract of sale. It is incumbent on the beneficiary to issue a commercial invoice. A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank

may accept a commercial invoice issued for an amount in excess of the amount permitted by the credit, and its decision will be binding upon all parties, provided the bank in question has not honoured or negotiated for an amount in excess of that permitted by the credit²⁶.

III. NATURE OF THE RELATIONSHIP OF BANKER/CUSTOMER UNDER A DOCUMENTARY LETTER CREDIT

The relationship between a banker and a customer in a documentary credit transaction is contractual nature. The contract follows that between the customer (buyer) and seller who in their commercial dealings have accepted to deal with documentary credit. By nature the relationship cannot be said to be based on employer/worker²⁷ concept since none of the parties (banker and customer) is employing the other. In a contract for service the independent contractor is bound to produce the work promised and the employer is bound to pay remuneration agreed upon. It is clear that the object of a contract for service is the production or alteration of something²⁸. In a contract for service, under no condition will the contractor or employee undertakes an engagement towards a third party. The engagement is rather taken towards the employer. Under a documentary credit²⁹ transaction the banker undertakes to discharge an obligation to a third party-seller, and not the buyer – customer with whom he (the banker) is in contract. This is to say that by nature the relationship between the banker and a customer under a documentary letter of credit is not therefore a contract of employment.

The legal relationship between a banker and his customer under a documentary credit operation, it has been judicially observed, is to an extent similar to a contract of agency with the bank having the mandate of the customer³⁰. A close look at the banker/customer relationship under a documentary letter of credit reveals some convergence between the relationship and an agency relationship. On the one hand the banker receives a commission from the customer (buyer) for opening the letter of credit. On the other hand the customer (buyer) gives instructions in the application form to banker which instructions serves as a mandate from a principal to an agent. This similarity although looks glaring and convincing the banker is not a mere agent. That the banker is not an agent is echoed by the fact he undertakes³¹ an

²¹ Article 28 (j) UCP 600

²² Article 28 (f) (i) and (ii).

²³ In a situation where the CIF or CIP value cannot be gotten from the insurance document the second proviso to paragraph (f) (ii) of article 28 is helpful. The proviso is to the effect that: the amount of insurance coverage in such situations must be calculated on the basis of the amount for which honour or negotiation is requested or the gross value of the goods as shown on the invoice, whichever is greater.

²⁴ Article 28 (g)

²⁵ Ibid (h)

²⁶ Article 18 (b) *ibid*

²⁷ One may be tempted to hold that the relationship between the banker and customer under a documentary credit transaction by nature is leaned on a contract for service since the banker been an expert in his field will be considered as an independent contractor. This reasoning will not stand the test time with regard to documentary credit transaction because it will simply failed to explain the irrevocability of an irrevocable letter of credit.

²⁸ Chung Hui Wang (1907): *The German Civil Code*, London. 137

²⁹ For the definition of a documentary credit see the provisions of notes 3 *supra*

³⁰ *Delvin J in Midland Bank Ltd. V. Seymour (1955) 2 Lloyds Rep. 147*

³¹ The undertaking of the banker is in an irrevocable letter of credit

obligation of his own towards the seller in his own name³² (as a banker) and not in the name of the customer (buyer) who in a true agency transaction is the principal. It is crystal clear from the above analysis that by nature the relationship of banker/customer under a documentary letter of credit is similar to but is not an agency relationship.

The nature of the relationship between a banker and a customer in a documentary credit by nature is also similar to that of creditor and debtor. This is because as the court held in *Citizens National Trust & Saving Bank of Los Angeles v. Londono*³³, any deposit made the buyer in the operation is not held by the banker on trust for the seller. At this point buyer is the creditor. After acceptance of the documents stated at the opening of the letter of credit by the banker, when reimbursement becomes due the positions of creditor/debtor will be reversed. The banker will become the creditor and the buyer the debtor. Whatever analysis one may carry on the similarities of other relationships and nature of the relationship of banker and customer under a documentary letter of credit one thing which is clear is that the contract between a customer and a banker is a contract *sui generis* with its own special rules³⁴.

IV. THE ELEMENTS NECESSARY FOR THE OPENING OF THE DOCUMENTARY CREDIT

Since the relationship between a banker and his customer under a documentary credit (DC) transaction is contractual the prime element needed for the opening of the credit is acceptance by the banker of the customer's offer to open a DC. Opening the DC is therefore the initial stage of the relationship between the parties. This stage covers events which precede the acceptance of the drafts by the banker drawn by the customer (buyer). Acceptance of the customer's offer by the banker can either be done expressly or impliedly. In the former case the banker will manifest his intention to open the credit in writing while in the latter case will simply act upon the offer as made by the customer³⁵. Be it as it may, what one should note here is that although the application to open a documentary credit is made by the customer of the bank, the application form is supplied by the banker. The customer only fills the form and return it to the banker for acceptance or rejection. In case of rejection the banker must inform the customer so he can make alternative arrangement.

³² It has long observed in *International Railway Co. v. Niagara Parks Commission (1941) AC 328*, that in cases like this the agent is not a mere but s/he is or has become a party to the main contract. This reasoning of the court still holds till date since the banker is a party to the main contract under a documentary letter of credit transaction.

³³ (1955) 204 F. 2d 377

³⁴ It is important to note here that the contract between a banker and a customer under a documentary credit transaction will not exist without a prior contract between the buyer and seller who are involve in an international sale of goods contract.

³⁵ Implied acceptance will not be in the best interest of the buyer (customer) because if it happens that the banker fails to open the documentary credit it will difficult for the buyer to institute a legal action against the banker.

In addition to acceptance another necessary element for the opening of a documentary credit is time. Time is always of the essence in business transaction. Once the banker has accepted to open a credit he must not only in act with diligence but must act with reasonable speed within a given time frame. In *Ramstgate Victoria Hotel Co. Ltd v. Montefiore*³⁶, it was stated that where the banker accept the application form for the opening of a documentary credit by acting upon it, he should so act within reasonable time otherwise the buyer's offer will lapse. This is just to reiterate the fact that time is a very important element to be taken into account in the relationship between the banker and customer when it comes to opening a credit. Despite the fact the time is a very important element as far as the opening of a DC is concerned, the banker will assumes no liability or responsibility for the consequences arising out of delay, loss in transit, mutilation or other errors arising in the transmission of any messages or delivery of letters or documents, when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit, or when the bank may have taken the initiative in the choice of the delivery service in the absence of such instructions in the credit³⁷. From the provisions of the article one can say that the banker only need to make sure that the credit is transmitted within reasonable. The banker is obvious no responsible because he masters not the channel of transmission. In connection with the element of time if a banker employs the service of another bank for the purpose of giving effect to the instructions of the applicant does so for the account and at the risk of the applicant³⁸.

When a DC is opened the banker must adhere to the term of credit. The instructions given to by banker by the buyer must be strictly followed. The amount to be paid to the seller, date of expiration of the credit and all documents to be tendered by the seller should not be departed from by the banker. The banker will find himself in a very difficult position should he acted contrary to the buyer's instructions. The court in *Hazel Malas & Sons v. British Imex Industries Ltd*³⁹, the buyer is not liable to reimburse the bank for any payment made by it irrespective of whether the goods have been shipped or not when the mandate of the buyer was no complied with. In *Midland Bank, Ltd v. Seymour*⁴⁰, the defendant an English merchant, agree to purchase a consignment of Hong Kong duck feathers from a seller in Hong Kong. An offer was then made to the plaintiffs an English bank to open a documentary credit in favour of the seller. The defendant specified in the application form that credit is to be available in Hong Kong and equally stated the expiry date. The credit was opened in disregard of the buyer's

³⁶ (1866) L.R 1 Ex 109. It is also important to note that even where the banker accepts the offer of the buyer in writing he (banker) must act within reasonable time.

³⁷ Article 35 Uniform Customs and Practice for Documentary Credits 600

³⁸ Article 37 (a) ibid.

³⁹ (1975) 1 AEL 1071

⁴⁰ (1955) 2 Lloyd's Rep

instructions as to the place of availability and time of payment. In opening the credit, the plaintiff bank requires acceptance to be in London and permitted negotiation of the drafts in Hong Kong. The drafts were negotiated in Hong Kong before the expiry date but presented to the plaintiff in London after the expiry date. The plaintiff bank accepted the drafts but the defendant merchant refused to reimburse them arguing that the plaintiff bank failed to comply with his mandate. The court taking cognizance of previous transactions of the parties hold that by making the credit available in London and not Hong Kong did not amount to a breach which necessitate a repudiation of the contract. Devlin J nonetheless made the following remarks:

If the bank was authorised so to pay [i.e. only in Hong Kong], then although the place of payment may be commercially immaterial, the bank has exceeded its mandate and cannot recover. It is a hard law sometimes which deprives an agent of the right to reimbursement if he has exceeded his authority, even though the excess does not damage his principal's interest. The corollary ... is that the instruction[s] to the agent must be clear and unambiguous.

The judge to my humble opinion in giving judgement to the plaintiffs in this case was just trying to avoid a situation of unjust enrichment on the part of the buyer. This is so because had judgement been entered for the defendant he would had the goods he contracted for without making any payment for them. In his remarks Justice Devlin said the place of payment may be commercially immaterial. Although he used the word 'may' I hold the belief that once the place of payment is clearly stated in the application form it becomes a condition breach of which gives rise to outright repudiation of the contract. As mentioned herein above the doctrine of unjust enrichment saves the bankers interest. What one should take home from the facts of this case is that the terms of the application form for the opening of a documentary credit must be strictly respected. The lesson which bankers can draw from the facts of this case is that they should avoid deviating from the instructions given by the customer in his form for application. More to this bankers should make sure the terms in the application form are clear and unambiguous. Justice Devlin's remarks is therefore a serious warning to banks as agents of the buyer (customers) to scrupulously respect the mandate of the buyers as their principals. Buyers as principal of the bankers must also avoid giving unclear instructions. It should be pointed out at first side the court held that the specification of Hong Kong as the place in which the credit was to be available was not conclusive. This is just to say that

the instructions of the defendant as to the place of availability was not clear⁴¹.

V. DUTIES AND RIGHTS OF THE PARTIES UNDER A DOCUMENTARY LETTER OF CREDIT TRANSACTION

The opening of a documentary credit simply means that it shall be realized as instructed by the buyer. A bank therefore, which issues or confirms a commercial credit, becomes bound to accept or negotiate bills presented to it on demand or as in the case with documentary credits, on the fulfilment of conditions contained in the letter of credit once the beneficiary presents the bills⁴². The follow up of this statement to my understanding is that a banker who agrees to open a DC engages himself obligatorily towards the buyer to accept draft which conforms to the terms of the credit⁴³. The terms of the credit including of course any conditions attached are ascertainable from the letter of credit alone. The contractual duty of each bank under a confirmed irrevocable credit is to examine with reasonable care all documents presented. In *Union Bank of Nigeria v. S. Ozezuah*⁴⁴, it was held that the banker's undertaking under an irrevocable or confirmed credit is absolute. The absoluteness of the banker's undertaking under an irrevocable or confirmed credit simply implies that the banker is bound by every word in the letter credit. The issuing bank is only entitled to debit the buyer's account for the moneys it pays under the credit if it has strictly complied with its customer's (buyer) instruction evidenced by the application signed by him in connection with the opening of the credit. Any departure from those instructions without the customer's consent will result in loss of the bank's right to be indemnified by the customers.

Other conditions usually stipulated in a letter of credit are that the shipping documents should be presented to the bank within the time limit specified in the credit. In the same vein any bill of exchange drawn under the credit should not exceed the amount of the credit. Whether the letter of credit is revocable or irrevocable, it must state its expiring date as well as specify any last date for shipment of goods in question. It is important for us to point out that a bank is under no obligation to establish the genuineness or truth of the representations in the documents presented to it. Its obligation is limited only to ascertain that the documents are ex facie in conformity with the requirements of the letter of credit upon the presentation to it of apparently conforming documents which turn out to be an ingenious forgery by the seller.

Under a documentary credit transaction the issuing bank has the duty to ensure that the letter of credit issued by it to the seller complies strictly with the instructions of the buyer as contained in the application for credit. The bank must also

⁴¹ Error in translation or interpretations of terms in the application is not imputable on the bank see Article 35 of UCP 600.

⁴² I. J. Goldface-Irokalibe (2007), law of Banking in Nigeria, Malthouse Press Ltd Lagos Nigeria. 311

⁴³ The banker will be at fault should failed to honour a conforming draft.

⁴⁴ (1997) 2 NWLR (pt 485) 28

ensure that payment, acceptance or negotiations is effected only on presentation of the documents which fully conforms to the credit. Further the bank must write in the letter of credit all the terms and conditions stipulated by the buyer in his instructions for the opening of the credit. Failure to comply with the buyer's mandate by the bank amount to a breach of contract. This gives the buyer the opportunity to reject the documents for non-compliance with his mandate.

The bank has a duty examine the document tendered by the seller to see if such comply with the buyer's instructions. This duty is statutorily recognized by the Uniform Customs and Practice for Documentary Credit 600. On the standard of examination of documents the UCP is to the effect that: A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation⁴⁵. The UCP Rules further gives the bank a maximum of five working or banking operating days to do its examination⁴⁶. It should be noted that in a documentary credit transaction the parties deal with documents and not with goods or services. The bank's examination is therefore limited to the documents relating to the goods and not to the goods. Following this line of reasoning one will not be wrong to hold that acceptance or payment or even negotiation by a bank against documents which are in conformity with the terms and conditions of the credit binds the buyer who must reimburse the bank. This is because the bank acted on the authorization of the buyer and in accordance with the instructions given.

It is trite to note that the issuing bank has no right to refuse payment once the documents tendered by the seller or beneficiary of the credit on the grounds that the underline contract⁴⁷ has been breached. The bank's duty is to make sure documents tendered by seller is in conformity with instructions given by the buyer and nothing more. The issue relating to the bank's right to refuse to honour the beneficiary draft drawn under a letter of credit on extraneous grounds relating to the underline contract was considered in *HanzehMalas v. British Imex Industries*⁴⁸. In this case a Jordanian firm (buyer, customer of issuing bank) ordered reinforced iron rods from a British supplier (seller) which was to be paid for by instalments under a letter of credit. The first consignment was receive and found to be of inferior quality. The buyer, the Jordanian firm, HanzehMalas sought an injunction to restrain the issuing bank from making other

payments to the seller, the British firm. The court reject the prayer of the buyer on the grounds that the breach of the underline contract was a matter between the buyer and the seller. The court further holds that the bank was obliged as between itself and the beneficial seller to honour drafts drawn upon it under the letter credit once the documents tendered by the seller conforms to the terms and conditions under which the credit was opened. In a situation like this, the only available remedy to the buyer is to repudiate the underline contract with the seller before seizing the court to issue an injunction on the bank to stop payment of remaining instalments under the credit.

The right of the issuing bank under a documentary credit transaction is its entitlement to commission or remuneration as agreed in the contract to open the credit. The commission of the banker should however, not be confused with the security provided the by the buyer upon opening the credit. The buyer (customer) is often expected to put the issuing bank in a safe situation by providing it with funds or other form of security at the moment the credit is opened.

The standard form of a letter of credit normally contains a clause requiring the buyer to put the issuing bank in funds at the time the credit is issued. Like any other contract, a documentary credit transaction imposes on the buyer the duty to put the issuing bank in funds. In *Reynolds vs. Doyle*⁴⁹, it was held that a customer of a bank who requires the bank to open a letter of credit is not only under the duty to pay the bank for which it has accepted the bill of exchange drawn by the beneficiary but must also do so within a reasonable time before the bill fall due for payment. The rationale for this decision is that the buyer's duty to make available to the issuing bank the money required for the execution of the credit is absolute. Under the terms of the credit the issuing bank usually requires the buyer to furnish it with securities in the form of funds or documents of title to the goods which form the subject matter of the contract of sale. The funds or documents constitute security for any money advanced to the buyer by the bank. It is therefore clear that this duty of the buyer is a precondition for the opening of the credit by the issuing bank.

From above it is clear that the issuing bank is saddled with a lot of obligations under a documentary credit transaction. To protect the bank in the discharge of its obligations the UCP Rule 2006 accord the bank a number of exclusion clauses. With regard to the effectiveness of the documents tendered, the UCP Rules 2006 is to the effect that: A bank assumes no liability or responsibility or the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document, or for the general or particular conditions stipulated in a document or superimposed thereon; nor does it assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance

⁴⁵ Article 14-a

⁴⁶ To this effect i.e. duration of examination Article 14-b provides: A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.

⁴⁷ By the underline contract I mean the contract of sale between the buyer (customer of the issuing bank) and the seller.

⁴⁸ (1958) 2 Q.B 127

⁴⁹ (1840) 1 M & G753

represented by any document, or for the good faith or acts or omissions, solvency, performance or standing of the consignor, the carrier, the forwarder, the consignee or the insurer of the goods or any other person⁵⁰. By the wordings of this Article the issuing bank has no duty or obligation to verify the contents of documents tendered by the seller. Once the documents in their face conforms to terms and conditions of the contract for the opening of the credit, the bank has to honour the document and consequently effect payment. As far as transmission and translation of the document are concerned, the assumes no liability or responsibility or the consequences arising out of delay, loss in transit, mutilation or other errors arising in the transmission of any messages or delivery of letters or documents, when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit, or when the bank may have taken the initiative in the choice of the delivery service in the absence of such instructions in the credit⁵¹. Since the bank must always act under a documentary within a reasonable time frame in case of unforeseen consequences the bank will not be found wanting for not discharging its duty or duties under the credit⁵².

VI. CONCLUSION

The banker/customer relationship as observed in this article though emanating from a prior contract of sale of goods between the customer of the bank and a seller is independent from the sale's contract. The contract is strictly between the customer and the bank. The seller being the resultant beneficiary of the contract because the documentary credit is to be opening in his favour has nothing to say as far as the opening of the credit is concerned. From above it is clear that the relationship between the customer and banker under a documentary credit transaction by nature is not only limited to the law of contract but also extent other legal relations such as agency relationship. With regard to the duties of the parties in this transaction one realises that the customer's only duty is to put the bank in a good position by providing security for the opening of the credit. The bank on its part must not only keep to the terms and instructions of the customer but act within reasonable time.

⁵⁰ Article 34 UCP Rules 2006

⁵¹ Article 35 (a) *ibid*.

⁵² Article 36 *ibid* captioned *force majeure* provide that: A bank assumes no liability or responsibility or the consequences arising out of the interruption of its business by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control.

A bank will not, upon resumption of its business, honour or negotiate under a credit that expired during such interruption of its business.