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MARMARA UNIVERSITY
EUROPEAN COMMUNITY INSTUTE
DEPARTMENT OF LAW OF THE EUROPEAN UNION

PAYMENT TRANSACTIONS IN INTERNATIONAL TRADE

Master of Science Thesis

UYGAR BUDAK

Istanbul, 2007

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GENERAL KNOWLEDGE

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ABSTRACT

PAYMENT TRANSACTIONS IN INTERNATIONAL TRADE

International trade has increased considerably during the second half of the twentieth century due to the increasing needs, developing technology and particularly due to the developments in transportation and communication. The subject matter of the international trade, which, by its nature involves considerable risks, is sale contracts where the parties are in different countries and do not have sufficient knowledge about each other. Unlike domestic sale contracts, in international sale contracts the debts of the parties –delivery of the goods and payment of the price- can not be effected at the same time. The interests of both of the parties in expecting the other side's debt initially created the security problem in international trade. The lack of confidence between the parties and the risks inherent in international trade has led to the birth of documentary credit. The documentary credit, which is a payment method, has removed the security problem on a large scale.

The documentary credit, which is an institution created by practice, has not been arranged in detail by national laws. In this respect, the need to written rules was

met by Uniform Customs and Practice(UCP) promulgated by International Chamber of Commerce(ICC). Today, documentary credits issued by banks run according to those rules all over the world.

The importance of international trade for the countries is evident. The importance of the requirement to understand documentary credits as the most secured and most widely used way of payment in international trade, and uniform customs and practices for documentary credits is obvious. In this study, both the importance of documentary credits, their structure, process, types and legal character have been examined in detail, and innovations made by the last revision of UCP600 published by ICC have been pointed out.

GENEL BİLGİLER

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ÖZET

ULUSLARARASI TİCARETTE ÖDEME YÖNTEMLERİ

Artan ihtiyaçlara, gelişen teknolojiye ve özellikle taşımacılık ve iletişim teknolojilerindeki gelişmeye bağlı olarak özellikle yirminci yüzyılın ikinci yarısında uluslararası ticaret büyük bir artış göstermiştir. Yapısı gereği önemli riskleri bünyesinde barındıran uluslararası ticaret farklı ülkelerde bulunan ve çok defa birbiri hakkında yeterli bilgiye sahip olmayan taraflar arasındaki satım sözleşmelerini konu edinmektedir. Yerel satım sözleşmelerinden farklı olarak uluslararası nitelikteki satım sözleşmelerinin yerine getirilmesinde tarafların edimlerini oluşturan malın teslimi ve bedelin ödenmesi aynı anda gerçekleştirilememektedir. Her iki tarafın karşı tarafın edimini öncelikli olarak beklemekteki çıkarı uluslararası ticarette güven problemini ortaya çıkarmıştır. Taraflar arasındaki güvensizlik ve uluslararası ticaretin bünyesindeki riskler uygulamada akreditifin doğumuna yol açmıştır. Bir ödeme yöntemi olan akreditif taraflar arasındaki güven problemini önemli ölçüde ortadan kaldırmıştır.

Uygulamanın ortaya çıkardığı bir müessese olan akreditif, milli kanunlarca ayrıntılı olarak düzenlenmemiştir. Bu konuda birörnek yazılı kurallara duyulan ihtiyaç Milletlerarası Ticaret Odası'nın yayınladığı Akreditiflere İlişkin Birörnek Teamül ve

Uygulamalar ile giderilmiştir. Bugün tüm dünyada bankalarca açılan akreditifler bu kurallara göre yürütülmektedir.

Uluslararası Ticaretin ülkeler açısından önemi aşikardır. Uluslararası Ticarette en güvenilir ve en çok kullanılan ödeme yöntemi olan akreditif müessesesinin ve akreditiflere ilişkin birörnek kuralların bilinmesi gereğinin önemi açıktır. Bu çalışmada akreditifin önemi, yapısı, işleyişi, türleri ve hukuki niteliği ayrıntılı olarak incelenmiş, Milletlerarası Ticaret Odasının bu konudaki en son yayını olan 600 sayılı birörnek kuralların getirdiği yeniliklere dikkat çekilmiştir.

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CHAPTER II

LEGAL ASSESSMENT OF THE UCP AND THE DOCUMENTARY CREDITS

LIST OF ABBREVIATIONS

Art. : Article

CIF : Cost, Insurance and Freight

CIP : Carriage and Insurance Paid To

C.O. : Code of Obligations

Comm.C. : Commercial Code

fn. : footnote

FOB : Free on Board

ICC : International Chamber of Commerce

ISP : International Standby Practices

Ltd. : Limited

no. : Number

T.C.C. : Turkish Civil Code

UCP : Uniform Customs and Practice for Documentary Credits

URC : Uniform Rules for Collections

URR : Uniform Rules for Bank-to-Bank Reimbursements Under Documentary Credits

USD : United States Dollar

v. : Versus

Vol. : Volume

1. INTRODUCTION

Globalisation has increased, apart from the integration of economic, cultural and political systems, also the communication and the international trade, which is deemed to be the engine of growth. Additionally, the progressive dependence of the countries to each other due to the increasing needs and the fact that no country is self-sufficient has resulted the rapid increase of international economic relations between the countries and the merchants. The internet, developments in communication and information technologies has also played a significant role in the increase of international trade.

However international trade involves considerable risks. The importers and exporters are exposed to greater risks in international trade than a trader would be in a domestic sale. These risks inherent in international trade can be summarized mainly in two groups, namely; economic and commercial risks, and country and political risks. The risks of; insolvency or default of the buyer, non-acceptance of the documents and the goods, the seller's inability to supply the correct quality and quantity of the goods falls in the first group. Primarily, the risk of the far away debtor is noteworthy, since in international trade, credit worthiness of the debtor and its willingness to pay may be much more diffucult to assess. On the other hand, though the buyer's ability and willingness to pay, it may not be possible due to causes beyond his control, such as exchange control regulations, lack of foreign currency, government interventions in the transaction, changes in government policies, imposition of an import ban, cancellation or withold of an import license and what we call as force majeure such as Acts of God, riots, civil commotions, insurrections, wars. These risks fall in the second category. In cases where the payment is effected in the country of the debtor, the question of the free convertability and transferability of the currency will arise. The debtor may not be able to provide the foreign currency in his country since the conversion of the proceeds into

a different currency is not allowed and moreover, even if the proceeds are convertible to the required currency, they may not be transferable to the country of the seller.[1]

Moreover, since the seller and the buyer are in different countries, in contrast with domestic sales, simultaneous exchange of goods and money is not possible in international trade. So the delivery of the goods with one hand and collection of the money with the other is not an eventuality of international trade. For this reason, both parties have interest in expecting the performance of the other party initially. The seller would like to be paid in advance or at the latest as soon as he parts with the goods. In contrast the buyer would wish to delay payment as much as possible, at least until arrival of the goods, since payment on arrival will enable him to ascertain whether the goods are of right quality.[2]

The evaluation of risks in international trade and the interests of the parties play a major role in determining the method of payment to be used for settlement between the buyer and the seller. The degree of risk from the point of the seller or the buyer is dependent on the mode of payment. In this respect, documentary credits differ from the other payment methods since it serves to both the importer's and the exporter's interests and provides the necessary security for the parties. For this reason, it has a widespread use for the finance of international sales. These superior features of documentary credits will be stated in detail in the following sections.

It is to be expressed here that the documentary credit concept was not contemplated and designed by lawyers. Nor is it regulated in most of the national laws. The defect of a national code governing the operation of documentary credits was overcome by "Uniform Customs and Practices" (hereafter UCP) promulgated by International Chamber of Commerce (hereafter ICC). Those rules have got a widespread acceptance almost all over the world and today, most of the documentary credits run according to those rules. Very recently, during the study of this thesis last

[1] Jan Dalhuisen, **Dalhuisen on International Commercial, Financial and Trade Law**, 2.Edition, Oxford: Hart Publishing, 2004, p.423-456-457; Sibel Özel, **Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği**, 1.Edition, İstanbul: Beta Basım Yayım Dağıtım A.Ş., 1991, p.1-2; Ünal Tekinalp, **Banka Hukukunun Esasları**, 1.Edition, İstanbul:Beta Basın Yayım Dağıtım A.Ş., 1988, p.410-411

[2] Indira Carr, **International Trade Law**, 3.Edition, London: Cavendish Publishing Ltd, 2005, p.465; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.2; Tekinalp, p.410

version of the Uniform Customs and Practice (ICC publication no.600) has been implemented and in effect since July 1, 2007.

The need to research and study the documentary credits and the new UCP600 is evident, especially in a country where the export incomes has reached 100 billion USD and which aims 500 bilion USD export incomes in the 100'th anniversary of its foundation.[3]

In this thesis the documentary credits will be studied. In order to make a comparison with other payment methods used in international trade, firstly the process and features of other payment methods will be summarized. Then the documentary credits will be studied in detail in the following chapters.

[3] **Milliyet**, "İhracatçı 100 milyar dolar rekorunu ant içerek kutladı", October 2, 2007, p.9

1- PAYMENT METHODS IN INTERNATIONAL TRADE

The factors that effect the determination of method of payment in internationl trade are; the bargaining power of the parties to the sale contract, the economic climate in the importing and exporting countries, the political stability of the countries affecting the sale transaction, and the degree of trust and confidence of each party in the other.[4] Or the countries' foreign trade regulations may compel the parties to choose a specific payment method. The parties are free in agreeing a payment method so long as the relevant states' exchange control regulations permit.[5]

In international sales, payment may be effected in the following modes: Prepayment (Advance Payment), Open Account, Prefinance, Acceptance Credit, Documentary Collection, Documentary Credit. In this section of this thesis these payment methods will be examined briefly and in the second section documentary credit, which serves to the interest of both the seller and the buyer, will be examined in detail.

1.1. Advance Payment (Prepayment)

In an advance payment, the importer makes payment before the goods are dispatched or shipped. The buyer performs his payment obligation either by a bank remittance in which case he deposits the necessary funds in his own bank and the bank transfers the money to the seller's bank or by cash payment to the seller's bank. The seller ships the goods after he receives the money. So the seller receives the money in advance before he performs his obligation.[6]

Advance payment is ideal from the point of the seller but it is equally disadvantageous for the buyer. The buyer is exposed to considerable risks. The seller

[4] Carr, p.465

[5] Şenay Eryürek, **Uluslar arası Ticarette Ödeme Şekilleri ve Vesaik**, Anadolu Bankası Eğitim Yayınları 2, p.2; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.3; Salih Kaya, **Uluslar arası Bankacılık Uygulamaları**, 2.Edition, Ankara: Seçkin Yayıncılık San. ve Tic. A.Ş., 2003, p.66

[6] Cemal Şanlı, Nuray Ekşi, **Uluslar arası Ticaret Hukuku**, 4.Edition, İstanbul: Arıkan Basım Yayım Dağıtım Ltd. Şti., 2005, p.75; Abdurrahman Özalp, **UCP600'ın Kullanılması ve Akreditif**, 1.Edition, İstanbul: Türkmen Kitabevi, 2007, p.15; M. Vefa Toroslu, **Uygulamalı Dış Ticaret İşlemleri ve Muhasebe**, 2.Edition, İstanbul: Beta Basım Yayım Dağıtım A.Ş., 1999, p.59-60; Oğuz Sadık Aydos, **Akreditif**, 1.Edition, Ankara: Turhan Kitabevi Basım-Yayın Tic. Ltd. Şti., 2000, p.1; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.3; Salih Kaya, p.66

may not ship the goods or he may ship low quality goods. Moreover he may not be able to fulfill his obligation due to an export ban or any kind of government intervention.[7] The buyer may get nothing in return for which he has paid in advance.

Although the use of advance payment is not usual in international trade, the parties may prefer it for various reasons. The seller may offer the buyer a discount in case advance payment is made. The seller may be a monopoly or may have a dominant position in the relevant market or demand to his products may be excessive, thus imposes any conditions to his advantage against the buyers. The buyer may be in a weak bargaining position or very new in the relevant market, so in order to establish a long term trade relationship with the seller, he may accept advance payment. The seller may have been provided assurance such as a bank guarantee or a standby letter of credit to the buyer and the buyer may trust to the seller and his country's economic and politic climate.[8] It is advisable to the buyer to demand a bank guarantee against the failure of the seller to perform his side of the contract.

1.2. Prefinancing

Prefinancing is used in international trade usually for the sale of large scale of goods whose manufacture or provision cost vast amount of money. The buyer finances the seller for the cost of manufacturing the goods partially or wholly. The buyer provides the finance to enable the seller to meet the costs. As in the case of advance payment, again the seller receives the money before he performs his commitment. For that reason prefinancing is an advance payment in essence. The same risks are again available for the buyer stated under the heading of advance payment. The amount paid in advance by the buyer constitutes a credit for the seller. After the goods are shipped by the seller, the amount paid in advance is deducted from the sale price with its interest. Sometimes the buyer accepts to provide the finance in return for a bank guarantee. In

[7] Interbank, **Uluslararası Ticarette Bankalararası Ödeme Yöntemleri**, Eğitim Bölümü Yayınları No:19, p.47; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.3; Şanlı, Ekşi, p.76; Aydos, p.2; Kaya, p.66-67

[8] Özalp, p.15; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.4; Şanlı, Ekşi, p.76; Salih Kaya, p.67; Aydos, p.2

this case, if the seller fails to manufacture and ship the contracted goods the buyer will be entitled to refund with interest from the bank.[9]

1.3. Open Account (Cash Against Goods)

In an international sale contract the parties may agree to effect payment in open account. In contrast with advance payment, in an open account the seller performs his obligation initially and then it is the buyer who makes payment later. The seller ships the goods and sends the documents to the buyer. The buyer receives the documents and clear the goods through the customs. Then the buyer makes payment on the appointed date to the account of the seller either by a bank remittance or in cash. Thus the seller parts with the goods before he is paid and the buyer receives the goods before he pays the seller.[10]

It is obvious that a payment in open account is risky from the perspective of the seller since it provides no protection for him. He may not receive his money on the appointed date or he may never receive the money due to commercial or country risks. Furthermore the buyer who aims to decrease the price of the goods may make up disputes concerning the quality of the goods. The circumstances may leave the seller no choice apart from accepting a price cut since returning back the goods may cost more due to freight, insurance and storage charges. Moreover this may not be even possible if the seller collected the goods in the arrival port and sold them to the third parties.

Payment in open account terms is used where the seller has no doubts about the credit worthiness and/or willingness of the buyer to pay. Or the parties are well known to each other and any dispute is unlikely to arise. Since it is the cheapest and often the quickest and simplest way of payment, it is usually used between a parent and subsidiary company or where the buyer is an agent or branch of the seller. The following circumstances may also be an inducement for the use of the open account. The seller may be in a weak bargaining position due to the exporting country's economic and politic climate or he may be new in the relevant market and in order to

[9] İhsan Erdoğan, **Akreditif Sözleşmeleri**, Ankara: Nobel Yayın Dağıtım Ltd. Şti., 2000, p.5; Şanlı, Ekşi, p.77; Toroslu, p.60

[10] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.4; Dalhuisen, p.458; Eryürek, p.28; Şanlı, Ekşi, p.78; Özalp, p.16; Interbank, p.47; Aydos, p.3

establish a long term trade relationship with the buyer he may accept to be paid after he performs his side of the contract. The buyer may be a monopoly and the sole purchaser of the specific good, so he may impose any term to his interest in the sale contract. Moreover the exchange control regulations may prescribe the use of open account payment mode. Lastly the buyer may have provided an assurance to the seller such as a bank guarantee against his default[11]

An other form of open account is the consignment sale in which the seller consigns the goods to the buyer who is a branch or agent of the seller or a broker called consignee. The consignee commits to sell the goods according to its price in the relevant market. The consignee, after selling the goods, deducts his commission and charges and pay the remainder to the seller. In a consignment sale the exact price of the goods are determined by the relevant market conditions in the country of the consignee. The consignee buyer may undertake to pay the consignor seller a minimum price in any case even the goods are sold with a lower price which is called joint account. In that case the risk of the seller is decreased, or in esence, shared with the consignee who guarantees a minimum amount of payment to the seller. Similar to the open account, in a consignment sale again the risk falls on the seller since his credit is in no way secured.[12]

1.4. Acceptance Credit

An acceptance credit is a more secured way of payment in comparison with the above mentioned modes of payment since it provides protection to the parties to some extent and serves to the advantage of the both parties. The buyer pays at a fixed or determinable date after receiving the goods, thus financed by the seller until that maturity date. The buyer is enabled to pay his debt by selling the goods to the third parties. On the other hand the seller is assured by a bill of exchange accepted by the buyer and sometimes accepted or backed by a bank.[13]

The banks may also play a role in the transaction which operates as follows: the parties of the sale contract agree that the buyer will accept a bill of exchange in

[11] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.4-5; Dalhuisen, p.458; Eryürek, p.28; Şanlı, Ekşi, p.78-79; Özalp, p.16; Salih Kaya, p.73-74; Interbank, p.99; Aydos, p.3
[12] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.5; Şanlı, Ekşi, p.79; Salih Kaya, p.74
[13] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.5; Toroslu, p.62

return for the documents. The seller, after shipping the goods, send the documents to the buyer with a bill of exchange drawn by him on the buyer. The seller may utilize the services of a bank for sending the documents. In that case the seller's bank sends the documents and the bill to the buyer's bank. The buyer's acceptance of the bill is a precondition of the delivery of the documents to him. After the buyer accepts the bill, the documents are released to him. The buyer clears the goods from the custom with the documents. The time draft enables him to sell the goods and pay his own debt at the maturity date. Sometimes the buyer may stipulate the bill to be accepted by the buyer's bank or accepted by the buyer and avalised by his bank. This is called the banker's acceptance. In that way the seller gets the security of a bank. The mere acceptance of the buyer is called "trade acceptance" in which case the seller is exposed to credit risk since the buyer may go bankrupt in the period between his acceptance and maturity date.[14]

The seller does not have to wait for the maturity date of the bill of exchange. Since the seller obtains a negotiable instrument, he may sell it to a bank to obtain cash. But of course the amount he will get will be less the interest and the commission of the bank than the face value of the bill. The discountability of a bill is depended on the standing and the credibility of the drawee. Although it may be difficult to find a bank to discount a bill accepted by the buyer, a bill accepted or avalised by a bank will enable the seller to obtain cash immediately.[15]

Acceptance credit is an ideal way of paying for the buyer as he pays after he receives the goods, thus he is financed by the seller and allowed a definite period of time until the maturity date of the bill. Moreover he has the chance to sell the goods and then pay his seller. So he can trade without having to tie his capital to the transaction. In contrast, acceptance credit is not so ideal from the point of the seller. Firstly the buyer may get the chance to inspect the goods and if he is not satisfied with the quality of the goods he may not want to accept the bill and take up the documents. This will entail

[14] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.6; Toroslu, p.62-63; Şanlı, Ekşi, p.77-78; Salih Kaya, p.73

[15] Leo D'archy, Carole Murray and Barbara Cleave, **Schmitthoff's Export Trade The Law and Practice of International Law**, 10. Edition, London: Sweet & Maxwell Limited, 2000, p.169; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.6; Aydos, p.4; Salih Kaya, p.73

diffuculties for the seller either to find a new customer or bring back the goods. Secondly a bill of exchange accepted by the drawee is not an absolute payment. There is always the risk that the bill may not be honoured by the buyer drawee, eventhough it was accepted. If the buyer dishonours the bill, the only available remedy for the seller is to start legal proceedings in the country of the buyer which is not a desirable outcome for the seller since the legal proceedings will involve extra expenses and it may take considerable time to get a result. For this reason, it can be said that an acceptance credit provides semi-security for the seller. Therefore it is advisable for the seller to require the bill to be avalised or accepted by a reliable bank. [16] Obviously in the latter case the drawer seller will draw the bill on the bank which will assume the obligation of the buyer to pay.

1.5. Documentary Collection

The parties of an international sale contract may agree to effect payment on a documentary collection basis. In contrast with a documentary credit, it is here the seller who organises this payment facility. Again, dissimilar to the documentary credits, the performance of the seller is initial step in execution of the contract. The seller, after shipping the goods, requests his bank(remitting bank) to turn over the documents relating to the goods to a bank(collecting bank) in the country of the buyer which will deliver them to the buyer in return for payment or acceptance of a bill of exchange. The process can be summarized as follows: The seller ships the goods he contracted for and deliver the documents accompanied by a collection instruction giving complete and precise instructions to his bank. The remitting bank sends the documents to the collecting bank and instruct it whether the documents shall be delivered to the buyer on acceptance of the bill or on payment. The seller will get the documents either by accepting the bill drawn by the seller or by paying as required and thus will receive the goods.[17]

For the widespread use of documentary collections in international trade, in order to ensure uniformity, ICC published Uniform Rules for Collections(hereafter

[16] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.7; Salih Kaya, p.73
[17] Tekinalp, p.483 D'archy, Murray, Cleave, p.163; Dalhuisen, p.461; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.9; Şanlı, Ekşi, p.81

URC). It was first published in 1956 and revised in 1967, 1978 subsequently in 1995. 1995 revision (ICC publication No:522) is in force as of January 1, 1996.

These ICC sponsored rules are not applicable per se. The applicability of URC522 is depended on their incorporation into the text of the collection instruction. If incorporated as such, they are binding on all parties thereto unless otherwise expressly agreed or contrary to the provisions of a national, state or local law and/or regulation which can not be departed from.(Art.1.a.)

For the purposes of the articles of URC522 the parties are; the "principal"(seller-exporter) is the party entrusting the handling of a collection to a bank, the "remitting bank" is the bank to which the principal has entrusted the handling of a collection, the "collecting bank" is any bank, other than the remitting bank, involved in processing the collection, the "presenting bank" is the collecting bank making presentation to the drawee.(Art.3.a.) The drawee is not counted as one of the parties in a collection, for the purposes of URC522 articles. The reasons submitted for that situation are lack of commitment on the part of the drawee[18] or the lack of banks' commitment against the drawee.[19] The drawee(buyer-importer) is defined as the one to whom presentation is to be made in accordance with the collection instruction.(Art.3.b.) URC522 defines "collection" as the handling by banks of documents in accordance with instructions received, in order to: 1.obtain payment and/or acceptance, or 2.deliver documents against payment and/or against acceptance, or 3.deliver documents on other terms and conditions.(Art.2.a.) For the purposes of URC522, "documents" are "financial documents" which means bills of exchange, promissory notes, cheques, or other similar instruments used for obtaining the payment of money and "commercial documents" which means invoices, transport documents, documents of title or other similar documents, or any other documents whatsoever, not being financial documents.(Art.2.b.)

A bank is in no way obliged to handle a collection or any collection instruction or subsequent related instructions. But URC522 charges the banks, which elects not to

[18] Eryürek, p.25; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.9
[19] Tekinalp, p.485

handle a collection or any related instructions, to advise the party from whom it received the collection or the instructions by telecommunication or, if that is not possible, by other expeditious means, without delay.(Art.1.b.-c.)

URC522 prescribes that all documents sent for collection must be accompanied by a collection instruction incorporating the URC522 and giving complete and precise instructions. Banks are only permitted to act upon the instructions given in such collection instruction and in accordance with URC522. Banks will disregard any instructions from any party/bank other than the party/bank from whom they received the collection, unless otherwise authorised in the collection instruction.(Art.4.a.1-3) Art.4.b. sets out the items of informations which a collection instruction should contain and states that it must contain the details of the principal, remitting bank, presenting bank and the drawee. It should specify the amount(s) and currency(ies) to be collected, list the documents enclosed and the numerical count of each document, state clearly the terms and conditions upon which payment and/or acceptance is to be obtained, terms of delivery of documents, charges and interests to be collected, whether they may be waived or not, method of payment and form of payment advice, instructions in case of non-payment, non-acceptance and/or non-compliance with other instructions.(Art.4.b.) A special emphasize is made for the address of the drawee. A collection instruction should bear the complete address of the drawee or of the domicile at which the presentation is to be made. If the address is incomplete or incorrect, the collecting bak may, without any liability or responsibility on its part, endeavour to ascertain the proper address. Although not stated under art.4, some other statements which the collection instruction must contain can be inferred from other provisions. According to art.5.b., the collection instruction should state the exact period of time within which any action is to be taken by the drawee. Especially it must be expressed whether the documents will be delivered to the buyer on acceptance of the bill or on actual payment or in accordance with special instructions.[20] The collection instruction should give specific instructions regarding protest in the event of non-payment or non-acceptance. In the absence of such specific instructions, the banks concerned with the collection have no obligation to have the documents protested for non-payment or non-acceptance.(Art.24) If the principal

[20] D'archy, Murray, Cleave, p.163

nominates a representative to act as case-of-need in the event of non-payment and/or non-acceptance, the collection instruction should clearly and fully indicate the powers of such case-of-need. In the absence of such indication banks will not accept any instructions from the case-of-need.(Art.25) The provision is in line with the art.4.a.3.

If the principal nominates a collecting bank, the remitting bank will utilise that bank for the purpose of giving effect to the instructions of the principal. In the absence of a nomination, the remitting bank will utilize any bank of its own or an other bank's choice in the country of payment or acceptance.(Art.5.d.) Similarly if the remitting bank does not nominate a specific presenting bank, the collecting bank may utilise a presenting bank of its choice.(Art.5.f.)

If a collection contains a bill of exchange payable at a future date, it should be indicated in the collection instruction whether the commercial documents are to be released to the drawee against acceptance or against payment. If there is no indication to that effect, commercial documents will be released against payment and the collecting bank will not be responsible for any consequences arising out of any delay in the delivery of the documents.(Art.7.b.)

As to the liabilities and responsibilities, the URC522 states that banks will act in good faith and exercise reasonable care.(Art.9.) Consistent with the general rules that banks deal with only documents not with goods, and any liability or responsibility can not be imposed unilaterally by the parties of the sale contract on the banks, the liability and responsibility of the banks relating to the goods was arranged in the following manner. Goods should not be despatched directly to the adress of a bank or consigned to or to the order of a bank without prior agreement on the part of that bank. In case the goods are despatched directly to the adres of a bank or consigned to or to the order of a bank without prior agreement on the part of that bank, such bank shall have no obligation to take delivery of the goods, which remain at the risk and responsibility of the party despatching the goods.(Art.10.a.) In addition, banks have no obligation to take any action in respect of the goods, including storage and insurance of the goods even when specific instructions are given to do so. Banks will only take such action if, when, and to the extent that they agree to do so in each case.(Art.10.b.) In case the banks take

action for the protection of the goods, they assume no liability or responsibility with regard to the fate and/or conditions of the goods and/or for any acts and/or omissions on the part of any third parties entrusted with the custody and/or protection of the goods. However, the collecting bank must advise without delay the bank from which the collection instruction was received of any such action taken.(Art.10.c.)

URC522 has also, in harmony with UCP, set out provisions absolving the banks from liability or responsibility. The banks are not responsible or liable for the acts of an instructed party(Art.11.), for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents, for description, quantity, weight, quality, conditions, packing, delivery, value or existence of the goods, and for the good faith, acts and/or omissions, solvency, performance or standing of the consignors, the carriers, the forwards, the consignees, the insurers of the goods, or any other persons whomsoever.(Art.13.) Banks will not assume any liability or responsibility also for the consquences arising out of delay and/or loss in transit of any messages, letters, documents, or for delay, mutilation or for other errors arising in the transmission of any telecommunication or for errors in translation and/or interpretations of technical terms.(Art.14.a.) They will not even be held liable for any delays resulting from the need to obtain clarification of any instructions received.(Art.14.b.) Again the provision of force majeure is identical to that of UCP600, according to which 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 strikes or lockouts.(Art.15)

URC522 has envisaged duties peculiar to the documentary collections for the banks, relating to the documents recieved by them. Banks must determine that the documents received appear to be as listed in the collection instruction and must advise by telecommunication or, if that is not possible, by other expeditious means, without delay, the party from whom the collection instruction was received of any documents missing, or found to be other than listed. Banks have no further obligation in this respect and they will present the documents as received without further examination.(Art.12.a-c.) If the documents do not appear to be listed, the remitting bank shall be precluded

from disputing the type and number of documents received by the collecting bank.(Art.12.b.) An other responsibility was contemplated for presenting bank which is responsible for seeing that the form of the acceptance of a bill of exchange appears to be complete and correct. But it is not responsible for the genuineness of any signature or for the authority of any signatory to sign the acceptance.(Art.22) Similarly the presenting bank is not responsible for the genuineness of any signature or for the authority of any signatory to sign promissory notes, receipt, or other instruments.(Art.23)

If the collection instruction specifies that interest is to be collected from the darwee and/or collection charges and/or expenses are to be for the account of the drawee and if the drawee refuses to pay them, the presenting bank may deliver the documents against payment or acceptance or on other terms and conditions without collecting interest and/or charges and/or expenses, unless the collection instruction expressly states that interest and/or collection charges and/or expenses may not be waived.(Art.20.a.-21.a.) Where the collection instruction expressly states that they may not be waived and the drawee refuses to pay them, the presenting bank will not deliver documents and will not be responsible for any consequences arising out of any delay in the delivery of the documents. In case of such a refusal the presenting bank must inform by telecommunication or, if that is not possible, by other expeditious means without delay the bank from which the collection instruction was received.(Art.21.b.-21.c.)

In all cases where disbursement and/or expenses and/or collection charges are to be borne by the principal, the collecting banks shall be entitled to recover promptly outlays in respect of disbursements, expenses and charges from the bank from which the instruction was received, and the remitting bank shall be entitled to recover promptly from the principal any amount so paid out by it, together with its own disbursements, expenses and charges, regardless of the fate of the collection.(Art.21.c.) Banks reserve the right to demand payment of charges and/or expenses in advance from the party from whom the collection instruction was received, to cover costs in attempting to carry out any instructions, and pending receipt of such payment, also reserve the right not to carry out such instructions.(Art.21.d.)

URC522 has entrusted the duty to the collecting banks to advise the fate of the collection to the remitting bank. The remitting banks shall instruct the collecting bank regarding the method by which the advises of payment, acceptance or non-payment or non-acceptance are to be given. In the absence of such instructions, the collecting bank will send the relative advises by the method of its own choice at the expense of the bank from which the collection instruction was recieved.(Art.26.b.) In case of acceptance; the collecting bank must send without delay the advice of acceptance to the bank from which the collection instruction was received and in case of payment; in addition to sending without delay the advise payment, it must detail the amount or amounts collected, charges and/or disbursements and/or expenses deducted, where appropriate, and method of disposal of the funds. In case of non-payment and/or non-acceptance; the presenting bank should endeavour to ascertain the reasons for non-payment and/or non-acceptance and advise, without delay, the bank from which it received the collection instruction. On receipt of such advice the remitting bank must give appropriate instruction as to the further handling of the documents. If such instructions are not received by the presenting bank within 60 days after its advice of non-payment and/or non-acceptance, the documents may be returned to the bank from which the collection instruction was received without any further responsibility on the part of the presenting bank.(Art.26.c.)

The advantages of a documentary collections may be summarised as such; it is simple, cheap and a quick way of settlement. The expenses of a documentary credit are avoided in a documentary collection. It serves a better security for the seller than an open account. If a time bill is used and the buyer gets the documents against acceptance, he may finance his importation by selling the goods to the third parties. In that case the seller may have the bill negotiated or discounted especially if it is backed by a bank, thus recives the money immediately. And in some cases the buyer may have the chance to examine the goods before he takes up the documents.[21]

The logic of documentary collection rests upon the assumption that the banks will not deliver the documents representing the goods to the buyer until he accepts the

[21] Özalp, p.17-18; Tekinalp, p.483; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.10; Eryürek, p.23

bill or makes payment. So the documents will be released to the buyer in exchage for acception of the bill or payment by the buyer. Thus the buyer will not be able to get the goods until he performs his side of the contract. These assumptions are still not a complete security for the exporter. The major risk of the exporter is the buyer's reluctance to take delivery of the documents and thus the goods. Under a documentary collection the buyer drawee does not commit to take up the documents. So, in case the buyer refuses to take the documents, the seller may face with an undesirable situation. The seller will either try to find a new customer which may result more expenses such as storage charges and extra insurance premium or return back the goods which entail freight and insurance charges. He may not even do these, if the goods are of perishable nature. Again the country and political risks are available besides the economic and commercial risks.[22] Whatever the terms of the payment is, whether it be Cash Against Documents(CAD), Documents Against Payment(D/P) or Documents Against Acceptance(D/A) the payment is always effected in the country of the debtor with the attendant convertibility, transferability, country and political risk exposure.[23]

For these considerations it is advised that the seller must be sure about the willingness and solvency of the buyer and he must be aware of the political economic climate of the buyer's country and the exchange control regulations thereof.[24]

1.6. Documentary Credits

Since the documentary credits are the subject of the following chapters, under this heading, the features peculiar to documentary credits will be summarised. In fact these features are the disparities of the documentary credits which adds to its unique value.

A documentary credit is a better and more common way to avoid payment risks in international trade. A documentary credit is an undertaking of a bank(issuing bank) which commits to pay the seller(beneficiary) a sum of money upon the delivery

[22] Tekinalp, p.483; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.10; Eryürek, p.23; Özalp, p.17-18
[23] Dalhuisen, p.462-463
[24] Tekinalp, p.483; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.10; Eryürek, p.23; Özalp, p.17

of certain specified documents.[25] In contrast with a documentary collection, a documentary credit is organised by the buyer importer(applicant). After the parties agree to effect the payment of the sale price by a documentary credit, the buyer requests a bank in his country to issue a documentary credit in favour of the seller(beneficiary). The issuing bank, having accepted the buyer's request, advises the credit to the seller. Usually a second bank(correspondent bank) is utilized in the country of the seller for the advice of the credit. Upon the notification of the credit to the seller, he makes the necessary arrangements to ship the goods. After shipping the goods and preparing other required documents, the seller tenders all these documents to the correspondent bank. In case the documents are found to be complying with the terms and conditions of the credit, the seller is paid by the bank.

As stated, the first difference between a documentary collection and a documentary credit relates to the party organising the process. In the former it is the seller, in contrast in the latter it is the buyer who takes the first step. Moreover the opening of the credit is a condition precedent to the performance of the seller under the sale contract.[26] Since a credit is irrevocable, the obligation of the bank to pay is irrelevant to the subsequent unwillingness of the buyer to accept the documents and goods. Thus, the seller is sure when he is making necessary arrangements and shipping the goods that the credit will be honoured if he complies with the requirements of the credit.

Secondly, under a documentary credit, the bank(issuing bank) takes on the obligation of the buyer to pay. In other words, the obligation of the bank is primary, not secondary as in the case of an ordinary suretyship. Moreover it is not in any way depended whether the bank is reimbursed by its customer or not. Nor is it effected by any problem that may arise in the relationship between the buyer and the debtor. The payment obligation of the bank is thus an independent obligation.[27] The mere presentation of required documents in due time is sufficient for the bank's payment obligation to arise. It should be recalled that the banks involved in a documentary

[25] Dalhuisen, p.463
[26] Paul Todd, **Bills of Lading and Bankers' Documentary Credits**, 3. Edition, London-Hong Kong: LLP Reference Publishing, 1998, p.20
[27] Dalhuisen, p.463

collection does not have any commitment in this sense. An other result of the documentary credit is that the seller is secured by the irrevocable undertaking of a bank to pay which is a more reliable solvent paymaster than the buyer. Thus, the credit risks relating to the buyer is eliminated by substituting the bank instead of the buyer.

An other disparity is related to the place of payment. Under a documentary collection the payment is effected in the country of the buyer, in contrast the payment is effected in the country of the seller under a documentary credit. In case of a confirmed credit, the seller gets the assurance of a second bank in his own country. The confirming bank, in addition to that of the issuing bank, undertakes to make payment to the seller, if he complies with the terms and conditions of the credit. So the seller's security is reinforced by a second bank in his country not only for the insolvency of the issuing bank but also for the settlement of disputes. In case of a dispute, he may sue the confirming bank in his own country and jurisdiction. In this context, the confirming bank saves the seller from sueing the issuing bank in a foreign country and jurisdiction.[28] By having an enforceable undertaking of a bank in his own country, the seller does not bear the transfer and currency risks.[29]

[28] Dalhuisen, p.463-464; Todd, p.23
[29] Fuat İlalan, "Akreditif ve Kullanılması", **Banka ve Ticaret Hukuku Dergisi,** Vol.5, No.3 (1970), p.567

CHAPTER I

1. DEFINITION, PROCESS AND FUNCTIONS OF THE DOCUMENTARY CREDITS

1.1. Definition and Process of Documentary Credits

In a domestic sale, the exchange of the goods and the money takes place at the same time. The buyer and the seller performs their debts reciprocally which are paying the money on the one hand and handing over the goods on the other hand. The parties do not face any problems of security, since the buyer may inspect the goods before accepting and the seller is paid immediately. The same assessment is also available for international sales in the old days of the international trade, since before the nineteenth century the buyers were calling at the foreign ports usually with a chartered vessel to buy goods from the seller who brought them alongside the port where the contract was concluded and exchange of money and the goods made. In fact this way of international trading is not different than a domestic sale since the present parties perform their debts reciprocally at the same time.[30]

In international trade of modern times the buyer and the seller are in different countries. The absence of physical existence of the parties at the same place while performing their debts, render it impossible to execute mutual consideration at the same time. Besides, the parties have little or no information about each other's trustworthiness, solvency, ability and the willingness of the other party to perform his side of the bargain.[31] This situation causes problems of security.

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[30] Todd, p.6; Banu Şit, "Kanunlar İhtilafı Hukukunda Akreditif ve Milletlerarası Ticaret Odasının Akreditife İlişkin Yeknesak Kuralları", **Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni,** No.1-2 (2001), p.76

[31] Sevgi Bozkurt, **Akreditifin Uygulanması**, 1.Edition, Ankara: Seçkin Yayıncılık San. ve Tic. A.Ş., 2006, p.18; Mustafa Cem Yeniaras, "Uluslar arası Ticarette Akreditif ve Belge Karşılığı Ödeme", **İstanbul Barosu Dergisi,** Vol.80, No.1 (January-February 2006), p.109-110; Mehmet Bahtiyar, "Akreditif ve Milletlerarası Özel Hukukta Doğurduğu Sorunlar", **Banka ve Ticaret Hukuku Dergisi,** Vol.15, No.3 (June 1990), p.73-74; Todd, p.10; Tekinalp, p.410; Erdoğan, p.23

The seller is not sure about the financial standing of the buyer. He may not be paid after dispatching the goods and getting back the goods may be diffucult and expensive. So the ideal solution for seller is to demand payment in advance. On the other hand the buyer will not wish to pay before receiving the goods which he was not able to inspect before. Moreover he has doubts whether he will receive the right quality goods. So each party have reasonable grounds to expect the performance from the other side first and not to execute his own obligation until the other side executes.[32]

The conflict of interests resulted the formation of documentary credit[33] mechanism which ensures the protection of both side's interests.[34] Before being able to explain how the security of the parties' assured, the mechanism should be summarized. The seller and his buyer agree in a sale contract that payment shall be made under a documentry credit. The buyer requests his bank(issuing bank) to issue a letter of credit for the seller. The issuing bank, having accepted the request and opened the credit, advises the credit to the seller(beneficiary) and undertakes to make payment if the terms and conditions of the credit are met.[35] But usually the bank will instruct a second bank(correspondent bank) in the country of the seller to advise the credit to the beneficiary and to pay if the necessary conditions are met. These conditions of the credit will be the documents to be tendered by the beneficiary which represents the goods that have been shipped. After receiving the advise of the credit, the beneficiary ships the goods and does whatever else is necessary to comply with the letter of credit. Then he submits the documents to the correspondent bank which will check the documents whether they comply with the terms and conditions of the credit or not. In case of the absence of the second bank, the documents should be tendered to issuing bank. If a

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[32] Arslan Kaya, **Belgeli Akreditifte Lehtarın Hukuki Durumu**, 1. Edition, İstanbul: Beta Basım Yayım Dağıtım A.Ş. 1995, p.6; Seza Reisoğlu, **Türk Hukukunda ve Bankacılık Uygulamasında Akreditif**, Ankara: Ayyıldız Matbaası A.Ş., 1995, p.4; Vahit Doğan, **Uluslar arası Ticarette Ödeme Aracı Olarak Akreditif**, 2. Edition, Ankara: Seçkin Yayıncılık San. ve Tic. A.Ş., 2005, p.37; Kemal Dayınlarlı, "Dış Ticaret İşlemlerinde Akreditif", **Yargıtay Dergisi,** Vol.16, No.3 (July 1990), p.411; Akın Ekici "Akreditifte Lehtarın Dürüstlük Kurallarına Aykırı Olarak (Fraud) Bedeli Talep Etmesi ve Bu Durumda Akreditif Bedelini İştira (İskonto) Eden Bankanın Hukuki Durumu, **Prof. Dr. Hayri Domaniç'e 80. Yaş Günü Armağanı**, Vol.1, (2001) p.159; Todd, p.10;

[33] The terms "documentary credit", "documentary letter of credit", "letter of credit", "commercial letter of credit" and "commercial credit" do all have the same meaning. See Michael Brindle, Raymond Cox, **Law of Bank Payments**, 2. Edition, London: Sweet & Maxwell, 1999, p.531, fn.1 and Raymond Jack, **Documentary Credits**, Revised 2. Edition, London: Butterworths, 1996, p.1

[34] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.3; Brindle, Raymond Cox, p.531

[35] Jack, p.3; D'archy, Murray, Cleave, p.169; Arslan Kaya, p.10; Şit, p.80

complying presentation has been made, the bank accept the documents and pays the beneficiary. Otherwise it will refuse them. In the last stage the issuing bank presents the documents to the buyer in return for payment by him. Then the buyer obtains the possession and the property of the goods, and may take the goods from the port with these documents.

Thus the seller gets the money as soon as he performs his debt. On the other hand the buyer is sure that the seller will not be paid if the conditions of the credit are not fulfilled. So both parties' interests are secured by documentary credit.

Several definitions of the documentary credit can be made. Goode, defines as "a banker's assurance of payment against presentment of specified documents"[36]. Rowe gives a similar definition: "an undertaking by one party (normally but not necessarily a bank) to pay a sum of money to another party (the beneficiary) against presentation of documents stipulated in the credit" [37] Jack states that "a documentary credit is a means of providing payment by substituting a bank for the buyer as the party which will make payment to the seller" and he further defines "in broad terms a documentary credit provides the promise by a bank of immediate or future payment against the presentation of documents to the bank or its agent, most commonly in connection with sale of goods"[38] Özel discribes the documentary credit as, bank's undertaking of payment of a sum of money to the seller according to the instructions of the buyer, if the conditions are completely met.[39] Turkish Supreme Court of Appeal defined documentary credit in its ruling in 28.02.1980 as a contract between the buyer and the bank, which aims the payment to the seller who in return presents specified documents.[40]

According to Art.2 of UCP600; "credit means any arrangement, however named or described, that is irrecovable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation", where "Honour means: a. to pay at

[36] Roy Goode, **Commercial Law**, 3. Edition, London: Penguin Boks, 2004, p.952
[37] Michael Rowe, **Letters of Credit**, London: Euromoney Publications PLC, 1987, p.5
[38] Jack, p.2
[39] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*; p.13
[40] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif,* p.5, and fn.8 thereof

sight if the credit is available by sight payment. b. to incur a deferred payment undertaking and pay at maturity if the credit is available by deferred payment. c. to accept a bill of exchange ("draft") drawn by the beneficiary and pay at maturity if the credit is available by acceptance."

1.2. Functions of The Documentary Credits

Documentary credits have three functions, namely; security function, payment function and the credit function.

1.2.1.Security Function

The security function is available for both of the parties of the underlying contract.[41] The beneficiary is secured by the documentary credits since he gets an assurance of a bank to pay him. He is sure that if he makes a complying presentation, he will be paid.[42]The undertaking of the bank is irrespective of the buyer's solvency and his will to perform his debt.

Moreover the seller's position is strengthened by the concepts of abstractness or independence of the documentary credits. According to that leading feature of the documentary credits, a credit is a separate, independent transaction from the underlying contract. The undertaking of the bank to pay is not subject to claims or defences resulting from the relations of the buyer with the seller. This means that the bank can not abstain from paying the beneficiary by asserting any claims stemming from the underlying contract. So the beneficiary is aware that if he presents the required documents, the payment will be made by the bank.[43]

The buyer's security is provided by the fact that the beneficiary is not paid until he complies with the terms and conditions of the credit. The prerequisite of payment for

[41] Arslan Kaya, p.30; Doğan, p.39; Tekinalp, p.419
[42] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.14; Dayınlarlı, p.407-408, 412
[43] Doğan, p.40

the beneficiary is to present the documents to the bank which shows that the beneficiary has performed his side of bargain. So the buyer is sure that the beneficiary will not be paid before he performes his own commitment.[44]

It is stated that the performance of documentary credit its security function for the buyer depends on two conditions. First the documents, which sufficiently indicate that the seller has performed his debt, should be determined appropriately. Since the banks deal only with the documents and the banks decide to accept and pay only by examining them, the documents should be able to proove that the beneficiary has performed his obligation as accepted in the underlying contract. Secondly the bank should examine the documents with reasonable care, in accordance with the principle of strict compliance whether they comply with the credit or not.[45] The authors rightly state that the security function of the documentary credit is more limited for the buyer than to seller. The banks examine the documents on their face and there may be a falsification on the documents. For that reason, despite the presentation of ostensible complying documents, the goods may be defective or nonquality goods may have been shipped.[46]

1.2.2. Payment Function

The documentary credit functions as a payment means in international trade. The parties of the underlying contract agree that payment will be made via a letter of credit. The agreement charges the buyer to open a letter of credit in favour of the seller. [47] The opening of the credit is carried out with the aim of performancing the debt unless otherwise agreed between the parties. As a rule, by just procuring the openening of the credit in accordance with the underlying contract, the buyer does not discharge his payment obligation. In other words the act of opening a credit is not the absolute payment of the debt. The buyer's payment obligation is discharged only upon actual payment of the money to the seller. [48]

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[44] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.14; Dayınlarlı, p.408,412
[45] Tekinalp, p.419-423; Doğan, p.41; Arslan Kaya, p.31
[46] Arslan Kaya, p.31; Yeniaras, p.110
[47] Doğan, p.42
[48] Tekinalp, p.424; Arslan Kaya, p.32; Doğan, p.42; Yeniaras, p.109; Bozkurt, p.19

The documentary credit substitutes the bank instead of the buyer as debtor. By agreeing to be paid by the way of a documentary credit, the seller accepts that he will look first to the bank for payment of the purchase price. He can not by-pass the credit and demand payment from the buyer.[49] If the bank fails to pay, then he can recourse to the buyer. The payment of the bank to the seller extinguishes the bank's undertaking stemming from the credit and also the buyer's debt stemming from the underlying sale contract.[50]

1.2.3. Credit Function

Although its name resembles credit, it is accepted that documentary credit is not a credit in financial sense. It is just a means of payment in international trade.[51] In the normal course of the transaction the applicant deposits the necessary funds in the bank to have the credit opened. But the bank may agree to open a credit to its customer for the financing of the transaction in return for the pledging of the documents to the bank. Doğan claims that although the existence of the economic relation between the financial credit and the documentary credit, there is no legal relation and still the documentary credit does not function as a credit.[52] Tekinalp, agreeing with Doğan, states that exceptionally documentary credit may provide security for financial credit.[53]

Although the documentary credits can not be accepted as a financial credit, it should not be overlooked that, besides its actual function as to payment, documentary credits may serve as a credit in the financial means of the word in various ways for both of the parties. In case of the deferred payment or in case of the parties' agrement to make the payment by a time draft, the buyer is granted a credit by the seller until the maturity date. Besides the issuing bank may issue a documentary credit without being

[49] Brindle, Cox, p.555; Tekinalp, p.424-425; Arslan Kaya, p.32; Doğan, p.42-43
[50] Doğan, p.43
[51] Reisoğlu, Seza, "Hukuki Açıdan Akreditif ve Uygulama Sorunları", **Bankacılar Dergisi**. No.52 (2005), p.40; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.6; Tekinalp, p.425; Arslan Kaya, p.32; Doğan, p.43
[52] Doğan, p.43
[53] Tekinalp, p.425

deposited the necessary funds by the applicant for the financing of the transaction in return for the pledging of the documents. In this case the documentary credit provide security for financial credit. [54]

On the other hand, the opening of a red clause or green clause credits enables the beneficiary to draw the credit in part or wholly before he ships the goods and present the documents to the bank. This constitutes a credit granted to the beneficiary. Again in transferable credits, the seller pays his supplier by transfering the credit. So that his sale contract with the supplier is financed. If the letter of credit is not transferable, then the seller may request his bank to open a documentary credit in favour of his supplier on the security of the first credit or he may request so, using the credit already opened in his favour as a counter. The seller pays his supplier with the second credit without having to deposit the funds to his bank. These are all ways of providing credit to the seller. [55]

[54] Arslan Kaya, p.33; Tekinalp, p.425; Bozkurt, p.20; Erdoğan, p.25
[55] Jack, p.31; Tekinalp, p.425-426; Bozkurt, p.20; Arslan Kaya, p.33

2. THE PARTIES OF A DOCUMENTARY CREDIT

Three parties take a part in documentary credits, namely; applicant, issuing bank and the beneficiary. But usually a documentary credit will include a fourth party, correspondent bank whose services are utilised by the issuing bank, in the country of the beneficiary.

Art.2 of the UCP600 envisaged that a bank could issue a credit "on its own behalf". In such a case, the titles of applicant and issuing bank merge on the bank[56] and it will result the transaction to become a relationship between two parties.

2.1. Applicant

The applicant of the credit is the buyer of the underlying sale contract. In other words he is the importer of goods, who arranges the opening of the credit. Art. 2 of the UCP600 defines applicant as "the party on whose request the credit is issued". After the buyer and the seller agree in the sale contract that the purchase price will be paid by a documentary credit, the buyer instructs his bank to open a credit in favour of the seller (beneficiary) in accordance with the underlying sale contract.[57]

To discharge his duty to open a credit arising from the underlying contract with seller, the buyer applies to a bank to issue the credit. He either deposits the funds to the bank or authorizes the bank to debit his account, depending on the agreement with his bank.[58] As mentioned earlier, in the latter case the transaction is financed by the bank.

2.2. Issuing Bank

[56] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.6
[57] Brindle, Cox, p.532; D'Archy, Murray, Cleave, p.169; Jack, p.3; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.22; Doğan,p.44; Aydos, p.23; Bahtiyar, p.75
[58] Jack, p.64; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.22-23

The bank which is requested by the applicant to open a letter of credit is referred to as the "issuing bank".[59] The UCP600 defines the issuing bank in Art.2 as, "the bank that issues a credit at the request of an applicant or on its own behalf." The applicant is the customer of the bank which is usually in the country of the applicant.

Following the acceptance of the applicant's instructions, the issuing bank arranges a credit in accordance with those instructions.[60] It, either itself or usually by instructing to a correspondent bank, advises the credit to the beneficiary.

The issuing bank is the debtor of the credit[61] since, it undertakes to honour the credit, if the stipulated documents are presented and that they constitute a complying presentation. According to art.7.b., it is irrecovably bound to honour as of the time it issues the credit. Thus, once the credit is issued, the issuing bank is under a payment obligation which can not be amended or revoked by it unilaterally.

2.3. Beneficiary

The beneficiary is the seller of the underlying sale contract, to whom the credit is adressed.[62] He is the exporter of the goods purchased by the applicant. UCP600 defines the beneficiary in art.2 as "the party in whose favour the credit is issued"

After he receives the advise of the credit duly opened, he ships the goods and presents the required documents to the bank. In order to be paid he has to make a complying presentation. Otherwise the bank will refuse to take his documents and to honour the credit.

2.4. Correspondent Bank

[59] Jack, p.3
[60] Jack, p.68
[61] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.23
[62] Jack, p.3

Since the documentary credits are generally used to finance international trade, the issuing bank is in a different country to the beneficiary. Although it is possible that the issuing bank may directly deal with the beneficiary, usually it will utilise the services of an other bank in the country of the beneficiary which is called the correspondent bank.[63] Correspondent bank is a general name of the second bank which is instructed by the issuing bank to act on its behalf in relation to a documentary credit.[64] The correspondent bank may be a branch of the issuing bank in the country of the beneficiary. It should be noted that according to art.3, "branches of a bank in different countries are considered to be seperate banks."

The correspondent bank's role will depend on the instructions accepted by it from the issuing bank. It may function as an advising bank, nominated bank or confirming bank in a documentary credit process. [65]

2.4.1. Advising Bank

The issuing bank may instruct the correspondent bank only to advise the opening of the credit and its terms to the beneficiary. Unless the advising bank adds its confirmation, it does not undertake any obligation in respect of payment.[66] Art.9.a. of the UCP600 states that; "an advising bank that is not a comforming bank advises the credit and any amendment without any undertaking to honour or negotiate." In such a case the correspondent bank does not play any further role in the credit transaction. Its sole function is advising the credit to the beneficiary. It is accepted that there is not a contractual relationship between the advising bank which acts as the agent of the issuing bank, and the beneficiary.[67]

Art.9 of the UCP600 frames the liability of the advising bank. According to the article, the advising bank may elect not to advise the credit to the beneficiary. In such a

[63] Jack, p.114
[64] Bozkurt, p.124; Brindle, Cox, p.563;
[65] Jack, p.114-115; Brindle, Cox, p.563; Bozkurt, p.124; Yeniaras, p.120
[66] Jack, p.115; Reisoğlu, *Hukuki Açıdan Akreditif ve Uygulama Sorunları*, p.47; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.23; Doğan, p.225-226; Arslan Kaya, p.81-82
[67] Arslan Kaya, p.82-83; Bozkurt, p.125; Doğan, p.225-226; Tekinalp, p.449-450; Yeniaras, p.121

case it must inform without delay the bank from which the credit advice has been received. Otherwise it will be liable for damages which the issuing bank may incur.[68] If it elects to advise the credit, it must check the apparent authenticity of the credit, that is whether it appears to be genuine or not and it must satisfy itself that the advice accurately reflects the terms and the conditions of the credit received. If the authenticity of the credit can not be established, the advising bank must inform without delay the bank from which the instructions appear to have been received or in case it elects to advise the credit, it must inform the beneficiary that it has not been able to satisfy itself as to the apparent authenticity of the credit or the advice. It is accepted that the provision assigns the bank the duty to check the authenticity of the signature under the credit or the code of credit in case of communication of the credit by a telex or telegraph. The bank should also investigate if the apparent issuing bank does really exist and whether the credit contains the necessary terms of a credit.[69] Although there is not a contractual relationship between the advising bank and the beneficiary, the advising bank is liable in case the credit, which it advised, turns out not to be genuine, if it was negligent in checking out the authenticity of the instructions.[70]

Since the advising bank acts as the agent of the issuing bank, it will bind the issuing bank even though it deviates from its instructions in advising the credit.[71] As a result of that, the issuing bank will have to honour the credit as advised. But after paying the beneficiary it may recourse the advising bank for breach of the attorney contract between them.[72] However the issuing bank will not be bound if the beneficiary knows that the credit advised by the advising bank differs from the instructions of the issuing bank.[73]

A bank utilizing the services of an advising bank to advise a credit must use the same bank to advise any amendment of the credit. In fact art.9 makes no distinction

[68] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif,* p.155
[69] Arslan Kaya, p.13; Doğan, p.54
[70] Ünal Somuncuoğlu, "Akreditif İşleminde Özellikle Türk İhracat Mevzuatı Açısından Yerel (Aracı) Bankaların İhracatçı Karşısındaki Hukuksal Durumu ve Sorumlulukları", **Banka ve Ticaret Hukuku Dergisi,** Vol.12, No.1 (1983), p.55; Jack, p.117
[71] Jack, p.116; Brindle, Cox, p.564
[72] Jack, p.116
[73] Brindle, Cox, p.564

between the advising of a credit and amendment. So the same liability of the advising bank is available for the advise of the amendments.

Since the advising bank is not authorised to examine and determine the documents, whether or not they constitute a complying presentation, submission of the required documents to the advising bank will not be regarded as presentation in due time. The documents must be received by the issuing bank on or before the last day for presentation, in order to constitute a complying presentation.[74]

2.4.2. Nominated Bank

The issuing bank may authorise the correspondent bank to pay, to incur a deferred payment undertaking, to accept drafts or to negotiate drafts and/or documents presented by the beneficiary under the credit.[75] In case the correspondent bank fulfills one of those duties, it is referred as nominated bank. UCP600 defines nominated bank as; "the bank with which the credit is available or any bank in the case of a credit available with any bank." According to art.6.a. which specifies, " a credit must state the bank with which it is available or whether it is available with any bank", all credits must designate a nominated bank or any bank is a nominated bank in a freely available credit. If a credit does not designate any nominated bank, then the credit is available with the issuing bank only.[76] A credit available with a nominated bank is also available with the issuing bank.

The nominated bank and the advising bank may be the same bank as is the case in usual. In this case the nominated bank will also function as an advising bank being subject to above mentioned art.9.[77]

[74] Arslan Kaya, p.82; Yeniaras, p.121
[75] Brindle, Cox, p.564,571; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.172; Bozkurt, p.125-126
[76] Özalp, p.233
[77] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.172

The nominated bank is not under any obligation to honour or negotiate, unless it confirmed the credit. Art. 12.a. state precisely; "unless a nominated bank is the confirming bank, an authorization to honour or negotiate does not impose any obligation on that nominated bank to honour ot negotiate…" The nominated bank is just authorized (not obliged) to honour or negotiate. It does not undertake any obligation against the beneficiary. It pays as the agent and on behalf of the issuing or confirming bank which has undertaken that payment will be made.[78] Even if the beneficiary presents the stipulated documents to the nominated bank and that nominated bank refuses to pay against a complying presentation, the beneficiary can not force it to pay. The seller's only claim is against the issuing bank which undertook to pay.[79] UCP goes one step further in art.12.c. which states; "receipt or rexamination and forwarding of documents by a nominated bank that is not a confirming bank does not make that nominated bank liable to honour or negotiate, nor does it constitute honour or negotiation."

Art. 12.b. is a novelty of the UCP600. It states that; "by nominating a bank to accept a draft or incur a deferred payment undertaking, an issuing bank authorizes that nominated bank to prepay or purchase a draft accepted or a deferred payment undertaking incurred by that nominated bank." Before the implementation of UCP600, to be able to discount deferred payment undertakings, the correspondent banks must have been authorized by the credit to discount or they were seeking authorization from the issuing bank to discount.[80] Otherwise they used to bear the risks of discounting before the date of maturity.

The salient example is the case of *Banco Santander SA v. Bayfern Limited.*[81] The facts of the case: "A letter of credit was issued by Paribas Bank in favour of Bayfern Ltd. The letter of credit was advised and confirmed by Banco Santander. The maturity date of the letter of credit was 27 November 1998. As between Paribas and Santander, the former undertook "at maturity ... to cover Santander in accordance with

[78] Jack, p.120
[79] Brindle, Cox, p.572
[80] Özalp, p.281
[81] [1999] All E.R. 586

their instructions". Bayfern then requested Santander to discount the letter of credit before the date of maturity. Santander agreed to the early discounting. Documents were presented to Santander; payment followed on 17 June 1998 and the documents were subsequently transmitted to Paribas. On 24 June 1998 Paribas advised Santander that the documents supplied "should be considered to be false" and that payment would be withheld. Banco Santander sought reimbursement from Paribas." [82]

The court had to decide whether the issuing bank was liable to reimburse the correspondent bank under a deferred payment credit where the correspondent bank had discounted the credit prior to maturity and banks became aware of the fraud of the beneficiary before the maturity date.[83] The court held that the issuing bank authorized the correspondent bank to pay at maturity. Thus the right of the correspondent bank to reimbursement arises when payment is made at maturity, not before. If the credit had not been discounted early, since the banks became aware of the fraud, the correspondent bank would not discount the credit at maturity date and there would not be any duty of the issuing bank to reimburse it. So the correspondent bank was not entitled to reimbursement. As a result the correspondent bank bored the risk of discounting the deferred payment credit before the maturity date, in the absence of an authorization to discount. [84]

The new art. 12.b. of the UCP600 presupposes that by nominating a correspondent bank to accept a draft or incur a deferred payment undertaking, the issuing bank authorizes that nominated bank to prepay or purchase a draft or deferred payment undertaking.

Although the issuing bank's authorization to honour or negotiate does not impose an obligation on the nominated bank, which is not a confirming bank, to honour or negotiate, the nominated bank may expressly agree to honour or negotiate and so

[82] J.C.T. Chuah, "Briefings – Early Discounting of Letter of Credit And The Risk of Fraud", 2000, Kingston Law School,http://www.rowansbank.co.uk/itfl07/Fraud/Banco_Santander_Article.rtf (10 July 2007), p.1
[83] Brindle, Cox, p.565
[84] Chuah, p.2; Ekici, *Akreditifte Lehtarın Dürüstlük Kurallarına Aykırı Olarak (Fraud) Bedeli Talep Etmesi ve Bu Durumda Akreditif Bedelini İştira (İskonto) Eden Bankanın Hukuki Durumu*, p.172-173

communicate to beneficiary. This possibility was envisaged in art 12.a. It should be noted that the issuing bank does not instruct or request the nominated bank to add its confirmation. The nominated bank undertakes the beneficiary to honour or negotiate, in return for comission from him, in case a complying presentation is made.[85] It is a valid contractual relation between the nominated bank and the beneficiary which is called silent confirmation.[86] Reisoğlu states that silent confirmation is a kind of a guarantee given to beneficiary, in case of nonperformance of the issuing bank.[87]

Art. 6.d.ii. declares that; "the place of the bank with which the credit is available is the place for presentation." If the article is read in conjunction with art.14.a., it is seen that it is also the nominated bank's duty to examine the documents presented, contary to advising bank. A nominated bank shall have a maximum of five banking days following the day of presentation to determine if a presentation is complying. So the beneficiary will discharge his debt by tendering the required documents to the nominated bank on or before the last day for presentation, irrespective of the arrival date of the documents to the issuing bank.[88] It is appropriately noted that, although the nominated bank's duties are the same with those of the issuing bank and the confirming bank in the context of examining the documents, the results of failure of the nominated bank in performing its duties, are not stated expressly.[89]

If the nominated bank honours or negotiates the credit, then it is entitled to reimbursement by the issuing bank or the confirming bank. The reimbursement is usually effected by the issuing bank direct to the correspondent bank. But sometimes the credit may state that the reimbursement will be provided via a third bank which is called reimbursing bank. In that case the nominated bank which honoured or negotiated the credit, will look first to the reimbursing bank for reimbursement. In case it does not reimburse the nominated bank on first demand in accordance with the terms and conditions of the credit, issuing bank is responsible for the reimbursement ultimately.[90]

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[85] Goode, p.959
[86] Özalp, p.26
[87] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.170-171
[88] Bozkurt, p.126
[89] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.173, Bozkurt, p.127
[90] Brindle, Cox, p.565; Bozkurt, p.127

Reimbursement under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity.

2.4.3. Confirming Bank

An issuing bank may authorize or request the correspondent bank to add its confirmation to the credit. If the correspondent bank adds its confirmation to the credit, then it constitutes a direct, independent, irrecovable undertaking of that bank to honour or negotiate the credit in case the required documents are presented in the required time. UCP600 defines confirming bank as "the bank that adds its confirmation to a credit upon the issuing bank's authorization or request." where "confirmation means a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honour or negotiate a complying presentation." Similar to the irrecovable undertaking of the issuing bank, a confirming bank is irrevocably bound to honour or negotiate as of the time it adds its confirmation to the credit, according to art.8.b.[91] Thus the undertaking of the issuing bank is reinforced by the seperate, independent undertaking of the confirming bank.[92] The undertaking of the confirming bank is enforceable independently of the position taken by the issuing bank. So even if the confirming bank can not obtain reimbursement from the issuing bank or the issuing bank's liquidation before rembursing the confirming bank or its insolvency will not effect on the obligation of the confirming bank to honour or negotiate.[93]

The inclusion of a confirming bank in the documentary credit process make the beneficiary's position more adventageous. Since the issuing bank is usually in the country of the applicant, the beneficiary may face with the possibility of having to settle disputes in a foreign country in case any problems arise. In such a case he will encounter uncertainities of litigating abroad and incure more expenses.[94] On the other

[91] Art.7.b: "An issuing bank is irrecovably bound to honour as of the time it issues the credit."
[92] Goode, p.957; D'archy, Murray, Cleave, p.197; Reisoğlu, *Hukuki Açıdan Akreditif ve Uygulama Sorunları*, p.49; Bozkurt, p.35; Arslan Kaya, p.86-87; Doğan, p.230; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.159; Yeniaras, p.124; Ekici, *Akreditifte Lehtarın Dürüstlük Kurallarına Aykırı Olarak (Fraud) Bedeli Talep Etmesi ve Bu Durumda Akreditif Bedelini İştira (İskonto) Eden Bankanın Hukuki Durumu,* p.163-164
[93] Todd, p.22-23; Arslan Kaya, p.87
[94] Todd, p.22

hand the confirming bank will probably be in his own country and in case of any disputes he will sue confirming bank in his domestic courts. Besides he may not have much knowledge about the solvency of the issuing bank which is domiciled abroad and he would like to have the guaratee of a domestic bank whose standing is reliable to him. So he is also protected against the insolvency of the issuing bank.[95]

A bank authorized or requested to confirm may not be prepared to do so. In that case it must inform the issuing bank without delay and may advise the credit without confirmation, according to art.8.d.

In art.8 of the UCP600 the undertaking of the conforming bank is worded very similar to that of the issuing bank. According to the article the undertaking of the confirming bank is dependent on the presentation of stipulated documents, which is complying, to the confirming bank or to any other nominated bank.[96] Upon the making of the complying presentation; the confirming bank must honour the credit, even if the credit is available with a nominated bank and that nominated bank does not honour or negotiate, or the confirming bank must negotiate, without recourse, if the credit is available by negotiation with the confirming bank. It is stated that only the right to recourse relating to drafts is abandoned; not the right to recourse stemming from the defects on the part of the beneficiary under the credit which entitles the bank to demand back the sum paid.[97]

The duties which were assigned by the UCP600 in relation to examination of documents are available also for the confirming bank. So the confirming bank also have a maximum of five banking days following the day of presentation to determine if a presentation is complying.

An other duty assigned to the confirming bank is stated in art.8 c.; “a confirming bank undertakes to reimburse another nominated bank that has honoured or negotiated a

[95] Todd, p.23
[96] Bozkurt, p.128; Yeniaras, p.124
[97] Arslan Kaya, p.89

complying presentation and forwarded the documents to the confirming bank." As mentioned above the nominated bank pays as the agent of the issuing bank and the confirming bank, and on their behalf. For that reason, depending on the case, one of these undertaking banks must reimburse the nominated bank which honoured or negotiated the credit. On the other hand, the confirming bank itself, which has paid the seller in accordance with the terms of the credit, is entitled to reimbursement from the issuing bank.[98]

Since both the issuing bank and the confirming bank undertakes seperately to pay the beneficiary, it was debated in the doctrine, from which of these banks the beneficiary should demand payment in the first step. The question may be asked as such, whether one of these banks' liability to payment is primary. Two views were put forward about the issue. According to the first view, the banks are jointly liable for payment. So the beneficiary can apply to any of the banks, which one he prefers to.[99] Tekinalp states that joint liability of the banks is accepted also in Swiss and German laws.[100] The second view contends that the beneficiary should recourse to the confirming bank first. In case the confirming bank does not pay the beneficiary, he can demand payment from the issuing bank.[101] Turkish Supreme Court of Appeals ruled in favour of the second view in its varios decisions.[102]

In practice there will not be a significant problem. Since the art.6.a. orders so, the credit will state the bank with which it is available.[103] Although it may be otherwise, usually it will be the confirming bank which is in the country of the beneficiary. Besides, the beneficiary will be inclined to demand payment from the confirming bank in his country, instead of applying to issuing bank abroad. The UCP600 seems to terminate the debate via the second sentence of the art.6.a. which states; " a credit

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[98] D'archy, Murray, Cleave, p.476
[99] Doğan, p.233; Tekinalp, p.453; Yeniaras, p.124; Dayınlarlı, p.410; Bedii Eğilmezler, "Akreditif", **Adalet Dergisi**, No.5-6 (May-June 1965) p.643
[100] Tekinalp, p.451
[101] Arslan Kaya, p.88; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.165; Bozkurt, p.128; Yeniaras, p.124
[102] 19.HD. 17.6.1999T, 1994E., 4228K. Doğan, p.233, and fn.123; 12.HD. 4.11.2000T, 16851E., 17397K. Bozkurt, p.128-129 and fn.134
[103] Arslan Kaya, p.88

available with a nominated bank is also available with the issuing bank." So although a credit assigns a nominated bank with which the credit is available, the beneficiary will be able to recourse to the issuing bank for payment. It seems that UCP600 adopted the first view.

2.5. Reimbursing Bank

Art.7.c. obliges an issuing bank to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. The same obligation for the confirming bank is envisaged with a similar wording in the art.8.c. Reimbursement will usually be effected by the issuing bank direct to the nominated bank.[104] But in some cases the issuing bank may instruct the nominated bank in the credit to reimburse itself from a third bank. In this case the nominated bank which honoured or negotiated will demand reimbursement from that reimbursing bank. Payment by the reimbursing bank will be made against the demand of the nominated bank without the reimbursing bank's examination of the documents whether they comply with the credit or not. The role of the reimbursing bank is limited to make payment against on the first demand. It is not relevant whether the documents comply with the credit or not. Furthermore UCP 13.b.ii. prohibits to require the nominating bank to supply reimbursing bank with a certificate of compliance with the terms and conditions of the credit.

If the credit provides that the reimbursement will be obtained by the nominated bank from a third bank, the credit must state if the credit is subject to ICC rules for bank-to-bank reimbursements in effect on the date of issuance of the credit. These rules are the Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits (hereafter URR525) which is in effect since 1 July 1996.[105] If the credit does not state that reimbursement is subject to ICC rules for bank-to-bank reimbursements then art.13.b. will apply.

[104] Jack, p.126
[105] Özalp, p.283-284

The issuing bank must assign a reimbursing bank in the credit and it must provide that reimbursing bank with a reimbursement authorization in good time that conforms with the availability stated in the credit. That reimbursement authorization should not be subject to an expiry date, according to the art.13.b.i.

There is not a contractual relationship between the nominated bank and the reimbursing bank. The undertaking of the reimbursing bank to ensure reimbursement is against the issuing bank, not against the nominated bank. So the reimbursing bank may refuse to pay the nominated bank and the nominated bank can not force it to pay. In that case it will be liable for breach of the contract between the issuing bank and itself.[106] Art. 13.c.states that; "an issuing bank is not relieved of any of its obligations to provide reimbursement if reimbursement is not made by a reimbursing bank on first demand." The ultimate responsibility to pay the nominated bank falls on the issuing bank in case the reimbursement is not made by the reimbursing bank. Moreover, it will be responsible for any loss of interest, together with any expenses incurred, if reimbursement is not provided on first demand by a reimbursing bank.

Art.13.b.iv. sets out the charges of the reimbursing bank which are for the account of the issuing bank. If the charges are for the account of the beneficiary, the issuing bank will indicate so in the credit and in the reimbursement authorization. In this case the charges shall be deducted from the amount, when reimbursement is made. In case reimbursement is not made, the charges will remain the obligation of the issuing bank.

Since the reimbursement is made by the reimbursing bank before the isuing bank is able to examine the documents, it may be that the nominated bank may have honoured the credit against noncomplying documents. This will likely to happen in sight payment credits, since the nominated bank immediately demands payment from the reimbursing bank, before the issuing bank receives the documents.[107] In such a case, for the reason that the reimbursing bank reimburses the nominated bank on behalf the

[106] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.177-178
[107] Jack, p.126

issuing bank, it will be for the issuing bank -not the reimbursing bank- to recover the sum paid to the nominated bank.[108]

[108] Jack, p.127, Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif,* p.179

3. FUNDAMENTAL PRINCIPLES OF DOCUMENTARY CREDITS

3.1. Autonomy of the Credit

In the wide sense of the word, the documentary credit involves all relations between the parties, namely; the underlying sale contract between the buyer and the seller, the contract between the buyer and the issuing bank, the contract between the issuing bank and the correspondent bank, if any, and the contract between the issuing bank and the beneficiary. In case of a confirmed credit, apart from these, an other contract comes into being between the confirming bank and the beneficiary. In the narrow sense of the word, the credit connotes the contract between the issuing bank and the beneficiary.[109] Under this heading, the credit should be understood in the latter meaning.

The documentary credit functions as an abstract payment obligation of the issuing bank independent of the underlying contract of sale between the seller and the buyer and from the seperate contract between the buyer and the issuing bank. In particular the credit is seperate and independent of the underlying transaction giving rise to it.[110] The conditions of the bank's duty to pay are to be founded exclusively in the terms of the credit and, the right and the duty to make payment do not in any way depend on performance by the seller of his obligations under the contract of sale. So any dispute that may exist between the seller and the buyer in respect of the contract of sale which brought the documentary credit into existence will not affect the credit. Therefore, a breach of the seller under the contract of sale, such as shipment of goods which fail to correspond to the contract description or which are of unsatisfactory quality, does not entitle the buyer to instruct the bank to withold payment under the credit, if the terms of the credit have been fully complied with. The only condition of beneficiary's entilement to be paid is that he must conform to the terms of the credit. In

[109] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif,* p.56; Todd, p.24-25; Şit, p.81-82
[110] Goode, p.971; Jack, p17; D'archy, Murray, Cleave, p.170; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.16; Bozkurt, p.5; Arslan Kaya, p.107; Şit, p.82

other words, by the autonomy of the credit is meant the principle that documents presented under a credit are to be considered in the context of the credit alone and without reference to the underlying contract between the applicant for the credit and the beneficiary, or to other facts.[111] The priciple was expressed in the decision of *Power Curber International Ltd. v. National Bank of Kuwait* as such: [112]

> "It is vital that every bank which issues a letter of credit should honour its obligation. The bank is in no way concerned with any dispute that the buyer may have with the seller. The buyer may say that the goods are not up to contract. Neverthless the bank must honour its obligations. The buyer may say that he has a cross-claim in a large amount. Still the bank must honour its obligations."

Similarly, it was held in *Hamzeh Malas and Sons v. British Imex Industries*; [113]

> "…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, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not…"[114]

The autonomy principle is worded in art. 4.a. under the heading of Credits v. Contracts:

> "A credit by its nature is a seperate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.

[111] Carr, p.478; Goode, p.971-972; Jack, p.208; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.57-58; Şit, p.82
[112] [1981] 1 W.L.R. 1233, [1981] 3 All E.R. 607, [1981] 2 Lloyd's Rep. 394, [1981] Com. L.R. 224
[113] [1958] 2 Q. B. 127, [1958] 2 W.L.R. 100, [1958] 1 All E.R. 262;
[114] Carr, p.478

A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank."

The result of the principle is that, the above mentioned contracts under a documentary credit is strictly seperated. Therefore the issuing bank will not be able to plead any defence arising from its relationship with the buyer or from the relationship between the buyer and the beneficiary against the claims under the credit. So the bank can not get out of its obligation by pointing out the low quality of the goods or that it had not been put in the necessary funds by the applicant. Again the applicant can not instruct the issuing bank not to pay the beneficiary or to discount the amount on the grounds of shipment of defective goods. The issuing bank may open a credit different than that it agreed to issue or it may pay against nonconfirming documents. In such a case the applicant may have claim against the bank under the attorney contract made between him and the bank. In relation to low quality or defective goods, he will claim his rights against the seller under the sale contract. So he is not able to interfere into the process of the credit which he is not a party. Similarly the beneficiary can not avail itself of the relationship between the applicant and the issuing bank. In practice the application of the last sentence of the provision arises in cases where the applicant contracts with his bank for the opening of a credit in favour of the seller but the bank does not issue the credit and notify it to the seller. In such a case the beneficiary can not force the bank to open the credit.[115]

The banks evaluate the demand of the beneficiary under the credit solely according to the terms of the credit. Even if any reference is made to the underlying sale contract in the credit, the banks are not concerned or bound with it. To prevent the disputes that may arise, while opening a credit, the issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like, according to the art. 4.c. Any

[115] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.58-59; Reisoğlu, *Hukuki Açıdan Akreditif ve Uygulama Sorunları*, p.41-42; Tekinalp, p.455; Ekici, *Akreditifte Lehtarın Dürüstlük Kurallarına Aykırı Olarak (Fraud) Bedeli Talep Etmesi ve Bu Durumda Akreditif Bedelini İştira (İskonto) Eden Bankanın Hukuki Durumu* p.165

extraneous matter or fact will be disregarded by the bank. If the applicant is willing any condition to be fulfilled, he should spell out the document indicating that the condition has been fulfilled in the credit.

Buyers often seek an injunction from the courts to stop the banks from paying when they are not satisfied with the goods. The courts, after expressing the autonomy principle of the credits as mentioned above, decline any attempts by buyers to invoke breaches of the sale contract to prevent payment under the documentary credits.[116] In the case of *Discount Records Ltd. v. Barclays Bank Ltd.*[117] the buyer who on the delivery of the cargo, discovered that some of the boxes were empty, while others contained cassettes rather than records, applied for an injunction. It was held that; the banker's obligation to pay under the credit was seperate from the contract of sale, and the court could intervene only if a sufficiently grave cause was shown.

The exception of the principle arises in case of the fraud of the beneficiary which will be discussed under an other heading.

3.2. Banks Deal With Documents, Not With Goods

This second cardinal principle of documentary credits is closely related with and a complementary or a part of the above mentioned autonomy principal. According to this principal, the obligations of the banks are in respect of the documents, not in respect of the goods. The bank which operates a credit is concerned only with whether the documents tendered by the seller correspond to the terms of the credit. If the documents presented to the bank appear to be in order, then the bank is both entitled and obliged to pay. As long as the documents are in order, the banks can not get out of their obligations by pointing to defective goods. The banks are not interested in anything apart from that whether the documents conform on their face to the credit requirements. The banks are

[116] Goode, p.972
[117] [1975] 1 W.L.R. 315, [1975] 1 All E.R. 1071, [1975] 1 Lloyd's Rep. 444, (1975) 119 S.J. 133

interested neither in the condition of the goods, nor in whether the seller or the buyer is in breach of the sale contract.[118]

The principle is enshrined under the heading of *Documents v. Goods, Services or Performance* in the art.5 of the UCP600 as follows; "*Banks deal with documents and not with goods, services or performance to which the documents may relate.*"

In the case of *United City Merchants v. Royal Bank of Canada*,[119] it was held that:

> "If, on their face, the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, the bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents is alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of goods to which the documents appear on their face to relate, that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price."

A documentary credit is a transaction in documents and documents alone.[120] The bank to whom the documents are presented has neither the facility nor the responsibility for verifying the physical state or even the existence of the goods or any other facts external to the documents. Under documentary credits, banks have no responsibility for anything other than the conformity of the documents to the credit. Moreover, apart from the irresponsibility for the quantity, quality, condition, value and existence of the goods, banks assume no liability for the accuracy, authenticity and genuineness of the documents. The duty of the bank is to determine, on the basis of documents alone,

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[118] D'archy, Murray, Cleave, p.170; Goode, p.974; Carr, p.478; Todd, p.194; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.16-17; Bozkurt, 5-6; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.59; Arslan Kaya, p.107; Şit, p.83; Orhan Gülen, "Akreditif Amirlerinin Riayet Etmeleri Gereken Bazı Hususlar", **Banka**, No.27-28 (1956), p.35

[119] [1982] Q.B. 208, [1981] 3 W.L.R. 242, [1981] 3 All E.R. 142, [1981] 1 Lloyd's Rep. 604, [1981] Com. L.R. 98, (1981) 125 S.J. 413

[120] Jack, p.17

whether or not the documents appear on their face to constitute a complying presenation. If they do, the bank has to pay the beneficiary. [121] Even if the beneficiary proves the bank that he has fulfilled his obligations and did whatever is required under the sale contract, the bank is obliged to refuse nonconforming documents. Or vice versa, even if the bank is aware that the beneficiary is in breach of the underlying contract, it has to honour if the documents on their face comply with the terms and conditions of the credit.[122]

As stated earlier, these principles set out in art. 4 and 5, are so closely connected that they can not be treated independently.[123] The documentary and autonomous characters of credit transaction is essential to the continuance of the documentary credit system as the primary, secure means of payment in international trade.[124] Interference of courts to the process of credits by granting injunctions upon the buyers revocation of claims arising from the underlying contracts, would detract from the value of documentary credits, since the seller agrees to be paid by a credit, keeping in mind that he will have assurance of a reliable solvent paymaster who will honour the credit irrespective of any disputes that may arise, provided that he presents complying documents.

3.3. Fraud Exception

While under the principle of the autonomy of the credit, the bank's duty to pay is not in general affected by matters relating to the underlying transaction, there are exceptional cases in which the bank is entitled and obliged to his customer buyer to withold payment.[125] Fraud on the part of the beneficiary, is the exception of the autonomy of the credit where the bank has to refuse to honour the undertaking which it has given the beneficiary according to the terms of the credit. In other words, fraud ensures both banks and the courts to take into account the evidences and the facts other

[121] Goode, p.976; Jack, p.18; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.16-17; Şit, p.84
[122] Arslan Kaya, p.107
[123] Many of the authors deal with these two principles as one under the heading of autonomy of credits.
[124] Jack, p.17-18; Özel, p.17; Şit, p.82
[125] Goode, p.989

than that the terms and conditions of the credit. Otherwise maintaining the principle of autonomy so as to benefit a party who had acted fraudelently or in blatant bad faith to the detriment of third party would be to allow beneficiary to benefit from his own fraud.[126]

Fraud as an exception of the autonomy principle was not set out in the UCP. It was left to the national laws and in practice developed in court decisions. Goode defines fraud such that; "*it suffices that it constitutes the tort of deceit in that it is made knowingly and with intent that it should be acted upon by the person to whom it is adressed.*" and states that it is not necessary that the maker of the statement is liable in the sense of criminal law.[127] Fraud issues arise where the seller ships worthless goods, presents forged documents or inserts false statements in genuine documents or fraud will relate to the documents which may be forged or untrue in relation to the goods to which they refer, however on their face they appear to be correct and good tender under the documentary credit.[128]

Attention should be paid to the distinction between the disputes relating the quality of the goods and fraud issues. The former is not an exception of the autonomy principle and will not be taken into account by the banks. As mentioned earlier, the courts also dismiss the complaints in relation to the quality of the goods due to the autonomy principle. On the contrary, the fraud of the beneficiary is the exception of the principle, in which case the bank is under a duty not to make payment. In fraud cases the beneficiary ships invaluable goods other than that he contracted for, rubbish, or even there may be no good shipped in real. In the case of the *Sztejn v. Henry Schroder Banking Corpn.*[129] the seller agreed to ship 50 cases of expensive bristles. The shipment was made, the documents were in order, but the cases were filled with worthless

[126] Rowe, p.149; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.18-19;Tekinalp, p.459; Bozkurt, p.110-111; Şit, p.112
[127] Goode, p.991
[128] Sibel Özel, "Akreditifte Hile" **İstanbul Barosu** Dergisi, Vol.69, No.10-11-12 (1993), p.778; Rowe, p.150; D'archy, Murray, Cleave, p.210; Ekici, *Akreditifte Lehtarın Dürüstlük Kurallarına Aykırı Olarak (Fraud) Bedeli Talep Etmesi ve Bu Durumda Akreditif Bedelini İştira (İskonto) Eden Bankanın Hukuki Durumu,* p.167
[129] (1941) 31 N.Y.S. 2d 631

cowhair and rubbish. In his ruling the judge drew the distinction between complaints about the goods and the fraud situations, by stating that:

> "However, I believe that a different situation is presented in the instant action. This is not a controversy between the buyer and seller concerning a mere breach of warranty regarding the quality of merchandise; on the present motion, it must be assumed that the seller has intentionally failed to ship any goods ordered by the buyer. In such a situation, where the seller's fraud has been called to the bank's attention before the drafts and the documents have been presented for payment, the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller."[130]

The allegation of fraud is raised by the buyer who attempt to prevent the bank from paying or the seller from drawing the credit and/or presenting the documents. He may allege that the seller has shipped rubbish or no goods at all, or a document was forged or fraudelently false. The bank which is asked to pay under a documentary credit should refuse to pay only if satisfied that the demand is fraudelent. The allegation may be founded on suspicion, even a grave one. If no more can be established, the bank should pay.[131] Mere allegation of fraud is insufficient to refuse payment. In the famous case of *United City Merchants Ltd v. Royal Bank of Canada* it was held that even if the fraud was established clearly to the satisfaction of the bank, if there is no evidence that the beneficiary knew of the fraud, the bank can not refuse payment since the fraud may have been committed by a third party such as the maker of the document as is in the case, and the seller himself may have been deceived by the fraud of the third party. In the case although the cargo was shipped on 16 December 1976, the bill of lading was dated as 15 December 1976 by the loading brokers, which was the last date for shipment. The sellers were unaware of the loading broker's fraud. It was held that unless the seller was fraudulent or was privy to the fraud, the bank could not refuse payment. The decision is considered as protecting the beneficiaries who with no

[130] Jack, p.209-210; Rowe, p.149; Özel, *Akreditifte Hile*, p.778-779; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.18-19
[131] D'archy, Murray, Cleave, p.210-211; Brindle, Cox, p.585

knowledge of fraud buys goods afloat and sells them to the buyer.[132] Consequently where the bank has compelling proof that a fraud has been committed and the beneficiary knew of this fraud, if both of these facts are clearly established to the satisfaction of the bank, it must not honour the credit. Such a case arises if the beneficiary himself creates the fraud or someone does it with his knowledge or connivance.[133] A bank is not deprived of his right of reimbursement unless it can be shown that on the evidence before him at the time of payment, fraud on the part of the maker of the demand was clearly established.[134]

In Turkish law, it is accepted that if it is proved by the applicant that the payment demand of the beneficiary constitutes an abuse of rights, or his act is in breach of objective good faith principle, then the bank should refuse to pay. Otherwise, the bank will not be entitled to reimbursement. As to the degree of proof that is to be tendered to the bank by the applicant, "liquidated evidence" is required. Liquidated evidence is defined as proof which discloses to the bank that the beneficiary's payment demand is in breach of the principle of objective good faith without any need to take into account his personal interpretation, opinion, or evaluation. The following examples are given for the liquidated evidence; any court decision signifying the forgery of the signature on the bill of lading, any official document evidencing that rubbish was shipped instead of the goods contracted for.[135] Doğan states that conclusive evidences in the sense of procedural law should be understood from the term.[136] [137] Ekici claims that the liquidated evidences are the ones which can be prooved by documents. According to the auther official documents, expert's reports, which signify that defective, erroneous goods have been shipped, may be accepted as liquidated evidence in the specific case or they may be accepted as evidence supporting the other proofs. In this respect, deposition is not a liquidated evidence. Court rulings and provisional remedies which have been granted on the basis of liquidated evidences are also liquidated evidences. The author

[132] Carr, p.502-503; D'archy, Murray, Cleave, p.211-212; Özel, *Akreditifte Hile*, p.779-780,784
[133] D'archy, Murray, Cleave, p.212-213; Özel, *Akreditifte Hile*, p.786
[134] Brindle, Cox, p.585; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.18-19; Özel, *Akreditifte Hile*, p.786
[135] Tekinalp, p.459; Ekici, *Akreditifte Lehtarın Dürüstlük Kurallarına Aykırı Olarak (Fraud) Bedeli Talep Etmesi ve Bu Durumda Akreditif Bedelini İştira (İskonto) Eden Bankanın Hukuki Durumu,* p.169; Özel, *Akreditifte Hile*, p.786
[136] Doğan, p.390
[137] For further explanations and definitios see Kaya p.169

points out that, since the provisional remedies may be granted due to the allegation which seems almost real, such provisional remedies should not be deemed as liquidated evidence[138] In any case, in order to be qualified as liquidated evidence, it should denote clearly that the beneficiary's payment demand infringes the objective good faith principle without leaving any doubt.[139]

The aplicant who considers that the beneficiary is going to make or has made a presentation which he should not make and which should not be met with payment, he may seek an injunction from the court to prevent the payment and/or presentation. In Turkish law, a provisional remedy may be sought from the court according to the art. 103 of Code of Procedural Law.[140] At that point it should be stated that the courts are disinclined to grant injunction for the prevention of payment and/or presentation. The first reason of that is the autonomy principle which prevents the courts from taking into account the extraneous facts and claims arising from the underlying contracts. Secondly in the fraud cases where the courts may grant an injunction, the burden is cast on the party alleging fraud which is diffucult to discharge in the majority of the cases.[141] As pointed above mere allegation of fraud is insufficient to issue an injunction. Besides the fraud exception is construed restrictively in order to maintain the efficiency of documentary credit as an instrument for financing international commerce. The narrow ambit of the fraud exception is generally justified on grounds of commercial efficiency.[142] These views are illustrated in the case of *R D Harbotle (Mercantile) Ltd v. National Westminster Bank*:[143]

> "It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud which the banks have

[138] Ekici, *Akreditifte Lehtarın Dürüstlük Kurallarına Aykırı Olarak (Fraud) Bedeli Talep Etmesi ve Bu Durumda Akreditif Bedelini İştira (İskonto) Eden Bankanın Hukuki Durumu,* p.170-171
[139] Arslan Kaya, p.173-174
[140] Jack, p.220; Özel, *Akreditifte Hile*, p.786
[141] Carr, p.503-504
[142] Carr, p.503
[143] [1978] Q.B. 146, [1977] 3 W.L.R. 752, [1977] 2 All E.R. 862

> notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts… The machinery and commitments of banks are on a different level. They must allow to be honoured, free from interference by the courts. Otherwise trust in international commerce could be irreparably damaged."[144]

The standard burden of proof should be high enough to safeguard the autonomy principle but not so high as be unattainable.[145] Excessive strictness with respect to the proof of fraud would make it impossible for the courts to apply this exception to the principal of autonomy of the credit.[146] In court decisions different emphasises have been made such as; "established or obvious fraud", "a good arguable case that on the matters available the only realistic interference to draw is that of fraud."[147] In principal, the courts require that the facts on which the fraud exception is pleaded are established clearly and unambiguously.[148] And it has been emphasised in many cases that the fraud and the knowledge of the bank must be clearly established.[149] It was ruled in the case of *Bolvinter Oil SA v. Chase Manhattan Bank*:[150]

> "The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will be clearly fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests upon the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged."

With regard to the banks, the applicant should seek an injunction against the paying bank whether it be the issuing bank or the correspondent bank. Once the payment is made before the communication and establishment of the fraud to the bank,

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[144] Jack, p.222; Carr, p.503
[145] Goode, p.992
[146] D'archy, Murray, Cleave, p.213
[147] Goode, p.992
[148] D'archy, Murray, Cleave, p.213
[149] Jack, p.222
[150] [1984] 1 W.L.R. 392, [1984] 1 Lloyd's Rep.251, (1984) 128 S.J. 153

then its right to reimbursement will arise. In order to prevent the bank from paying, apart from the communication of fraud, the evidences also should arrive the bank before payment is made. Mere informing the bank about the fraud does not suffice to prevent the bank from paying.[151]

A distinctive situation relating to acceptance credits should be stated shortly. In case the bank accepts the bill of exchange against fraudulent or forged documents presented by the beneficiary, it will be obliged to pay the bill at maturity to the indorsee in due course, provided that the indorsee did not act to the detriment of the bank while acquiring the bill.[152]

[151] Tekinalp, p.460
[152] Tekinalp, p.460 and see art.599 Comm.C.

4. TYPES OF DOCUMENTARY CREDITS

Documentary credits are used in international trade as payment means for the settlement of goods or services purchased. The beneficiary of the credit is required to present the bank, the documents which proves that the goods have been shipped or the service has been carried out. These documents will usually be the invoice, transport documents and the insurance documents.[153]

What we call as clean credits are different from the documentary credits for some reasons. The beneficiary is not required to present any documents to the bank in order to be paid. The applicant instruct his bank just to pay a sum of money to the beneficiary irrespective of any documents.[154] The terms of the credit may be the maximum amount of the money which the beneficiary can draw and the expiry date of the credit.[155] Clean credits are not utilised in international trade relating to importation or exportation of goods. They are used for various specific reasons such as for paying engineering and consultancy firms, for payment the salaries of the applicant's employees or for the financing of building or ship cunstruction.[156] It is also stated that clean credits are opened in favour of prestigious beneficiaries or in cases where the counter consideration has been guaranteed.[157] Nevertheless the use of clean credits are very rare.

Since they are significantly different from the documentary credits, the explanations made for the credits are not valid for the clean credits. In fact when the expression "credit" is used, documentary credits are intended to express and in this study the word "credit" should be perceived as the documentary credits.

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[153] Özalp, p.42
[154] Erdoğan Göğer, **Akreditif Muamelesi ve Hukuki Mahiyeti**, 2.Edition, Ankara, 1980, p.12; Doğan, p.48; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.11; Şit, p.84
[155] Mehmet R.Uluç, "Borçlar Hukuku Açısından Akreditif", **Banka ve Ticaret Hukuku Dergisi**, Vol.3, No.3, (March 1966), p.435; Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti*, p.12
[156] Haydar Yılanlı, **Dış Ticaret İşlemleri**, 1.Edition, İstanbul:Beta Basım Yayım Dağıtım AŞ., 2003, p.50; Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti*, p.12; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.11; Şit, p.84; İlalan, p.564
[157] Özalp, p.42

4.1. Revocable Credits

The distinction between the revocable and irrevocable credits relates to the issuing bank's obligation to the beneficiary.[158] A revocable credit may be amended or canceled by the issuing bank at any moment and without prior notice to the beneficiary.[159] The payment is depended on, apart from that the presentation of stipulated documents and compliance with the terms and conditions of the credit, that the issuing bank does not revoke or amend the credit until the payment is effected. So the undertaking of the issuing bank is conditional upon a dissolving condition.[160] The issuing bank may revoke or amend the credit without the consent of the beneficiary. Besides the issuing bank is not obliged to communicate the beneficiary the revocation of the credit. The running of revocable credit does not have any disparity with the irrevocable credits until the revocation right is exercised. The rights and the obligations of the parties' are again the same as in an irrevocable credit.[161]

The right to revoke a credit belongs to the issuing bank. But the issuing bank will usually revoke a credit upon the instruction received from the applicant. However the issuing bank may revoke on its own initiative to protect itself in case the buyer gets into financial difficulties.[162]

It should be noted that UCP600 does not comprise the revocable credits. It does not contain any provision relating to revocable credits.[163] In fact revocable credits do not correspond with the credit definition of UCP600 which defines the credit as irrevocable and definite undertaking of the issuing bank. Thus UCP600 provisions are not applicable to the revocable credits. For that reason it is advised that the seller and the buyer should agree the terms and the conditions of the revocable credit in detail,

[158] D'archy, Murray, Cleave, p.194; Todd, p.34
[159] UCP500 Art.8.A.
[160] Doğan, p.49; Tekinalp, p.427; Arslan Kaya, p.14; Uluç, p.465; Bozkurt, p.34; Yeniaras, p.126
[161] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif* p.88; Doğan, p.49
[162] Carr, p.488; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.25; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.89; Doğan, p.49-50
[163] Özalp, p.43

especially in relation to the revocation of the credit, the striking point to be arranged being the time period until when the credit can be revoked.[164]

During the life of the UCP500, it was accepted that the issuing bank may revoke or amend the credit at time of the presentation until the payment is made. Upon the payment, right of revocation or amendment expires.[165] However it is also stated that revocation of a credit upon the presentation of documents may constitute an abuse of right, taking into account that the beneficiary will have already been shipped the goods.[166] In such a case the beneficiary may recourse the applicant according to the underlying sale contract, unless he is paid by the issuing bank under the credit.[167] UCP500 settled the issue in art.8.b. Article orders that the issuing bank must reimburse the bank which pays, accepts, negotiates or in case of deferred payment credits the bank that has taken up documents, prior to receipt by it of notice of amendment or cancellation. That means after the nominated bank pays, accepts, negotiates or takes up the documents in deferred payment credits, the issuing bank can not revoke or amend the credit.

Since the issuing bank incurs no real commitment under a revocable credit, the beneficiary is not afforded security. For that revocable credits are commonly used as a payment mechanism where security for payment is not an objective where seller and buyer are associated companies, sister companies, a parent and subsidiary or the parties which have a well-established relationship may agree to make payment by a revocable credit since the bank charges are far lower than those of irrevocable credits.[168]

4.2. Irrevocable Credits

[164] Özalp, p.43
[165] Tekinalp, p.427; Arslan Kaya, p.14-15; Yeniaras, p.126; Şit, p.85; Selahattin Karahan, "Akreditifler Hakkında Bazı Bilgiler", **Banka,** Vol.2, No.7 (July 1965), p.35
[166] Doğan, p.450; Arslan Kaya, p.14; Şit, p.85
[167] Bozkurt, p.34
[168] Goode, p.958-959; Carr, p.487; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.89; Doğan 51; Arslan Kaya, p.55; Bozkurt, p.34

Irrevocable credits can not be revoked or amended after it has been communicated to the beneficiary without the consent of the beneficiary, the issuing bank and the confirming bank if any.[169] Irrevocable credits commit the issuing bank to honour the credit, notwitstanding the instructions of its customer to the contrary as the case may be, provided that the terms of the credit are fulfilled by the beneficiary.[170] The issuing bank is irrevocably bound to honour as of the time it issues the credit. With a letter of credit, the beneficiary gets a definite, irrevocable undertaking of the issuing bank to honour the credit, under which payment is conditional only upon presentation of the stipulated documents in the required time and compliance with the terms and the conditions of the credit. Since the issuing bank can not revoke the credit unilaterally without the consent of the beneficiary, irrevocable credits gives security to the beneficiary.

Art.7 of the UCP600 expresses the undertaking of the issuing bank; according to which, the issuing bank must honour the credit, even if the credit is available with a nominated bank and that nominated bank does not honour or negotiate, provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation.

It should be noted that all credits are irrevocable in the sense of UCP600 which defines the credit as irrevocable and definite undertaking of the issuing bank. Hence there is no need to indicate a credit subject to UCP600 as irrevocable. Actually, all provisions of UCP600 were envisaged for irrevocable credits.[171]

Irrevocable credits are divided in two groups, namely; confirmed credits and the unconfirmed credits.

4.2.1. Confirmed Credits

[169] Brindle, Cox, p.540; Reisoğlu, *Hukuki Açıdan Akreditif ve Uygulama Sorunları*, p.45; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.87; Bozkurt, p.34; Arslan Kaya, p.12; Doğan, p.51-52; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.27; Tekinalp, p.428; Yeniaras, p.125; Bahtiyar, p.80
[170] Goode, p.959
[171] Özalp, p.44

The distinction between a confirmed credit and unconfirmed credit depends on the obligation of the correspondent bank to the beneficiary.[172] Upon the issuing bank's authorization or request, the correspondent bank may advise the credit to the beneficiary by adding its own undertaking to that of the issuing bank, that he will be paid on presentation of stipulated documents. Where an irrevocable credit is confirmed, the confirming bank takes on towards the seller all the obligations taken on by the issuing bank.[173] The beneficiary enjoys the advantage of confirming bank's undertaking in addition to that of the issuing bank. The obligation of the confirming bank is seperate and independent from that of the issuing bank. It is not a secondary obligation in the nature of suretyship.[174] UCP600 defines confirmation as; " a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honour or negotiate a complying presentation."

As the confirming bank advises the credit to the beneficiary by adding its undertaking, a contractual relation comes into being between the confirming bank and the beneficiary. The legal character of this contractual relation is accepted as abstract debt undertaking in the sense of art. 17 of the CO.[175]

The confirmed credits gives the beneficiary maximum security. In addition to that of the issuing bank, he gets a second bank's undertaking in his own country. Especially where the confirming bank is reputable, he is sure that, provided that he fulfills the terms and conditions of the credit, he will be paid. Besides having a second enforcable, contractual undertaking, in case of disputes that may arise, he can litigate confirming bank in his own jurisdiction without being no more compelled to litigate abroad.[176] Thus confirmed credits act as a means of localising payment obligation of an

[172] D'archy, Murray, Cleave, p.194
[173] Todd, p.37; Carr, p.490; Jack, p.25; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.89; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.28; Doğan, p.52-53; Tekinalp, p.429; Yeniaras, p.125
[174] Brindle, Cox, p.541; Arslan Kaya, p.14; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.90; Bozkurt, p.35 ;Doğan, p.52-53; Tekinalp, p.429-430; Şit, p.86; Karahan, p.36
[175] Osman Tolun, "Akreditifin Hukuki Mahiyeti", **Adalet Dergisi,** No.3 (1957); Doğan, p.53;
[176] Carr, p.490

export transaction in the seller's country.[177] In this case, the seller avoids the country and political risks of the buyer's country.

Confirmed credits are significantly more expensive than unconfirmed credits. For that reason the parties may agree that an unconfirmed credit by a reputable bank assures sufficient security for the payment of the price.[178]

Some issuing banks may refuse to instruct or request to the correspondent banks to confirm the credit. This may be because they see such a request by their customers as an insult to their credit worthiness or to their prestige. Moreover the national policy of the country may direct the banks not to request confirmation of their credits.[179] In such cases exporters who are willing to enjoy the benefits of a confirmed credit, requests the correspondent banks to confirm the credit. The correspondent bank's confirmation without authorization of the issuing bank is called as silent confirmation. The beneficiary will have the undertaking of a confirming bank that the credit will be honoured as if the credit had been confirmed pursuant to the instructions of the issuing bank. In such a case the confirming bank will not have any right of reimbursement against the issuing bank under the credit. It will be for the beneficiary to pay the commission and the expenses incurred by the silent confirmer. It is a contractual relation, which is valid and binding on the parties to it, between the beneficiary and the correspondent bank. Art. 12.a. of the UCP600 points out this possibility.[180]

4.2.2. Unconfirmed Credits

The correspondent bank may advise the credit to the beneficiary, without any undertaking to honour or negotiate. In an unconfirmed credit, the correspondent bank does not enter into any obligation to make payment under the credit. The correspondent bank's role will usually be limited to the notification of the opening and amendment of

[177] D'archy, Murray, Cleave, p.198
[178] Brindle, Cox, p.541; Todd, p.42
[179] Jack, p.121
[180] Brindle, Cox, p.541; Jack, p.121; Özalp,p.26; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.170-171

the credit as an advising bank.[181] Or alternatively, the correspondent bank may be a nominated bank with which the credit is available. Under this type of credit, only the issuing bank assumes the legal responsibility of paying the beneficiary, in case a complying presentation is made.[182]

Under an unconfirmed credit, there is not a contractual relation between the correspondent bank and the beneficiary. The correspondent bank acts as an agent of the issuing bank and its liability is against the issuing bank. It is not liable for anything towards the beneficiary. An exception to this conception is envisaged in art. 9.b. of the UCP600, according to which the correspondent bank, in advising the credit or amendment, is attributed liability for the apparent authenticity of the credit or amendment, against the beneficiary.[183]

The unconfirmed credit may provide that the credit is available with the correspondent (nominated) bank. In that case, the nominated bank is authorized to pay, but not obliged to pay towards the beneficiary. So the beneficiary will not be able to enforce the nominated bank to pay, in case of its failure to do so, since it did not undertake to pay him. The situation is same, even if the nominated bank received the funds for payment from the issuing bank.[184] The disadvantegeous position of the unconfirmed credits exists in such cases where a dispute arises. The beneficiary will have to litigate the issuing bank abroad in a foreign jurisdiction.[185]

4.3. Revolving Credits

Revolving credits are used where the buyer is the regular customer of the seller and in relation to transactions conducted on a regular basis between the buyer and the seller.[186] Where the sale contract covers a number of shipments, the buyer will instruct

[181] D'archy, Murray, Cleave, p.196;Arslan Kaya, p.12-13; Tekinalp, p.428; Doğan, p.54; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.27; Yeniaras, p.126
[182] Carr, p.488; Tekinalp, p.429; Şit, p.86
[183] Kaya, p.13; Tekinalp, p.429; Doğan, p.54
[184] Kaya, p.13; Tekinalp, p.429; Doğan, p.55
[185] Carr, p.490; D'archy, Murray, Cleave, p.196
[186] Carr, p.493; D'archy, Murray, Cleave, p.200

his bank to open a revolving credit covering all the shipments which guarantees the seller payment for the entire shipments.[187] Under a revolving credit the seller, after each shipment, will present the required documents and get the amount of money specified in the credit. Afer each drawings the amount will be reinstated and the seller will be able to draw again, upto overall amount of the credit. Thus the credit is renewed automatically and the buyer is saved from endeavouring to open a new credit.

A credit may revolve around time or value. If the credit is renewed after a period of time, upon the drawing of the beneficiary, then the credit revolves around time.[188] In such credits a period of time (for ex. a month) is specified during which the shipment and the drawing can be effected. After the expiry of the period, the credit is renewed and available for the same amount. For instance a credit is opened in favour of the exporter, which states that the credit is available for 10 months and each drawing is 20.000 USD. per month. That kind of credits may be cumulative or non-cumulative. In the former the amount which is not drawn in a month, is carried forward the next month, thus the beneficiary will be able to draw 40.000 USD. the next month according to the given example. If the cedit is non-cumulative, the beneficiary will not be able to draw the amount which he did not draw on time. This will result the decrease of the overall amount available under the credit.

It should be noted that credits revolving around time are different than the instalment drawings or shipments envisaged in art.32 of the UCP600, which states that "…any instalment is not drawn or shipped within the period allowed for that instalment, the credit ceases to be available for that and any subsequent instalment." While nonfulfillment of a drawing within the given period, will not have any negative effect on the subsequent drawings under the revolving credits, it will be a reason to terminate the credit for subsequent drawings, in case instalment drawings are stipulated under the credit.[189] Given the similarity of the two cases, in order not to face with problems it is

[187] Todd, p.46
[188] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.59
[189] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.97; Özalp, p.46; Bozkurt, p.39

advised that the expression; "Article 32 of the UCP600 is not applicable" should be added to the terms of the credit.

A credit may also revolve around a value. In that case the credit is renewed after the beneficiary draws the specified amount, irrespective of the time of drawing during the credit period. Such a credit enables the beneficiary to present documents whenever he wishes during the credit period.[190] It is important to define in the credit the (maximum) amount of each drawing and the maximum amount available under the credit or the number of renewals. Otherwise it may result an unlimited liability.[191]

The utilities of revolving credits are such that; the buyer is saved from striving to open a credit each time, instructing his bank and complying with the formalities. Instead of having to open various credits, he will open just one revolving credit, thus he will pay less charges and commissions and he will save his time. On the other hand, the seller who is aware of the guaranty that he will be paid each time after shipping, will go on producing or procuring the goods and ship them without having to wait for the credit to be opened each time. Thus he will also save his time.[192]

4.4. Red Clause and Green Clause Credits

Although as a rule under a documentary credit the beneficiary is paid upon his presentation of the shipping documents to the bank, the red and green clause credits enable the beneficiary to draw on the credit partly or entirely prior to the shipment of the goods. This enables the beneficiary to finance the production or procurement of the goods, or transport and insurance expenses.[193] Thus the beneficiary is granted credit. The payment made to the beneficiary before the shipment, constitutes advance.[194]

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[190] Goode, p.968
[191] Özalp, p.48; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.60
[192] Özalp, p.48; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.60; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında* Akreditif, p.96
[193] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif,* p.97; Reisoğlu, *Hukuki Açıdan Akreditif ve Uygulama Sorunları*, p.46; Tekinalp, p.425; Şit, p.87
[194] Tekinalp, p.472; Karahan, 37

Under a red clause credit, the nominated bank pays the beneficary upon the instruction of the issuing bank. This advance payment may be provided conditional upon presentation of any documents such as those evidencing the existence of the goods or forwarder's certificate affirming that the goods have been received for shipment.[195] The nominated bank pays the beneficiary on behalf and at the risk of the issuing bank. If the beneficiary does not fulfill his obligations, he is obliged to pay the money back to the issuing bank with the interest.[196] The issuing bank will be entitled to reimbursement from its customer for the sum paid to the beneficiary. The sum paid in advance will be deducted from the amount payable on presentation of the full shipping documents. [197]

The red clause credits are so called because the clause in the credit stating the credit amount allowed prior to shipment was written in red ink in the past. This type of credit was developed in Australian, New Zeland and South African wool trade.[198] Since the buyer bears considerable risk of nonfulfillment of the obligations on the part of the beneficiary, red clause credits are used when there is a high degree of trust between the parties of the contract.[199]

The green clause credits which were developed in Zaire coffee trade operate in the same way as red clause credits. The only difference is the advance payment is depended on the presentation of a warehouse receipt which evidences that the goods are stored in a warehouse in the name of the bank. Thus the bank is provided with a degree of security.[200]

4.5. Back-to-Back Credits

Back-to-back credits are used in international trade where the merchant buys the goods from the manufacturer or a supplier and sells to his buyer. In that case the seller is a middleman who is not the ultimate buyer and there are at least two sale contracts.

[195] D'archy, Murray, Cleave, p.201
[196] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif,* p.98; Bozkurt, p.38
[197] Goode, p.968; Karahan, 37
[198] Jack, p.33
[199] Carr, p.493; Jack, p.33; Yeniaras, p.130
[200] Carr, p.494; Goode, p.968; Jack, p.33; Tekinalp, p.473; Bozkurt, p.38; Şanlı, Ekşi, p.95

Back-to-back credits enable the seller to finance the sale contract between him and his supplier or manufacturer. After his buyer opens the credit in favour of the seller, the seller requests the bank which advises the credit to him, to open a second credit in favour of the manufacturer on the security of the first credit. Alternatively, he may request his own bank to open a credit in favour of his supplier using the credit already opened in his favour as a counter, in which case the second credit is called as counter credit.[201]

In contrast with transferable credits, although economicly related, there are two legally independent credits in a back-to-back credit.[202] The beneficiary of the first credit is the applicant of the second credit and the nominated or the confirming bank of the first credit acts as the issuing bank in the second credit. The terms and the requirements of the second credit must be in conformity with the first credit. The documents of the second credit should be -as much as they can- so that the seller will be able to tender them under the first credit, except that invoice.[203] The second credit will involve short terms as to the expiry date of the credit and the shipment date. The amount of the second credit will be less than the first one, the difference being the commission of the seller. He will draw that amount by substituting his own invoice to that of the supplier.[204]

The running of the back-to-back credit may be summarized as such: After he is advised the opening of the first credit in his favour, the seller requests the nominated bank to issue a credit in favour of his supplier. The nominated bank advises itself or by a correspondent bank, the second credit to the supplier. The supplier is paid upon making a complying presentation. Then the seller's bank demand him to substitute his own documents such as invoice, instead of the suplier's. These documents are presented by the nominated bank to the issuing bank which makes payment under the first credit.

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[201] Jack, p.31
[202] Doğan, p.359; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.56; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif,* p.99
[203] Goode, p.1011
[204] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.56

The nominated bank deducts the sum paid to the supplier and its own charges and pay the balance to the seller.

It is stated that banks dislike issuing back-to-back credits except for customers of first class standing.[205] Because banks entertain considerable risk by opening a back-to-back credits. They undertake and pay the supplier without being deposited the necessary funds by the applicant of the second credit. The issuing bank may find flaws in the documents or the seller may fail to make a complying presentation under the first credit in which case seller's bank will have already become committed to pay the supplier under the second credit.[206] In practice the seller's bank issues the second credit in consideration of the pledging or assignment of the proceeds of the first credit and the bank is authorized by the seller to set off the sum paid to the supplier from the amount collected under the first credit.[207] Admittedly, these precautions do not provide the bank with complete security, since the payment under the first credit is depended on making a complying presentation, which may not be realized. For these reasons the banks must be sure of their customer's trustworthiness and solvency.

Back-to-back credits are opened for various reasons such as: the applicant of the first credit may not wish to open a transferable credit or his bank may refuse to open a transferable credit whose operation is more diffucult to control than a non-transferable credit. In case a transferable credit is opened, the transferring bank may decline to transfer the credit. Lastly the seller may wish the buyer not to be aware in any way that the goods are supplied from a third party.[208]

4.6. Transferable Credits

Under a transferable credit, the beneficiary has the right to request the nominated bank to make the credit available in whole or in part to one or more other parties.[209]

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[205] Goode, p.1011
[206] Goode, p.1011
[207] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif,* p.99
[208] Özalp, p.51
[209] Jack, p.30

Again the seller is a middleman who procures the goods from a third party as in the case in back-to-back credits. The seller uses the credit opened in his favour to finance his contract with his seller supplier.[210]

The process can be summarized shortly as such: In the underlying sale contract the seller stipulates the buyer to open a tranferable credit in his favour. The buyer opens a transferable credit in favour of the seller (first beneficiary) who then after being advised, requests the nominated bank to transfer part of the credit to the supplier. Upon its consent, the nominated bank (transferring bank) advises the terms and conditions of the credit to the supplier (second beneficiary). The amount of the credit advised to the second beneficiary will be less than the amount of the original credit. The difference between the two amounts is the profit of the first beneficiary. After the supplier presents his documents, he is paid and the nominated bank notifies the seller to substitute his own invoice for that of the second beneficiary. The difference between the seller's and buyer's invoices is paid to the seller.

The credit must specifically state that it is "transferable." Otherwise it can not be transferred. A transferable credit may be made available in whole or in part to another beneficiary, or in part to more than one beneficiary. The credit can be transfered only once. The second beneficiary or beneficiaries can not make a second transfer. The second beneficiaries can transfer back their parts to the first beneficiary. This will not be deemed as second transfer. A credit may be transferred in part to more than one second beneficiary provided that partial drawings or shipments are allowed.(Art.38.d.) And of course the aggregate of the sums transferred can not exceed the amount of the credit.[211]

The bank which effects the transfer is called as transferring bank. The transferring bank is the nominated bank if the credit is not a freely negotiable credit. If it is a freely negotiable credit, a bank that is specifically authorized by the issuing bank to transfer is the transferring bank. An issuing bank also may be a transferring

[210] Brindle, Cox, p.545
[211] Brindle, Cox, p.547

bank.(Art.38.b.) Many times the issuing bank will be the transferring bank where a nominated bank does not take place in the credit process.

A bank is under no obligation to transfer a credit to the extent and in the manner expressly consented to by that bank.(Art.38.a.) So the designation of the credit as transferable by the issuing bank is not sufficient for its transfer. The provision in fact reflects a general principle of contract law. The issuing bank may commit itself by the terms of the credit but can not commit other banks. Moreover the beneficiary has no right to demand transfer, he can merely request it.[212] The nominated bank may refuse to transfer a credit which they anticipate that the transfer may lead to diffuculties for them.[213]

Any request for transfer must indicate if and under what conditions amendments may be advised to the second beneficiary. The transferred credit must clearly indicate those conditions.(Art.38.e.) If a credit is transferred to more than one second beneficiary, rejection of an amendment by one or more second beneficiary does not invalidate the acceptance by any other second beneficiary, with respect to which the transferred credit will be amended accordingly. For any second beneficiary that rejected the amendment, the transferred credit will remain unchanged.(Art.38.f.)

The seller (first beneficiary) must take care to ensure that the documents which his supplier is required to present match those he himself has to present.[214] According to the art.38.g.; the transferred credit must accurately reflect the terms and conditions of the credit, including confirmation, if any, with the exception of; the amount of the credit, any unit price stated therein, the expiry date, the period for presentation, or the latest shipment date or given period for shipment. Any or all of these terms and conditions may be reduced or curtailed.(Art.38.g.) The amount of the credit (and unit prices, if any) will be reduced since the balance of the amount represents the profit of the first beneficiary. The reason for reducing and curtailing the periods and dates is to

[212] Goode, p.1001
[213] Jack, p.236
[214] Brindle, Cox, p.546

enable the first beneficiary to prepare his own documents which he will substitute for those of the second beneficiary within the periods stated by the credit. The percentage for which insurance cover must be effected may be increased to provide the amount of cover stipulated in the credit or in art.28.(Art.38.g.) The provision ensures that the cover provided by the second beneficiary will be sufficient to enable the first beneficiary to be paid under the original credit as he will have to provide a policy which fully covers the value of the cargo to the applicant.[215] Since the amount of the credit transferred will be less than the amount of the original credit, the percentage for the insurance coverage will be more than that stated in the credit or in art.28. For instance, let us suppose that the original credit is for 100.000 USD and the percentage for the insurance coverage is 110%. For the transfer of 90.000 USD, the percentage for the insurance coverage must be 122,22%, in order to cover the amount stipulated in the original credit.[216]

It is important for the middleman seller in a sale chain that the buyer should not be aware of the manufacturer. Otherwise the applicant may exclude the seller from the sale chain and may contact directly with the manufacturer. Thus he can buy the goods with a lower price. For these considerations the name of the first beneficiary may be substituted for that of the applicant in the credit advised to the second beneficiary. But if the name of the applicant is specifically required by the credit to appear in any document other than the invoice, such requirement must be reflected in the credit.(Art.38.g.) A requirement in the credit to demonstrate the name of the applicant will obviously destroy the confidentiality which the system of transfer is designed to maintain.[217]

Presentation of documents by or on behalf of a second beneficiary must be made to the transferring bank.(Art.38.k.) After the second beneficiary makes presentation, the first beneficiary has the right to substitute his own invoice and draft, if any, for those of a second beneficiary for an amount not in excess of that stipulated in the credit, and upon such substitution the first beneficiary can draw under the credit for the difference,

[215] Jack, p.239
[216] Özalp, p.498
[217] Jack, p.239

if any, between his invoice and the invoice of the second beneficiary.(Art.38.h.) If the first beneficiary fails to present his own invoice and draft, if any, on the first demand, or if the invoices presented by the first beneficiary create discrepancies that did not exist in the presentation made by the second beneficiary and the first beneficiary fails to correct them on the first demand, the transferring bank has the right to present the documents as received from the second beneficiary to the issuing bank, without further responsibility to the first beneficiary.(Art.38.i.)

The first beneficiary may, in its request for transfer, indicate that honour or negotiation is to be effected to a second beneficiary at the place to which the credit has been transferred, up to and including the expiry date of the credit. This is without prejudice to the right of the first beneficiary in accordance with sub-art.cle 38.h.(Art.38.j.) In other words, even if the honour or negotiation is effected at the place to which the credit has been transferred, the first beneficiary may substitute his own invoice and draft, if any, for those of the second beneficiary.

Unless otherwise agreed at the time of transfer, all charges (such as commissions, fees, costs or expenses) incurred in respect of a transfer must be paid by the first beneficiary.

Art.39 of the UCP sets out assignment of proceeds which is wholly different than the transfer of a credit. According to the article, even if a credit is not designated as transferable, the beneficiary may assign any proceeds to which he may become entitled under the credit in accordance with the provisions of applicable law. Moreover the article expresses that it does not relate to the assignment of the right to perform under the credit.

The beneficiary who assigns the proceeds is merely transferring the right to ask for and receive payment following his performance of the credit contract.[218] The beneficiary assigns his right to monies which will become payable under a credit

[218] Goode,p.1000

following the presentation of documents. Assignment is concerned with the transfer of a future debt from the creditor, the beneficiary to the assignee. In contrast the transfer of a credit provides for a second beneficiary to present documents persuant to the credit.[219] But the assignee of the proceeds can not tender documents in his own right.[220] Moreover the consent of the debtor(the issuing bank or the confirming bank) is not requisite for the assignment of the proceeds, conversely the consent of the banks is essential in transferring the credit.

In Turkish Code of Obligations the assignment in the sense of art.39 of UCP600 is set out between art.162 and art.172. According to the art.162 the creditor can assign a claim to a third party without the consent of the debtor provided that it was not prohibited by law or contract or unless the transaction requires otherwise. Art.163 prescribes the assignment to be performed in a written form.

It is important to notify the assignment to the bank immediately. If the bank pays the beneficiary, before the notification but after the assignment, it will be absolved from the debt. In case the credit is available with a nominated bank, it will be a prudent course to notify both the issuing bank and the nominated bank.[221]

4.7. Standby Letters of Credit

Standby letters of credits are not true documentary credits since they are a form of bank guarantee.[222] They were originated in the United States where banks are prohibited from issuing guarantees since guarantee business is not accepted as a normal banking activity within banking laws. Standby credits were adopted to circumvent that legal hitch.[223]

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[219] Jack, p.246
[220] Goode, p.1000
[221] Arslan Kaya, p.225-226
[222] Todd, p.47
[223] Rowe, p.124; Reisoğlu, *Hukuki Açıdan Akreditif ve Uygulama Sorunları*, p.47; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.60

Under a standby credit the bank undertakes to pay the beneficiary against documents in the event of default by the applicant. The standby credits enable the beneficiary to obtain money from a bank when the applicant has failed, or is alleged to have failed, to perform the contract or some aspect of it.[224] The running of the standby crdits are similar to that of ordinary documentary credits. Again the credit is an independent, seperate transaction from the underlying contract, under which the bank undertakes to make payment, provided that the stipulted documents are presented. It has disparities too, in comparison with documentary credits. In a documentary credit the beneficiary is paid upon his presentation of documents which evidences that he has performed his side of the bargain. In fact this is the envisaged, desired result of the transaction. On the other hand, under a standby credit the beneficiary is paid upon the nonperformance of the other side which is not the desired result. While the former is a means of payment, the latter is intended to protect the beneficiary in case of default of the other party to the underlying contract. Besides the documents to be presented, differ in these transactions. Under a documentary credit, transport documents which evidences shipment are presented together with invoice and the insurance policy. But under a standby credit, many times only a statement of demand by the beneficiary together with a sight draft drawn on the bank will be the only documents to be presented in order to be paid.

Although its function is different to that of the ordinary documentary credits, the substance of the undertakings are same. Thus a correspondent bank may be utilised to advise the credit or to confirm and effect the payment.[225]

Since the 1983 revision, UCP is applicable if the parties so wish, to standby letter of credits to the extent which they may be applicable.[226] Since the UCP rules were not designed for the standby credits, many of its provisions are inappropriate for them. To deal with that, "International Standby Practices" (hereafter ISP98) was published by

[224] Carr, p.507; Jack, p.260; Şit, p.223
[225] Jack, p.264
[226] Rowe, p.124; Carr, p.507

the ICC and came into force on January 1, 1999.[227] It should be indicated in a standby credit that it is subject to ISP98, in order to enable application of those rules.

Standby credits are mainly used for execution of international construction works under a building contract. The company which undertakes to construct opens a standby credit in favour of the other party of the underlying contract. Thus the beneficiary is protected against nonperformance or defective performance of the contractor. Standby credits are sometimes opened by the exporters in favour of the importers. In case the goods shipped comes out to be low quality or damaged, the importer is paid by the bank under a standby credit. Similarly it may also be used in various field such as leasing contracts.[228] It is stated that standby credits have evolved into a general-purpose financial tool used to support financial as well as non-financial undertakings and domestic as well as international transactions.[229]

[227] Brindle, Cox, p.548
[228] Şanlı, Ekşi, p.96-97; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.60-61
[229] Goode, p.1018

5. PERFORMANCE OF DOCUMENTARY CREDITS

After the beneficiary makes a complying presentation, the undertaking of the issuing bank and the confirming bank if any, under the credit, to pay becomes due. Art. 6.b. of UCP600 indicates the ways of paying the beneficiary which orders that "a credit must state whether it is available by sight payment, deferred payment, acceptance or negotiation." Thus the beneficiary may be paid in either of these four manners.

5.1. Sight Payment

A credit may state that it is available at sight payment. In that case the credit provides for payment on due presentation of documents after allowing time for them to be examined for compliance with the credit.[230]

Sight payment is the basic payment method under documentary credits which aim the exchange of the parties' mutual considerations to take place at the same time. The payment is effected in the currency and the amount envisaged in the credit without taking into account the changes in the exchange rates.[231] If the exchange control regulations of the beneficiary's country prohibit payment in currency envisaged in the credit, the bank will pay the beneficiary according to the daily rate current on the date of payment.[232]

Besides payment in cash, the bank may effect payment by presenting the beneficiary a cheque, or the bank may pass the money to the account of the beneficiary.[233]

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[230] Jack, p.25-26; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.62-63;Doğan, p.292; Yeniaras, p.127; Bozkurt, p.36
[231] Arslan Kaya, p.128
[232] Doğan, p.292
[233] Kaya, p.128; Aydos, p.39; Bozkurt, p.36; Şit, p.86

As a result of banking practice in some countries, sometimes it may be arranged in the credit that, a sight bill of exchange will be presented together with the documents. Calling for a sight bill of exchange under a sight payment credit has no legal significance since the payment will be made upon the presentation of documents and the bill will also be retained in the bank. Its function will be no more than a receipt which evidences the amount paid to the beneficiary.[234] But many times a bill of exchange is dispensed with, since it attracks stamp duty in national laws of some countries such as Spain, Italy and Turkey.[235]

It was argued in the doctrine whether the bank can set off the proceeds under the credit against the debt of the beneficiary stemming from other relations between the bank and the beneficiary. Two views were suggested in relation to the subject. The first view claims that, by incorporating the documentary credit provision in the contract, the parties impliedly agree that the proceeds of the credit can not be set off and the payment shall be made in cash. It is alleged that the transfer and the assignment of the proceeds of the credit can be ensured by adopting the view. The bank is taken to have accepted in the credit contract with beneficiary not to set off.[236] The second view contends that the bank does not undertake to pay the beneficiary in cash and unless explicitly agreed otherwise, the bank can set off the proceeds of the credit against the debt of the beneficiary arising from an other relation. The bank does not abandon its right to set off by making credit contract with the beneficiary.[237] First of all it should be noted that documentary credits involve more than one country. Determining the validity of the bank's set off claim is for the national law applicable to the contract between the bank and the beneficiary.[238] If the governing law of the contract is Turkish law, it is stated that the first view is unacceptable since the existence of documentary credit provision in the underlying contract does not justify the prohibition of the bank's right to set off. Moreover, the undertaking of the bank to pay does not result its commitment to pay in cash.[239] Unless the bank and the beneficiary agreed otherwise, the bank may set off the

[234] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.63
[235] Brindle, Cox, p.542; Özalp, p.52
[236] Arslan Kaya, p.129; Doğan, p.302-303
[237] Arslan Kaya, p.130; Doğan, p.303
[238] Doğan, p.303
[239] Arslan Kaya, p.131

debt of the beneficiary against the proceeds of the credit. Kaya accurately makes a seperation between the banks in relation to the subject. While the issuing and the confirming bank do have the right to set off, the paying (nominated) bank do not. Since the money paid by the nominated bank is entrusted to it by the issuing or confirming bank which case falls within the ambit of the art.123/1 of CO.[240] Turkish Supreme Court of Appeals also ruled that the correspondent bank can not set off since it pays on behalf of the issuing bank and it does not have a legal relation with the beneficiary.[241]

5.2. Deferred Payment

In a deferred paymet credit, the paying bank is authorized to pay at some future date determinable in accordance with the terms of the credit. The beneficiary again presents the documents on or before the expiry date of credit, but he is not paid immediately upon the presentation but after expiry of a stated period envisaged in the contract. This period may be calculated by reference to the date of the presentation of the documents to the nominated bank or the date of transport document such as 30, 60 or 90 days later from presentation date or bill of lading date.[242] Meanwhile the documents are released to the buyer.

Deferred payment credits enables the buyer to finance the credit. He receives the documents and the goods before the determined maturity date, and meanwhile he may sell the goods and gets the necessary funds to pay his bank. Thus deferred payment credits ensure credit to the buyer. Deferral of the payment is not for the inspection of the goods by the buyer. Any instruction of the buyer, who is not pleased with the goods, to prevent the bank from payment will not have an effect on the undertaking of the bank. Again the beneficiary is entitled to payment upon making a complying presentation. Apart from that the beneficiary is not able to receive the money in exchange for the documents, deferred payment credits are risky from the point of beneficiary since the

[240] Arslan Kaya, p.131
[241] Doğan, p.305
[242] Brindle, Cox, p.542; Jack, p.26; Tekinalp, p.470; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.63; Bozkurt, p.37; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.91; Yeniaras, p.127; Dayınlarlı, p.414

buyer may get an injunction in order to prevent the bank from paying the beneficiary in case that the applicant believes that payment should not be made on some grounds. This possibility weakens the security afforded by the documentary credit to the seller.[243]

Since the beneficiaries were not keen to have the payment deferred, banks were negotiating deferred payment credits. It was argued in the past whether the bank, which negotiates without first obtaining authority to negotiate, was entitled to reimbursement in case the fraud of the beneficiary is discovered before the maturity date as in the case in *Banco Santander v. Bayern Ltd*.[244] It was accepted that the risk of negotiating the credit falls on the bank which negotiates without authorization of the issuing bank, and the issuing bank is entitled to refuse to reimburse the negotiating bank. The UCP600 has terminated the arguement with the inclusion of art. 12.b. which presumes that by nominating a bank, the issuing bank authorizes that nominated bank to prepay a deferred payment undertaking incurred by that nominated bank. So the nominated bank can negotiate the deferred payment credits without any need to seek authorization from the issuing bank and they will be entitled to reimbusement which will be fulfilled by the issuing bank on the maturity date whether or not the nominated bank bank prepaid before maturity, according to art. 7.c.

Since the nominated bank does not undertake to honour the credit, it is the issuing bank which must honour if the nominated bank does not incur deferred payment undertaking or, having incurred deferred payment undertaking, does not pay at maturity. The same obligation is current also for the confirming bank.

Deferred payment credits are prefered instead of acceptance credits, since in a deferred payment credit bill of exchange is not involved in the transaction which is subject to high stamp duties in some countries.

5.3. Acceptance Credits

[243] Arslan Kaya, p.136; Doğan, p.293-294; Bozkurt, p.138-139
[244] See, 2.4.2.

An acceptance credit requires the beneficiary to present a term bill to the bank for acceptance against documents and payment by the accepting bank at maturity. In an acceptance credit the beneficiary draws on the bank a bill of exchange in accordance with the terms of the credit and if the documents are in order, the nominated bank will accept the bill and pay on maturity.[245] By accepting the bill, the bank signifies its commitment to pay the face value of the bill to the beneficiary presenting it.[246]

The bill of exchange will usually be drawn on the nominated bank with which the credit is available.[247] It should be recalled that since the nominated bank does not have any undertaking against the beneficiary, it is not obliged to accept and pay the bill on maturity. In case the nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity, it is the issuing bank that must honour the credit. The same liability was envisaged also for the confirming bank. The parties may agree that the bill of exchange will be drawn on a third party or a third bank. Again it is the issuing bank's liability to honour the credit in case of a failure of the third party or the bank to accept and pay. UCP forbids the credits to be issued available by a draft drawn on the applicant in art.6.c. This provision was aimed at avoiding a situation where the applicant may affect the relation between the bank and the beneficiary, by not accepting the draft.[248]

If the beneficiary does not want to hold the bill until it matures, he may turn it into money by negotiating, discounting or selling to his own bank. Thus, he obtains immediate payment of the value of the bill, less interest and charges.[249]

5.4. Negotiation Credits

[245] Goode, p.960; Brindle, Cox, p.542; Tekinalp, p.469; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.64; Bozkurt, p.132; Doğan, p.295; Arslan Kaya, p.16
[246] D'archy, Murray, Cleave, p.193
[247] Özel, p.64
[248] Brindle, Cox, p.543
[249] William Hedley and Richard Hedley, **Bills of Exchange and Bankers' Documentary Credits**, 4.Edition, London:LLP, 2001, p.294; D'archy, Murray, Cleave, p.193; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.64-65; Yeniaras, p.128

Under a negotiation credit, a bank is authorised to negotiate (purchase) the beneficiary's drafts drawn on another party and/or documents. The issuing bank (and the confirming bank, if any) undertakes to the bank who purchases drafts and/or documents within the terms and conditions of the credit that the drafts and/or the documents will be honoured.[250] Under an ordinary documentary credit, the undertakings of the issuing and confirming banks are directed to a named beneficiary alone. But under a negotiation credit, the undertakings are directed to any bank, or a specific bank which purchases and becomes bona fide holder of any bill of exchange and/or documents which are stipulated in the credit.[251] UCP600 defines negotiation as; "*the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank.*" Until the UCP500, negotiation was available only for drafts. UCP500 added documents near the drafts as negotiable instruments.[252]

The negotiation credit enables the nominated bank to purchase the drafts and/or the documents from the beneficiary in case he makes a complying presentation. The draft is indorsed to the nominated bank by the beneficiary and the nominated bank negotiates it subject to deduction of interest and commission.[253] [254] Thus, the beneficiary obtains the money immediately and the nominated bank which has the undertaking of the issuing bank, presents the documents in due course for reimbursement. It can be said that negotiation credits are usually used in cases where the credit does not provide an immediate payment.[255] The negotiation credit reconciles the interests of the buyer and the seller. On the one hand the seller turns the draft and/or documents into cash immediately, on the other, the buyer is not obliged to put in his bank the necessary funds until the maturity date. [256]

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[250] Brindle, Cox, p.543; Arslan Kaya, p.134; Bozkurt, p.137; Yeniaras, p.128
[251] Jack, p.27
[252] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.120; Bozkurt, p.136
[253] D'archy, Murray, Cleave, p.194; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.65
[254] It may be arranged that the interest and the commission will be paid by the applicant. In that case the beneficiary obtains the full value of the bill and/or documents
[255] Jack, p.27; Bozkurt, p.137
[256] Goode, p.967

Negotiation of a draft is available only in cases where the draft is drawn on a bank other than the nominated bank. If the draft is drawn on the nominated bank, the payment of the draft by the nominated bank does not constitute a negotiation.[257] That may be a sight payment credit or an acceptance credit.

A negotiation of a credit may be restricted to a bank or it may be available in any bank. The latter is called the freely negotiable credit under which the beneficiary may sell his draft and/or documents to any bank. In that case the undertaking of the issuing bank is against any bank which negotiates.

Where the negotiation credit is not confirmed, the nominated bank incurs no commitment to beneficiary to negotiate. If it does negotiate the draft, it has the indorsee's right of recourse against the beneficiary in the event of the bill being dishonoured. Where the nominated bank has confirmed the credit, it is under a duty to negotiate and it will not have recourse in case the bill is dishonoured, for this will be incompatible with its confirmation.[258] It should be noted that negotiation was envisaged for the nominated bank whether it is confirming bank or not. In Turkish literature misleading statements are noticed in relation to negotiation of the issuing bank. At that point it should be stressed that the issuing bank does not negotiate, it just "honours" which covers to pay, to incur a deferred payment undertaking and to accept a bill of exchange.[259] Art. 7 specifies the undertaking of the issuing bank. The only undertaking envisaged for the issuing bank is to "honour" however the credit is available.[260] Even if the credit is available by negotiation with a nominated bank and that nominated bank does not negotiate, the issuing bank's undertaking is to honour. So the expressions such as that the issuing bank negotiates without recourse, are misleading.

Art. 591 of the Comm.C. states that the drawer is liable in case the bill is dishonoured and the clauses indicating exemption from this liability is deemed not to

[257] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.120-121; Bozkurt, p.137
[258] Goode, p.967; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.66; Bozkurt, p.127; Arslan Kaya, p.134-135
[259] Rowe, p.51; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.141
[260] The credit may be available by negotiation with the confirming bank. In that case the confirming bank must negotiate without recourse.

have been noted. According to article the beneficiary who indorses the bill to a bank will be held responsible in case the bill is dishonoured, regardless of the bank, whether it has an irrevocable undertaking to the beneficiary or not. In other words the beneficiary as a drawer of the bill will face with the recourse of the bank as an indorsee of a dishonoured bill. This will be so if the Turkish law is the governing law of the beneficiary's liability. According to art. 682/II of the Comm.C., if the bill is signed in Turkey, Turkish law will determine the responsibility of the drawer.[261] So, if the governing law is Turkish law three possibilities may come about in cases where a bank negotiates a bill. First the nominated bank which does not confirm may recourse the beneficiary in case the bill is dishonoured by the issuing bank, which is not contrary to documentary credit principles. Second the confirming bank may have recourse to the beneficiary in case the bill is dishonoured by the issuing bank, which is not in accordance with the documentary credit principles. Lastly, although a negotiation does not take place, the issuing bank may have a right to recourse under bill of exchange law. This possibility may come about where it is envisaged under the credit that the draft will be drawn on a third party or a third bank. The situation may be summarised as such: after having drawn the draft on a third bank, the beneficiary presents his draft to the nominated bank to have it negotiated. The nominated bank refuses to negotiate and the beneficiary applies to the issuing bank. The issuing bank honours the credit according to art. 7.a.v.[262] Thus although the issuing bank does not negotiate, it becomes the indorsee of a bill drawn on a third bank. The issuing bank will present the bill to the third bank in due course. In case the third bank fails to honour the bill, the issuing bank as an indorsee of a dishonoured bill, will have a right to recourse against the beneficiary. Although legal under Turkish law, this situation is again not in accordance with the documentary credit principles. In such a case it is suggested that the beneficiary may set off the claim of the bank under the bill, against the amount that is owed to him by the issuing bank under the credit.[263] For the last two situations, Kaya states that; although clauses indicating exemption of the drawer from the liability will be disregarded according to art 591 Comm.C., a counter claim of the beneficiary relating to his

[261] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.67; Bahtiyar, p.85;
[262] The issuing bank will pay the face value of the bill without deducting discount.
[263] Resoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.141

exemption from the liability of a drawer arising from the law of obligations, still exist in effect.[264]

Art. 591 of Comm.C. may prevent Turkish exporters from having their drafts negotiated without recourse. While the foreign exporters enjoy the benefit of negotiating their drafts without being subject to recourse by the confirming banks, unavailability of this facility for Turkish exporters creates inequality. It is advised that the disadvantageous position of Turkish exporters should be removed by adding an exception clause for the application of art. 591 to the issuing and confirming banks' transactions.[265]

[264] Arslan Kaya, p.135
[265] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.67; Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti*, p.9; Bahtiyar, p.85

6. DUTIES AND OBLIGATIONS UNDER THE DOCUMENTARY CREDITS

Under a documentary credit, more than one contractual relationships come into being, namely; i) between buyer and the seller (under the contract of sale), ii) between the buyer and the issuing bank when the issuing bank agrees to act on the instructions of the buyer, iii) between the issuing bank and the correspondent bank when the correspondent bank agrees to act on the instructions of the issuing bank and to carry on whatever further roles it is given, iv) between the issuing bank and the seller when the credit is advised to the seller, and lastly v) if the credit is confirmed by the confirming bank a contract comes into being between the confirming bank and the seller. Each of these contractual relations give rise to rights and obligations to the parties to it, which should be analysed in order.[266]

6.1. The Relationship Between The Buyer And The Seller

6.1.1. The Duty of The Buyer to Open The Credit and Accept Complying Presentation

A documentary credit is opened because of an existence of an underlying contract which provides that it should be opened. That contract is usually a sale contract.[267] The parties may agree to make the payment by a documentary credit in a seperate contract or more usually in a provision in the sale contract which is called documentary credit clause. The buyer and the seller should agree the terms and the conditions of the credit such as: the time by which the credit must be opened, the type of the credit whether is to be confirmed or unconfirmed, the amount and the currency, the description of the goods, quantity and the unit price, the documents which must be presented and to which bank they will be presented, the expiry date of the credit, the method of payment.[268] In order to avoid problems, these and other matters should be

[266] Jack, p.6
[267] Jack, p.35-36
[268] Brindle, Cox, p.552

spelt out in detail without leaving any room for uncertainity.[269] Otherwise the buyer may open a credit with terms and conditions which seems appropriate to him and those may be to the disadvantage of the seller.

The arrangements for opening a documentary credit are made by the buyer. It is the buyer's duty to issue the credit which must be fufilled in the first instance. The credit must be opened by the buyer in due time. If the parties agreed on a date, the credit will be opened on or before that date. It should be noted that the opening of a credit includes its communication to the beneficiary too. The mere instruction to the bank by the buyer within that time will not do.[270] Where the sale contract provides that the credit should be opened immediately, as it was ruled in a case it must be opened within such time as is required for a person of reasonable diligence to get the credit established.[271] If the parties have not agreed upon when the credit must be opened, it must be opened within a reasonable time.[272] Where the contract stipulates a shipment period, the credit should be opened before the entire shipment period or in other words no later than the earliest shipment date.[273] According to the circumstances it may be accepted that it must be opened sufficient or reasonable time before the comencement of the shipment period to enable the seller to make necessary shipping arrangements and to have the benefit of the entire shipment period.[274] As the judge held in a case the seller is entitled before he ships the goods, to be assured that, on shipment, he will be paid and whenever he does ship the goods, he must be able to draw on the credit.[275]

The buyer is obliged to open a credit which conforms to the requirements of the contract of sale. As stated before, the conformity of the credit with the underlying contract can be ensured by stating the terms and the conditions of the credit explicitly in the contract. In this way the seller will be able to check whether the credit is that prescribed by the contract or not.[276] The seller may reject the defective credit which

[269] Jack, p.36
[270] Jack, p.41-42; Carr, p..494; Arslan Kaya, p.42-43; Yeniaras, p.117; Tolun, p.271
[271] See *Garcia v. Page & Co Ltd.*; Carr, p.494; Jack, p.42
[272] Brindle, Cox, p.553
[273] Goode, p.980; Carr, p.495
[274] Brindle, Cox, p.553; Goode, p.980
[275] See *Pavia and Co SpA v. Thurmann-Neilsen*; Carr, p.495
[276] Bozkurt, p.95

does not conform with the terms and conditions of the contract. In this case the buyer may cure the defect by procuring the issue of a new conforming credit, if he still has sufficient time.[277] Sometimes the seller takes no objection to a credit which does not conform but proceeds as if it were a conforming credit. In such a case, the credit will be opened with the terms and conditions as notified to the seller according to the art. 6 of CO. which arranges the implicit acceptance and the seller will be excluded from claiming the nonconformity of the credit.[278] According to the governing law of the relationship, the seller may be held to have waived the the nonconformity of the credit, which results the prevention of the seller from complaining of it. Or this situation may be held to be a variation of the underlying contract, which may be deduced from the conduct of the parties[279]

The buyer does not discharge his payment obligation by procuring the opening of the credit in accordance with the contract of sale. The opening of the credit is made with the intention or aim of payment. Thus the opening of the credit is not itself the payment. The buyer's payment obligation is discharged only upon actual payment of the money to the seller under the documentary credit. In this respect the documentary credit is similar to a bill of exchange drawn for the payment of a debt.[280] In the absence of any agreement to the contrary, payment with a documentary credit is taken to be conditional, not absolute payment. Practically, the importance of the conception is one of great importance in the event of the bank which has issued the credit becomes insolvent. If the credit were regarded as absolute payment, then the buyer would be under no liability to the seller, and the seller would bear any resulting loss.[281] The buyer will have to pay the seller the purchase price even if, he has put the funds in the issuing bank before the bank became insolvent, since the buyer promise to pay by a documentary credit, not to provide a credit which does not pay.[282]

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[277] Goode, p.979
[278] Arslan Kaya, p.55
[279] Jack, p.48
[280] Arslan Kaya, p.38-39; Tekinalp, p.424; Doğan, p.42; Bozkurt, p.19; Yeniaras, p.109
[281] A. G. Davis, **The Law Relating To Commercial Letters of Credit**, 2. Edition, London:Sir Isaac Pitman & Sons Ltd., 1954, p.45-46
[282] Brindle, Cox, p.554; Jack, p.57

After the opening of the credit, the seller may not demand payment in any other way, such as approaching the buyer directly. Nor he can sue for the price during the pendency of the credit. His right to sue for the price is suspended during the currency of the credit. If the bank fails to honour the credit on due presentation of documents, seller's right to sue buyer for the price revives.[283]

The opening of a credit may be a condition precedent to the formation of a contract or it may be a term of the contract. In the former case, which arises rarely, the failure of the buyer to open the credit will prevent the contract from coming into existence. The contract is not concluded in effect since the condition is not fulfilled which is a requirement for the formation of the credit. In the latter case the provision of the credit is a precedent to the obligation of the seller to ship the goods. The obligation of the buyer to open a credit is an essential term of the contract. The seller is not obliged to ship the goods until a credit conforming to the contract of sale has been opened. The breach of the obligation of the buyer to open a credit will give seller a cause of action against the buyer.[284]

The failure of the buyer to open a credit in due time in conformity with the sale contract constitutes his default. The seller may invoke the general principles which apply in any other situation where a buyer repudiates the contract of sale. If the date by which the credit is to be opened was determined, with the expiry of the time the buyer will be in default. Then the seller may avail the rights arising from the default of the debtor. Otherwise the seller can obtain the same rights by serving a notice for giving the buyer a date by which the credit must be provided and which must be a reasonable one. According to the art. 106 CO. the seller may denounce the contract and claim damages or he may demand from the buyer to fulfill his obligation and damages arising from the delay. The seller may also invoke art. 211 CO. according to which he may cancel the contract without any need to serve a notice for giving a reasonable period of time and claim damages.[285] It is stated that the measure of the damage will be the difference

[283] Goode, p.980
[284] Jack, p.45-46; Brindle, Cox, p.556-557
[285] Jack, p.46; Arslan Kaya, p.48-49; Tolun, p.271-272

between the contract price and the market price. If the seller is unable to recoup his lost profit by selling the goods in the market, he can also recover the profit that he would have made on the sale. Where there is no available market for the goods, the seller will recover damages equal to the contract price.[286]

An other duty of the buyer is to accept the complying documents of the seller which are presented duly. This duty is fulfilled by the banks which acts on behalf of the buyer. If the bank fails to accept a complying presentation, the legal results of that act will borne on the buyer as principal. In such a case the buyer will be in default and the seller will be able to demand the payment directly from the buyer under the sale contract, since that right of the seller to demand payment directly from the buyer will revive. Besides, the seller will again be able to avail himself from the principles of debtor default. It should be noted that the refusal of the bank against complying presentation will constitute the bank's default too, since he infringes his commitment under a documentary credit. The seller may sue the bank for breach of his commitment which is to make payment against a complying presentation.[287]

6.1.2. The Duty of The Seller to Ship The Goods and Present The Documents

In a synallagmatic contract the right of a party constitutes the obligations of the other party. In that respect once the seller is advised the opening of a credit, he is under an obligation to ship the goods which he contracted for and present the stipulated documents to the bank.[288] As stated above, the obligations of the seller is conditional upon those of the buyer's. As long as the buyer does not procure the opening of a credit, the seller is not bound to fulfill his obligations.

Sometimes the buyer's duty may not arise until the seller has done some act. For example, the parties may agree that the credit will be opened in accordance with the

[286] Brindle, Cox, p.557
[287] Kaya, p.50-51
[288] Carr, p.496; Arslan Kaya, p.52; Bozkurt, p.103; Tolun, p.273

provisional invoice or the necessary information which will be informed by the seller may be required. In such a case the procurement of provisional invoice or necessary information is a condition precedent to the buyer's obligation to open the credit. [289] Such conditions are to be fulfilled by the seller initially.

The seller will be in default unless he tenders the required complying documents to the bank on time. The seller's failure to make a complying presentation will exclude him from demanding payment under the credit. At the same time, his failure to make a complying presentation will result his default. At that point the principles of law of contracts will apply. The buyer may utilise the rights arising from the art.106 CO. without any further need to give the seller time since all credits state an expiry date for presentation which is determined, definite date in the sense of art.107/3 CO. According to art.106 CO., the buyer may claim damages and cancel the contract. The buyer may invoke art.187 CO. too which is a special provision for default of the seller in commercial sales. The article sets out two situations; the buyer may abandon the delivery and claim damages or if he intends to demand delivery, he must inform his intention to the buyer when the time expires. The latter entails the extension of the expiry date of the credit in order to enable the seller to make a second good tender.[290]

The seller may not make a complying presentation, although he has shipped the goods. Obviously this will result his exclusion from demanding payment under the credit. Unless the extension of the expiry date to enable the seller to make a second tender is ensured, the seller can demand payment directly from the buyer, provided that he has fulfilled his obligations under the sale contract. Because under the sale contract the buyer remains the debtor and the seller's right to demand payment under the sale contract revives after the expiry of the credit.[291]

6.2. The Relationship Between The Buyer And The Bank

[289] Jack, p.46
[290] Arslan Kaya, p.59; Doğan, p.206-207
[291] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.127; Arslan Kaya, p.59

In accordance with his duty to open a credit arising from his contract with the seller, the buyer will apply to a bank to issue a credit in appropriate form.[292] When the bank accepts the the application of the applicant, a contract comes into being between the applicant and the bank. The buyer's submission of the application constitutes an offer which the bank accepts usually by conduct in issuing the credit.[293] Explicit acception of the bank is not a prerequisite for the formation of the contract. According to the art.6 of the CO., unless refused by the bank in appropriate time, the contract forms.[294]

In his application to the bank, the applicant should state precisely the following informations:

a- the beneficiary of the credit.

b- the type of the credit; whether the credit is to be, confirmed-unconfirmed or transferable.

c- the description of the goods

d- the documents which must be presented.

e- whether the credit is available by sight payment, deferred payment, acceptance or negotiation.

f- the bank with which the credit is available or whether it is available with any bank.

g- the sum to be available under the credit

h- the expiry date of the credit.

ı- the latest date for shipment.[295]

These instructions should conform in all respects to the terms of the sale contract.[296] If the buyer requires the presentation of a document other than a transport document, insurance document or commercial invoice, he should state who is to be the issuer of the document, what is he to do prior to issuing the document and what is he to

[292] Jack, p.63-64
[293] Goode, p.981
[294] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.36
[295] Jack, p.65
[296] Goode, p.954; Brindle, Cox, p.559; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.22; Doğan, p.44

cover in the document.[297] Besides the buyer shouldn't require any condition without stipulating the document to indicate compliance with the condition, such as instructing the bank that payment will be made in case the goods are in good, merchantable quality. In such cases, banks will disregard the condition as not stated.(Art. 14.h.)

The instructions of the applicant must be clear, complete and precise without including excessive, unnecessary details. He should avoid giving unclear, ambiguous instructions to the bank in order not to give rise to diffuculties in the operation of the credit. [298] Also the bank should ask and help the applicant to clarify those unclear instructions. In practice the banks ask their customers to complete the standard application forms to open a credit, which include details of requirements and incorporate UCP. The applicant fills the necessary informations, and sign the application form.

It is accepted that the contract between the buyer and the issuing bank is an attorney contract which creates rights and obligations for both of the parties. Under that contract, the issuing bank agrees to issue the credit and to communicate it to the beneficiary either itself or through a correspondent bank and to make payment to the beneficiary against presentation of stipulated documents and the buyer agrees to reimburse the issuing bank for payments made under the credit.

6.2.1.The Duties of The Issuing Bank

The bank must follow the instructions of the buyer precisely, both in the opening of the credit and in its operation. As an agent it must strictly comply with the buyer's instructions.[299] If the buyer gives ambiguous, or incomplete defective instructions, the bank itself should not rectify the deficiency or complete the instructions. It should seek clarification from the buyer since the bank is bound with the instructions received from the buyer strictly.[300] Similarly the bank can not require another document which he

[297] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.34, Jack, p.202
[298] Goode, p.954; Jack, p.64; Gülen, p.35
[299] Brindle, Cox, p.559; Jack, p68
[300] Doğan, p.211

thinks will do as well instead of the one required by the buyer.[301] But it is stated that despite the ambiguousness of the buyer's instructions, the issuing bank will be entitled to be reimbursed if he construes them reasonably, provided that it must also have acted reasonably in proceeding on the basis of ambiguous instructions without seeking clarification from the buyer.[302]

The bank has not a duty to make investigation about the solvency or the standing of the seller if it was not agreed so in the contract. But, it is accepted that if the bank has knowledge about the seller's standing or solvency, it must inform that to the buyer.[303]

6.2.1.1. Open and Advise The Credit

Following the acceptance of the applicant's offer, the bank is under a duty to open a credit in accordance with the instructions of the applicant and either itself or by instructing a correspondent bank in the country of the beneficiary to advise the credit. But it is pointed out that the bank does not guarantee anything beyond his control such as confirmation of the credit. For the beneficiary may have such a reputation that no bank in his country may not want to confirm the credit.[304] So, despite the instruction of the applicant, a confirmed credit may not be provided.

The duty of the bank to open a credit is against the buyer. So in case the bank fails to issue a credit, the seller can not demand the bank to fulfill his obligation. The bank does not commit anything to the seller until it advises the credit. But the failure of the bank to open a credit in accordance with the instructions of the buyer results the buyer's default, in which case the seller may cancel the contract and claim damages from the buyer. In this case the buyer can resort the bank for the damages he paid to the seller. Moreover the bank will be liable to the buyer for his own loss since it infringed the contract under which the bank undertook to open a credit duly.[305]

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[301] Brindle, Cox, p.559
[302] Brindle, Cox, p.560
[303] Doğan, p.208; Bozkurt, p.107
[304] Jack, p.68; Tekinalp, p.436; Bozkurt, p.107-108; Doğan, p.210; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.38; Erdoğan, p.94
[305] Jack, p.70; Tekinalp, p.436;

6.2.1.2. Examine The Documents and Pay

The bank is bound to pay if a complying presentation is made. In order to define whether a presentation is complying or not, the bank must examine the documents -only the documents- on their face. If the documents constitute a complying presentation, it is bound to pay. Otherwise it should refuse to take up the documents and honour the credit. So it is the bank's duty to examine the documents, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the credit and to pay if they are complying. Documents which appear on their face to be inconsistent with one an other are to be considered not to be a complying presentation. The correspondent bank which paid against a complying presentation will be entitled to reimbursement from the issuing bank, and in turn the issuing bank will be entitled to reimburesment from the applicant. [306]

In two cases the bank's duty not to make payment arises. As stated above, firstly in case of presentation of nonconforming documents. Secondly the bank must decline to honour the credit despite the presentation of apparently conforming documents, if the fraud of the beneficiary is established.[307]

Banks are in no way concerned with anything else apart from the documents. The bank's obligation to pay is irrespective of the factual situations and any claims of the buyer arising from his relationship with the seller. Moreover the bank checks the apparent conformity of the documents *on their face* so that it is not liable for the falsification or accuracy of the documents.

The consequence of the issuing bank's failure in fulfilling its duty of examination may expose it to the damage claims of the applicant on account of the breach of the contract. The bank's right to be reimbursed from the buyer will expire, in

[306] Brindle, Cox, p.561; Charles Bontoux, (Translation:Edip Balcı), "Vesikalı Kredilerde Rezerv Tahtında Ödeme Yapılması", **Banka,** Vol.6, No.5 (May 1969), p.29; Tekinalp, p.436; Bozkurt, p.108; Doğan, p.212-213; Erdoğan, p.95; Yeniaras, p.119; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.39; Tolun, p.276
[307] Tekinalp, p.441; Bozkurt, p.110-111; Yeniaras, p.120

practice it will be left with documents on its hands in respect of which it has paid the beneficiary or the correspondent bank but which the buyer is not obliged to take up and to pay for.[308]

6.2.1.3. Exclusions of The Bank's Liability

The UCP600 places several limitations upon the bank's liability in its articles 34-37 like its predecessor. These provisions were so widely worded that they exempt the bank from the liability apart from the matters arising out of their control, also exonerate the banks from the errors within their control.[309] It should be noted that, the liability of the issuing bank against the applicant according to the articles 34,35,36 will be evaluated in the light of art.99 of CO. If we conform the article to the issue, the provisions of the contract between the applicant and the issuing bank which absolves the bank from his fraud and gross fault (culpa lata) are void. So the bank can be absolved only from his slight defaults (culpa levis).[310] But according to the art.99/II CO. the judge may regard the provision which absolves the bank from his slight default, void since the liability arises from a concession granted by the government.[311]

Art. 34 absolve the bank from liability for the form, suficiency, accuracy, genuineness, falsification or legal effect of any document or for the conditions stipulated or superimposed on a document. Nor any liability may be imposed on the bank for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance 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 person.

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[308] Goode, p.982; Jack, p.70
[309] Jack, p.70
[310] Dayınlarlı, p.418; Oğuzman, Öz, p.345
[311] M. Kemal Oğuzman, M. Turgut Öz, **Borçlar Hukuku Genel Hükümler**, 2.Edition, İstanbul: Filiz Kitabevi, 1998, p.347 and fn.356

Art. 35 sets out that a bank does not assume any 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. Besides the article relieves the bank from the liability for errors in translation or interpretation of technical terms and the bank may transmit credit terms without translating them. It is suggested that the article should not be construed as exempting a bank from liability for its own negligence.[312] UCP600 brought a novelty to the article which imposes on issuing bank or confirming bank a duty to honour or negotiate the credit or to reimburse the nominated bank which determines that a presentation is complying and forwards the documents, even when the documents have been lost in transit between the banks. Thus the risk of the documents loss in transit falls on the issuing bank or confirming bank provided that the nominated bank determines that presentation is complying and forwards the documents.

Art. 36 provides Force Majeure according to which a bank assumes no liability or responsibility for the consequences arising out of the interruption of its business by Acts of God, riots, civil commotions, inserructions, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control. The credit may expire during such interruption of business. In that case, upon resumption of its business, the bank will not honour or negotiate. The provision is to the detriment of the beneficiary. It is suggested that the beneficiary may stipulate that if the presentation is not timely made because of a force majeure, the last day for presentaion is automatically extended to the day X days after the reopening of the bank.[313]

A special attention should be paid for the art.37. The article under the heading Disclaimer for Acts of an Instructed Party, states in the subparagraphs a and b as follows:

[312] Jack, p.71
[313] Özalp, p.487

a. A bank utilizing the services 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 applicant.

b. An issuing bank or advising bank assumes no liability or responsibility should the instructions it transmits to another bank not be carried out, even if it has taken the initiative in the choice of that other bank.

At the first reading, the article gives the impression that, whatever the correspondent bank does, it does at the risk of the applicant and not of the issuing bank, though the applicant has no contract with the correspondent bank.[314] If the article is applied without any qualification, the result will be such that; suppose that the advising bank advises the credit with an error, such as a document required by the applicant is omitted. In that case the issuing bank will be bound by the credit as advised by the advising bank and the beneficiary will be entitled to payment. The effect of the provision would be that the applicant would be to accept and pay for the documents which does not comply with his instructions since the issuing bank utilizes the services of the advising bank for the account and at the risk of the applicant.[315] The same effect would be to arise where the correspondent bank accepts and takes up documents which does not comply with the terms and conditions of the credit and where it is the duty of the issuing bank to pay. Since the acception of the nonconforming documents by the advising bank binds the issuing bank, the issuing bank would pay for the account and at the risk of the applicant. It is rightly pointed out by authers that if the issuing bank had made those errors or accepted nonconforming documents itself, the liability would rest with it since it would be liable for breach of the attorney contract which imposes duty of care on the issuing bank.[316]

So far as the applicant is concerned, the advising bank is treated as the performance assistant of the issuing bank in the sense of art.100 of CO. The acts of the advising bank are therefore to be taken as those of the issuing bank for the purpose of

[314] Jack, p.72
[315] Jack, p.73
[316] Goode, p.983; Jack, p.73

determining any liability which the issuing bank may have to the applicant.[317] The article, after declaring the liability of the debtor who confers the performance of a debt to other persons (performance assitants), states that the liability can be removed partially or completely, with the exception that if the liability arises from a concession granted by the government, the debtor can absolve himself from the liability arising only from slight fault (culpa levis) of the performance assistant. The banks are accepted within the ambit of the provision since the permission of the Counsel of Ministers is a legal requisite to carry out banking activity in Turkey. This requirement connotes the concession in the sense of art.100.[318]

It is accepted that art.100 CO. has been adopted for the preservation of public order and the UCP rules are applicable if they are not contrary to the mandatory rules of Turkish law which were adopted for public policy considerations. The mandatory provision art.100 CO. prevails the art.37 of the UCP600 which will be enforceable so much as the the former permits.[319] Thus, in case Turkish law is the governing law, despite the issuing bank's stipulation of art.37 in the credit, the issuing bank will be able to exonerate himself only from the slight defaults of the correspondent bank.

6.2.2. The Buyer's Duty To Reimburse The Bank and To Take up The Documents

It is the duty of the buyer to take up from the issuing bank the documents which conform to his instructions and to pay the issuing bank in accordance with the arrangements between them.[320] The issuing bank may demand from the buyer to put in the necessary funds in advance, or the bank may be authorized by the buyer to debit his account, or it may be agreed that the buyer will pay the bank after he receives the documents and sells the goods. In the last instance the bank will demand security from

[317] Jack, p.72
[318] Somuncuoğlu, *Akreditif İşleminde Bankanın Sorumluluğu,* p.56
[319] Ünal Somuncuoğlu, "Vesikalı Krediler (Akreditif) Üzerine Bazı Açıklamalar", Vol.55, No.2 (February 1981), p.74; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.95; Erdoğan Göğer, "Belgeli Akreditifin Hukuki Mahiyeti ve Yargıtayın Bir İçtihadı", **Banka ve Ticaret Hukuku Dergisi**, Vol.4, No.4 (July 1968), p.697-698
[320] Jack, p.74; Tekinalp, p.444; Özel, p.37;

the buyer. In the normal course of the process, the documents and especially the bill of lading provides security to the bank. If the bank releases the documents in exchange for insufficient security, it may be out of pocket.

The duty of the buyer to take up the documents and to make payment arises if the bank makes payment against a complying presentation. The buyer is not obliged to accept documents which does not conform with his instructions or if a document is inconsistent with an other.[321]

The buyer is bound to pay fees, commissions, costs and expenses of the issuing bank. In addition to that he will pay for the correspondent bank's charges too. Art. 37/c burdens liability on the instructing (issuing) bank for the commissions, fees, costs or expenses (charges) incurred by the instructed bank in connection with the instructions. The issuing bank will in return demand those charges from the applicant who is liable to indemnify him. Again if the credit states that charges are for the account of the beneficiary and these charges can not be deducted from the proceeds, liability remains with the issuing bank who will ultimately recourse to the applicant for payment. Art 37/d declares that the applicant shall be bound by and liable to indemnify a bank against all obligations and responsibilities imposed by foreign laws and usages. The liability of the applicant is not directly against the correspondent bank with whom he is not in contractual relationship. In other words the correspondent bank can not claim payment from the applicant. The correspondent bank may recourse to the issuing bank only who will be indemnified by the buyer eventually.[322]

6.3. The Relationship Between The Issuing Bank And The Correspondent Bank

Since the documentary credits are used to finance the international transactions, the issuing bank and the beneficiary are in different countries. Although the issuing bank may deal with the beneficiary directly, usually the issuing bank utilises the

[321] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.37; Yeniaras, p.118; Tekinalp, p.444-445
[322] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.134; Doğan, p.220-221; Tekinalp, p.445

services of a second bank in the country of the beneficiary, which is called the correspondent bank, whatever role it plays in the transaction. Depending on the instructions it receives from the issuing bank, the correspondent bank acts in various capacities such as advising bank, nominated bank and the confirming bank.[323]

Although it is possible that a correspondent bank may act in one or more of these capacities, basically the correspondent bank's function will be advising the credit, since the opening of the credit entails the advice of the credit and its terms to the beneficiary in the first step. So the correspondent bank (advising bank) will advise the opening of the credit and its terms and conditions to the beneficiary as instructed by the issuing bank.

If the issuing bank does not want the authenticated teletransmisson of a credit to be taken as the operative credit, the teletransmission must state "full details to follow" (or words of similar effect) or that the mail confirmation is to be the operative credit. Otherwise an authenticated teletransmission of a credit will be deemed to be the operative credit, and any subsequent mail confirmation will be disregarded.(Art. 11/a) The same principle is available for amendments too.

Once the issuing bank advises the credit by utilizing the services of an advising bank, art.9/d imposes on the issuing bank to use the same bank in advising any amendment thereto.

The legal relationship between the issuing bank and the correspondent bank is defined as the attorney contract under which rights and duties arise for both of the parties.

6.3.1. The Duties of The Correspondent Bank

[323] Jack, p.114 - 115

As an agent of the issuing bank the correspondent bank must follow the instructions of the issuing bank strictly, failing which it can not claim reimbursement and may be liable to the issuing bank for breach of the contract between them.[324] In this respect, it must advise the credit to the beneficiary as instructed to it by the issuing bank. The issuing bank will be bound by the credit as advised by the correspondent bank even though it deviates from its instructions. The practical result of the correspondent bank's failure to comply with the instructions in advising the credit will be that the beneficiary will be entitled to payment by presenting documents in accordance with the credit as advised to him and the issuing bank will be obliged to pay against documents which are not in accordance with its instructions. If the applicant is not ready to accept and pay for the discrepant documents, the issuing bank may resort to its correspondent bank for the amount it has paid to the beneficiary. In case the correspondent bank is the paying bank, then the issuing bank may decline to accept the documents and to reimburse the correspondent bank on the ground that the documents do not comply with its instructions.[325]

It should be noted that by being appointed as an advising bank by the issuing bank does not impose on the correspondent bank an absolute duty to advise the credit. The correspondent bank may elect not to advise the credit. In this case it owes a duty to inform that without delay to the bank from which the credit has been received.(Art.9/e) Otherwise it will be liable against the bank from which it has received instructions.

According to the UCP, all credits must state the bank with which it is available and the bank with which the credit is available is the place for presentation. Many times, this bank, which is called as nominated bank, will be the bank which advises the credit to the beneficiary. The credit will provide that the documents to be presented to the nominated bank and the payment, acceptance or negotiation will be made by the nominated bank. In this case it will be the duty of the nominated bank to examine the documents to see whether they appear on their face to be in accordance with the terms

[324] Goode, p.984; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.151
[325] Jack, p.116

and the conditions of the credit.[326] The duty of the nominated bank to examine documents is very similar to that of the issuing bank described under 6.2.1.2. and this duty is irrelevant whether the nominated bank has confirmed the credit or not. It should be noticed that if the nominated bank accepts the documents, its acceptance will bind the issuing bank if the paying bank is the issuing bank. In case the nominated bank accepts noncomforming documents, the issuing bank will be bound to pay the beneficiary unless the applicant is ready to waive the discrepancy. Then the issuing bank will claim the amount it has paid to the beneficiary from the nominated bank. If payment is made by the nominated bank against nonconforming documents, it will not be entitled to reimbursement from the issuing bank. In order to be entitled to reimbursement the nominated bank must have honoured or negotiated documents which appear on their face to constitute a complying presentation. [327]

It is the duty of the nominated bank to pay, incur a deferred payment undertaking, to accept drafts and negotiate in case a complying presentation is made. If the nominated bank has not confirmed the credit, it is not obliged to honour or negotiate. If a nominated bank which is not a confirming bank does not honour or negotiate, the beneficiary can approach only to the issuing bank.[328]

Following the acception of the documents, the correspondent bank has to send the documents to the issuing bank in reasonable time. The clearence of the goods through the customs is depended on the arrival of the documents to the applicant. Having the delivery of the documents on time is of importance for the buyer who is willing to have the goods as soon as possible. For that reason, it is the duty of the correspondent bank to send the documents to the issuing bank in reasonable time, failing to which, the correspondent bank will be liable to the issuing bank due to the breach of attorney contract.(Art.390 of CO.)[329]

6.3.2. The Duties of The Issuing Bank

[326] Jack, p.118-119
[327] Jack, p.128; Yeniaras, p.122;
[328] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.41
[329] Reisoğlu, *Hukuki Açıdan Akreditif ve Uygulama Sorunları*, p.51

If the correspondent bank honours or negotiates against a complying presentation, the issuing bank is bound to reimburse the correspondent bank.[330] It may be arranged that the nominated bank will seek reimbursement from a reimbursement bank. In that case the issuing bank must provide the reimbursing bank with a reimbursement authorization. It will be for the reimbursing bank to reimburse the nominated bank on the first demand. If reimbursement is not made by the reimbursing bank on the first demand, it is the issuing bank which will reimburse the nominated bank since it is not relieved of any of its obligation to provide reimbursement.(Art.13/c) Besides the issuing bank will be responsible to the nominated bank for any loss of interest, together with any expenses incurred.(Art.13/b.iii)

The issuing bank is liable for any commissions, fees, costs or expenses (charges) incurred by the correspondent bank in connection with its instructions.(Art. 18/a) It may also be arranged that the charges of the correspondent bank will be for the account of the beneficiary. The credit then will state that the charges of the correspondent bank are for the beneficiary and they will be deducted from the amount due to the beneficiary.[331] It may be the case that the charges may not be deducted from the proceeds for any reasons such as the beneficiary's failure to make a presentation. In that case the issuing bank remains liable for the charges of the correspondent bank which will then be entitled to recover from the issuing bank. The issuing bank in its turn will seek to recover them from the applicant.[332]

6.4. The Relationship Between The Banks And The Beneficiary

Under a documentary credit, the beneficiary enjoys the benefit of a contractual undertaking of an issuing bank and the confirming bank if the credit is confirmed. The credit which becomes binding on those banks upon the receipt of the notice of credit by the beneficiary constitutes an abstract debt undertaking of the issuing and/or confirming

[330] Brindle, Cox, p.561, Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.44
[331] Jack, p.132-133
[332] Jack, p.133

bank.[333] That undertaking is depended on the condition of making a complying presentation by the beneficiary.

As of the time it issues the credit, the issuing bank undertakes to honour, in other words it is committed; to pay at sight if the credit is available by sight payment, or to incur a deferred payment undertaking and pay at maturity if the credit is available by deferred payment, or to accept a bill of exchange drawn by the beneficiary and pay at maturity if the credit is available by acceptance. By adding its confirmation, the confirming bank undertakes to honour and negotiate without recourse, if the credit is available by negotiation. The undertaking of the confirming bank is entirely distinct and independent from that of the issuing bank.[334]

The banks can in no way amend or cancel the credit without the consent of the beneficiary. Also the applicant can not ensure the amendment of the credit without the agreement of the beneficiary and issuing bank, and the confirming bank, if any. The confirming bank may not extend its confirmation to the amendment. In that case it must inform that to the issuing bank without delay and inform the beneficiary in its advice.(Art.10/b) The terms and conditions of the original credit will remain in force for the beneficiary until the beneficiary communicates its acceptance of the amendment to the bank that advised such amendment.(Art.10/c) Partial acceptance of an amendment is not allowed and will be deemed to be notification of rejection of the amendment.(Art.10/e) The banks can not stipulate that the amendment shall enter into force unless rejected by the beneficiary within a cretain time. Such a provision shall be disregarded.(Art.10/f)

The seller is entitled to payment under the credit if he presents complying documents to the nominated bank or to the issuing bank before the expiry date of the credit. The seller may retender the documents before the expiry date of the credit, if his

[333] Brindle, Cox, p.566; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.149; Tekinalp, p.445; Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti*, p.56-60; Arslan Kaya, p.70; Erdoğan, p. 57-58; Tolun, p.276; Uluç, p.464-465

[334] Goode, p.986

presentation is rejected for discrepancies which can be rectified and also if the time permits a second tender.[335]

Upon the beneficiary's presentation, the nominated bank or the issuing bank may accept and take up documents if they are complying, or reject the documents on grounds of non-conformity, or may pay under reserve. In the last case, the bank and the presenter are in a disagreement as to whether the documents comply with the credit, or the bank may be unsure whether to accept or reject the documents. In such cases, the bank may pay against an indemnity or under reserve the effect of which is that if the buyer refuses to waive the discrepancies and take up documents, the bank is entitled to recover the payment. This may provide a solution since the discrepancies may be minor or immaterial and the buyer may be prepared to accept the documents as tendered.[336] In order to reduce the likelihood of a subsequent dispute, it is suggested that the bank and the beneficiary should expressly agree upon their respective rights and liabilities in the event that the documents are rejected by the buyer.[337] It should be noted that such an arrangement binds only the parties to it. So if the documents are presented to the nominated bank, it will not bind the issuing bank and the duty of the issuing bank to examine the documents and to accept or reject them in accordance with the terms and conditions of the credit remain unchanged.[338] If the issuing bank decides to reject the documents it should follow the process envisaged by the UCP for the refusal of documents.

It is accepted that there is not a contractual relationship between the beneficiary and the advising bank. The advising bank is liable against the beneficiary only for checking the apparent authenticity of the credit or amendment that the advice accurately reflects the terms and conditions of the credit or amendment. Although there is not a contractual relationship between the advising bank and the beneficiary, the advising

[335] Tekinalp, p.447; Brindle, Cox, p.568
[336] Goode, p.986; Jack, p.103
[337] Brindle, Cox, p.569
[338] Jack, p.105

bank is liable in case the credit, which it advised, turns out not to be genuine, if it was negligent in checking out the authenticity of the instructions.[339]

Similarly, any contractual relationship does not exist between the nominated bank and the beneficiary. Mere authorization of issuing bank to honour or negotiate does not impose any obligation on the nominated bank unless the nominated bank has confirmed the credit and it does not undertake anything against the beneficiary. So even the necessary funds are put in the nominated bank by the issuing bank, it is not obliged to honour or negotiate the beneficiary's documents. If it fails to honour or negotiate, the beneficiary can not have a claim against the nominated bank. Its failure to honour or negotiate just constitutes the breach of the contract between it and the issuing bank which the beneficiary is not a party.[340]

[339] Jack, p.117; Reisoğlu, p.154; Somuncuoğlu, *Akreditif İşleminde Bankanın Sorumluluğu*, p.55; Ekici, *Akreditifte Lehtarın Dürüstlük Kurallarına Aykırı Olarak (Fraud) Bedeli Talep Etmesi ve Bu Durumda Akreditif Bedelini İştira (İskonto) Eden Bankanın Hukuki Durumu,* p.163

[340] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.154-175

7. DOCUMENTS, THEIR PRESENTATION AND EXAMINATION

As so far explained, since the letter of credits are documentary transactions and based on documents, the documents are the corner stone of the documentary credits. Up to now, for varios reasons, significance of the documents has been set out. The conclusion drawn from all above statements is that the beneficiary seller is entitled to payment under the credit if he makes a complying presentation, in other words he should tender stipulated conforming documents to the bank on or before the expiry date of the credit. This underlying inference requires handling the documents, the requirements to be met by them, their presentation by the beneficiary and their examination by the bank.

7.1. Documents Under The Documentary Credits

The UCP has set out considerable provisions for documents, some of which are in respect of all documents and others in respect of a group of documets such as transport documents and some relate to a specific document as such art.20 governing the bill of lading.

First of all as to the issuers of the documents, the UCP discourages the use of terms such as “first class”, “well known”, “qualified”, “independent”, “official”, “competent” or “local”. Describing the issuer of a document with these terms will not have any effect and despite the use of these terms, any issuer except the beneficiary is allowed to issue the document. The words such as “prompt”, “immediately”, “as soon as possible” will be disregarded, unless they are required to be used in a document.

Many times, a document without a signature will not be a valid, acceptable document. According to the UCP, a document may be signed by handwriting, facsimile signature, perforated signature, stamp, symbol or any other mechanical or electronic

method of authentication.(Art.3) In case the credit calls for a document to be legalized, visaed, certified or similar, this requirement can be ensured by any signature, mark, stamp or label on the document which appears to satisfy that requirement.(Art.3)

UCP prescribes that at least one of each document required in the credit must be presented as original unless otherwise stipulated in the credit.(Art.17.a.) If the credit requires presentation of multiple documents by using terms such as "in duplicate", "in two fold", "in two copies" the beneficiary may satisfy that requirement by presenting at least one original and the remaining number in copies, except when the document itself indicates otherwise.(Art.17.e.) For instance, the document may have a notation such as "this document issued in three originals all of which must be presented together." In such cases the notation must be taken into account.[341] Sometimes the credit may also call for all the original copies of a document. Apart from the credit itself, the UCP requires presentation of all original documents in relevant provisions in relation to bill of lading, multimodal transport document, sea waybill and charterparty bill of lading and insurance documents. If a credit requires presentation of copies of documents, either originals or copies may be presented.(Art.17.d.)

The identifiaction of a document as original is crucial in the credit process. The UCP has defined original documents in detail. According to the art.17.b. the banks shall treat any document bearing an apparently original signature, mark, stamp or label of the issuer of the document as original, unless the document itself indicates that it is not an original. In addition to that, according to art.17.c., in three circumstances a document will be accepted as original unless the document itself indicates otherwise; i.) if it appears to be written, typed, perforated or stamped by the document issuer's hand; or ii.) if it appears to be on the documen issuer's original stationery; or iii.) it states as original, unless the statement appears not to apply to the document presented.

[341] Özalp, p.333

It should be noted that the banks define the originality of a document according to their appearence. So a document may seem to be original but in real it may not be so. In such a situation the bank may not be held liable according to art.34.

The UCP permits presentation of documents dated prior to the issusance date of the credit. Thus the beneficiary, after concluding the sale contract and before the issuance of the credit, may start preparing the necessary documents for presentation. But in no way a document may be dated later than its date of presentation.(Art.14.i.)

An other novelty of the UCP600 is art.14.j. The adresses of the beneficiary and the applicant in any document need not to be the same as those stated in the credit or in any other document but they must be within the same country as the respective adresses in the credit. The contact details such as telefax, telephone, email and the like stated as part of the adresses will be disregarded. The exception of the rule is that, when the adress and contact details of the applicant appear as part of the consignee or notify party details on a transport document subject to articles 19, 20, 21, 22, 23, 24 or 25, they must be as stated in the credit.

The documents under a credit can be investigated in four groups under the headings of transport documents, insurance documents, invoice and other documents.

7.1.1.Transport Documents

Until the spread of container transportation, the usual form of transport document was traditional bill of lading.[342] To some extent a bill of lading was providing the security the parties the exporter and the importer needed in international sales. Under a c.i.f. or a f.o.b. contract the obligation of the seller is to ship the goods which is prooved by the bill of lading since a shipped bill of lading evidences that the goods have been loaded on board the vessel. Besides a bill of lading is a document of title, transfer of which transfers the property in the goods.[343] So, until he is paid, the seller keeps the

[342] Jack, p.170
[343] Todd, p.102

bill of lading and the property in the goods. In case the buyer defaults in payment, the seller may recover the goods or he may sell the goods to an other buyer. On the other hand the bill of lading may have disadvantages too. The goods may arrive at the destination before the documents. In that case the carrier has two options, the first is to wait for the arrival of the documents in which case additional costs and charges will arise. Secondly the carrier may deliver the goods without the bill is producted in which case, the carrier is taking an enormous risk for that if he delivers to someone who is not entitled to the goods, he will be liable to the true owner for the full value of the goods wrongly delivered.[344] For these considerations it is much better for the carriers to issue a non-negotiable waybill which lessens the risk of delivering to wrong person instead of a bill of lading.[345]

On the other hand, the growth of container transportation has engendered the appearence of container freight stations, which are often inland, where the containers are assembled and filled with the goods.[346] Since the container transport starts in an inland terminal in one country and ends in an inland terminal in an other, there will usually be three stages, one sea and two land legs. As the traditional bill of lading is for carriage from port to port, it is not suitable for carriages of that kind including more than one means of conveyance. A combined or multimodal transport document is the transport document of carriage involving at least two different modes of transport. Thus, container transportation led to creation of new forms of transport document.[347]

The UCP involves considerable provisions for the transport documents, some of which are applicable for all of the transport documents and some are peculiar to a specific document. Before investigating the latters which state the requirements that a specific document should reflect, those common provisions for all transport documents should be dealt with initially.

[344] Todd, p.104
[345] Todd, p.105
[346] Jack, p.170
[347] Jack, p.170

The UCP600 introduced a new provision in relation to the transport documents in art.14.l. which states that a transport document may be issued by any party other than a carrier, owner, master or charterer provided that the trasport document meets the requirements of articles 19, 20, 21, 22, 23 or 24. So any other party may issue, for instance, a bill of lading, provided that it indicates the name of the carrier and be signed by the carrier or the master or an agent of either, and it complies with other requirements of art.20.

The shipper or consignor of the goods indicated on any document need not be the beneficiary of the credit.(Art.14.k.) In practice, the credits contains clauses "Third party documents acceptable" absence of which will not have an adverse effect since art.14.k. ensures the same result.[348]

The UCP prescribes that a presentation including one or more original documents must be made not later than 21 calender days after the date of shipment and in any event not later than the expiry date of credit.(Art.14.c.) The reason for requiring transport documents to be presented within that period is to enable the applicant to take possesion of the goods in time.[349] The transport documents which are presented later than 21 calender days after the date of shipment (stale documents) will be rejected by the banks.

A statement on a transport document, that the goods are or will be loaded on deck, makes the document unacceptable since the goods loaded on board are exposed to damages of high seas. However, a clause on a transport document stating that the goods may be loaded on deck is acceptable.

If the parties did not make an arrangement in relation to partial drawings or shipments, they are permitted by the UCP.(Art.31.a) The UCP in art.31.b. states that a presentation consisting of more than one set of transport documents evidencing shipment commencing on the same means of conveyance and for the same journey will

[348] Özalp, p.309
[349] Jack, p.160

not be regarded as covering a partial shipment, provided that they indicate the same destination. Besides the sets of transport documents may indicate different dates of shipment or different ports of lading, places of taking in charge or dispatch. These differences will not render the shipment a partial shipment. If a presentation is made consisting of more than one set of transport documents which indicates different shipment dates, the latest date of shipment evidenced on any of the sets of transport documents will be regarded as the date of shipment. In case one or more sets of transport documents evidences shipment on more than one means of conveyance within the same mode of transport, they will be regarded as covering a partial shipment.

Jack rightly points out that where partial shipments are made, the documents should be presented to the bank in a single presentation, unless the credit permits drawings by instalments or shipments by instalments. Otherwise the documents will be rejected since they will not be for the correct quantity if they are presented in part.[350] At that point Art.32 should be recalled which declares that if a credit stipulates drawing or shipment by instalments is to be made within given periods and any instalment is not drawn or shipped within the period allowed for that instalment, the credit ceases to be available for that and any subsequent instalment. So the failure to ship or present documents in time will result the credit to be no more available. The position will be the same where the documents are presented in time but fail to comply and they can not be rectified before the end of the given period, since the credit will not be drawn within given period.[351]

Under a documentary credit the beneficiary is required to tender clean bill of lading or transport document unless otherwise stipulated in the credit. A clean shipped bill of lading states that the goods were loaded on board in apparent good order and condition.[352] Art.27 defines a clean transport document as; "*a clean transport document is one bearing no clause or notation expressly declaring a defective condition of the goods or their packaging*". Even if the credit does not state the word "clean" as to the

[350] Jack, p.196
[351] Jack, p.88
[352] Todd, p.132

required transport documents, the banks will reject the transport documents which are not clean. In other words in the absence of a direction to accept claused bill, clean bill will be required. The credit should expressly state clauses or notations which may be accepted, if any.[353] The word "clean" need not appear on a transport document, even if a credit has a requirement for that transport document to be "clean on board." That requirement is deemed to be complied with if the transport document bears no clause or notation declaring a defective condition of the goods.[354]

The UCP's definition of clean transport documents is criticized on the basis that the definition fails to specify the time with respect to which the clause or notation states.[355] It is doubtful whether the notation states the condition of the goods at the time of issue of the bill of lading or it states the condition of the goods upon completion of shipment. The factual situation of the question arose in the case of *Golodetz (M) & Co. Inc. v. Czarnikow Rionda Co. Inc.*[356] where a contract was made for the sale of sugar C&F Iran. After 200 tons of sugar had been loaded, a fire broke out on the vessel and that 200 tons of sugar was damaged by the fire and the water used to extinguish it. A seperate bill of lading was issued for that part of the sugar which bore a notation to the effect that the cargo it covered was discharged due to the fire and/or water damage. The question is whether the sellers were entitled to tender the bill or in esence if the bill is clean or not. The Court of Appeal held that a clause stating that the goods had been damaged after shipment did not render the bill of lading unclean for the purposes of tender under a C&F contract.[357] So the court took into account in determining the bill whether it is clean or not, the condition of the goods at the time of shipment. It should be noted the case was not a letter of credit case and the court did not decide whether the banks were entitled to reject the bill or not.[358] The position is not so clear from the point of the UCP which defines clean transport document as *one bearing no clause or notation expressly declaring a defective condition of the goods or their packaging* unreservedly.

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[353] Jack, p.192
[354] Jack, p.193
[355] Todd, p.175
[356] [1980] 1 W.L.R. 495, [1980] 1 All E.R. 501
[357] Jack, p.159; Todd, p.174
[358] Todd, p.174-175

7.1.1.1. Bill of Lading

If a credit calls for a bill of lading, however named, covering a port-to-port shipment, in other words covering carriage by sea from one port to an other, art.20 of UCP600 will apply.[359] The tendered document may or may not bear the words "ocean" or "marine" in the heading, provided that it complies with the terms and conditions of the credit and the requirements of the provisions of UCP.[360]

A bill of lading is a negotiable document issued by the carrier, master on behalf of the carrier (or an authorized agent), which acknowledges the receipt of the cargo for carriage and commitment to deliver the cargo at the port of discharge to the bearer of the bill of lading.[361] The bill of lading has three functions; first of all it serves as a receipt by the carrier, acknowledging that the goods have been delivered to him for carriage. Secondly it serves as an evidence of contract of affreightment between the shipper and the carrier. Lastly it represents the goods and functions as a document of title, by the indorsement of which property in the goods may be transferred or the goods may be pledged.[362] At the port of discharge only the holder of an original bill of lading may claim those goods from the vessel and also the carrier is entitled to deliver the goods to the holder of such a bill.[363]

The UCP600 in art.20 reflects the requirements which a bill of lading must bear. First of all, a bill of lading must appear to indicate the name of the carrier who is undertaking the carriage. As a bill of lading evidences the contract of carriage, it is fundamental that it should indicate who the carrier is.[364] The bill of lading must be signed by the carrier, the master or an agent of one of them. Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent. When

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[359] Jack, p.172
[360] Özalp, p.366
[361] Tahir Çağa and Rayegân Kender, **Deniz Ticareti Hukuku II**, İstanbul: Beta Basım Yayım Dağıtım A.Ş., 2001, p.65
[362] Şanlı, Ekşi, p.239; Jack, p.173
[363] Todd, p.102-103
[364] Jack, p.174

the bill is signed by an agent, he must indicate whether he has signed on behalf of the carrier or on behalf of the master.(Art.20.a.i.) If the credit states that "Freight Forwarder's Bill of Lading is acceptable" or a similar wording to that effect, the freight forwarder may sign the bill as a freight forwarder without any need to indicate himself as carier or an agent of carier. It is stated that in such a case it is not necessary to indicate the name of the carrier.[365]

The bill of lading must indicate that the goods have been shipped on board a named vessel at the port of lading stated in the credit. It is not enough that the goods have been received for shipment, since the buyer is entitled to the carrier's assurance that the goods have actually been taken on board.[366] The shipment on board a named vessel may be indicated in two ways; by a pre-printed wording, or by an on board notation indicating the date on which the goods have been shipped. If the shipment of the goods on board a named vessel at the port of lading is indicated by a pre-printed wording, then the date of issuance of the bill of lading will be deemed to be the date of shipment. If the bill of lading contains an on board notation, then 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.(Art.20.a.ii.) Even if the goods are shipped on the intended vessel, the requirement for an on board notation including the date of shipment and the name of the actual vessel is required.[367]

The bill of lading must indicate shipment from the port of lading to the port of discharge stated in the credit. If the bill of lading does not indicate the port of lading stated in the credit as the port of lading, or if it contains the indication "intended" or similar qualification in relation to the port of lading, 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 is

[365] Özalp, p.369
[366] Jack, p.175
[367] Özalp, p.369

indicated by pre-printed wording on the bill of lading.(Art.20.iii.) So, although the bill of lading indicates by pre-printed wording that the goods have been shipped on board a named vessel, if the bill does not indicate the port of lading stated in the credit as the port of lading or it contains "intended" or similar words in relation to the port of lading, an on board notation indicating the port of loading, the date of shipment and the name of the vessel is required.

An original bill of lading must be tendered by the beneficiary. If the bills of lading are issued in more than one original, the full set of original bills of lading are required.(Art.20.iv) Since each bill is effective to pass the property and entitles the holder to the delivery of the goods from the vessel, demanding only one original bill may give rise to opportunities for fraud where each of the originals are negotiated seperately.[368] In order to satisfy the bank that it has the full set, the bills of lading must indicate how many the set consist of.[369]

Art. 20.v. requires the bill of lading to contain terms and conditions of carriage or it must make reference to another source containing the terms and conditions of carriage. When the bill of lading incorporates terms and conditions of carriage from an other source, the bills are called short form or blank back bill of lading. Banks are not required to examine contents of terms and conditions of carriage.[370] The terms and conditions of the carriage either takes place at the back of the bill of lading or a reference to an other document is made. In neither of these situations, the banks will examine the terms and conditions of the carriage.[371]

The bill of lading must contain no indication that it is subject to a charter party.(Art.20.a.vi.) Otherwise the bill of lading will be rejected. The credit may call for a charter party bill of lading, in which case art.22 will apply.

[368] Todd, p.133; Jack, p.177
[369] Jack, p.177; Özalp, p.375
[370] Jack, p.177
[371] Özalp, p.375

Art.20.b. defines transhipment as, unloading from one vessel and reloading to another vessel during the carriage from the port of loading to the port of discharge stated in the credit. Unless the credit stipulated otherwise, a bill of lading which indicates that the goods will or may be transhipped is permitted provided that the entire carriage is covered by one and the same bill of lading.(Art.20.c.i.) Even if the credit prohibits transhipment, a bill of lading indicating that transhipment will or may take place is acceptable, if the goods have been shipped in a container, trailer or LASH barge as evidenced by the bill of lading.(Art.20.c.ii.) If the credit prohibits transhipment and states that application of art.20.(c) (i) and (ii) are excluded, then any bill of lading indicating that the transhipment will or may take place is unacceptable.[372] Clauses in a bill of lading stating that the carrier reserves the right to tranship will be disregarded.(Art.20.d.)

The authors point out the need for one through bill (or set of bills), that is one contract of carriage, to cover the entire carriage, even if a transhipment is permitted by the art.20.c. or the credit itself. The bill of lading must evidence a contract of carriage covering the whole voyage from the port of shipment to the port of discharge. The reason for requiring a bill of lading which covers the whole of the sea journey is that the buyer is entitled to a have a document giving him rights covering all the journey so that he is properly covered in the event of loss or damage to the goods. Thus a document issued by a carrier which covers transport by more than one carrier is acceptable only if the issuing carrier undertakes liability in respect of the whole voyage. Otherwise the document is unacceptable unless the credit expressly permits this.[373]

7.1.1.2. Non-Negotiable Sea Waybill

Like the bill of lading, the non-negotiable sea waybill constitutes a receipt of the goods by the carrier, and provides evidence of the carriage contract, but it does not

[372] Özalp, p.377
[373] Jack, p.178; Todd, p.136-137

represent the goods and is not document of title nor is it negotiable. Its transfer can not be used to transfer the ownership of the goods.[374]

The problem of the vessel arriving before the documents may be overcome by the use of non-negotiable sea waybill which the consignee does not need to present to obtain the delivery of the goods. The carrier delivers to a named consignee upon proof of identity and production of the original document is not a prerequisite for delivery as in the case of bill of lading.[375]

A waybill does not afford the security provided by the bill of lading since it is not a title of document representing the goods. The bank which advances money against a non-negotiable sea waybill does not obtain any security of the property in the goods. Moreover the buyer may obtain delivery without any need to present the waybill, with the result of defrauding the seller whom has not been paid under the credit, or with the result of defrauding the bank which has paid under the credit but which has not been reimbursed by the buyer. In the case of non-payment the bank can not enforce the buyer to pay by witholding the waybill, since the buyer does not need it to obtain delivery. For these considerations, a waybill is suitable between associated companies or branches of multinational companies or where the security is not required because of trust stemming from a long trading relationship. And a bank should accept a waybill if reimbursement is unlikely to be a problem. It is advised that a bank can prevent the buyer from taking the delivery of the goods before having settled the bank, by requiring to be named as the consignee. It can then assign its rights as consignee to the buyer on receipt of settlement from the buyer. An alternative suggestion for the bank is to require that the waybill be endorsed with a clause to the effect that the bank has a lien on the goods and that delivery was only to be made against written authority from the bank.[376]

[374] Todd, p.152; Jack, p.180-181
[375] Todd, p.151; Jack, p.180
[376] Todd, p.152; Jack, p.181

Since its transfer can not be used to transfer of the property in the goods, a non-negotiable sea waybill is unsuitable where the cargo afloat is intended to be resold.[377]

Art.21 of the UCP600 sets out the requirements for the non-negotiable sea waybill. It is identical to the art.20 except for the substitution of the words "non-negotiable sea waybill" for bill of lading. Shortly, a waybill must indicate the carrier, be signed by the carrier, master or a named agent of either, it must indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit and indicate shipment from the port of loading to the port of discharge stated in the credit. The full set must be tendered if issued in more than one original. It must contain terms and conditions of carriage or make reference to an other source containing the terms and conditions of carriage and contain no indication that it is subject to a charter party.

7.1.1.3. Multimodal Transport Document or Combined Transport Document

Multimodal transport document (or a combined transport document) is a docoment which covers at least two different modes of transport such as a rail and sea or a road and air.[378] Since the bill of lading covers carriage from port to port, it is not suitable for the transportation which involves land, rail or air stages apart from the sea. Container transport usually commences in an inland terminal in one country and ends in an inland terminal in an other country. In that case there will probably be three modes of transport, two land and one sea, all of which are covered by a single document, multimodal transport document.[379]

The process which give birth to a multimodal transport document is likely to take place as follows: the shipper consign the goods to a forwarding agent at a collection depot who will make the necessary arrangements for the entire operation. The

[377] Todd, p.152; Jack, p.181
[378] Jack, p.184
[379] Todd, p.106

shipper's contract is only with the forwarding agent who sub-contracts for each stage of the transportation with other carriers. The forwarding agent is liable for the entire operation against the shipper if the goods are damaged in any of the stages. If he is sued for the damages, he will recoup that from the actual carrier.[380]

If the credit calls for a transport document covering at least two different modes of transport, however named, art.19 of UCP600 will apply. Although the article is worded similar to art.20, there are a few differences. Again the document must indicate the name of the carrier and signed by the carrier, master or a named agent on behalf of either.(Art.19.i.) The article, in contrast with its predecessor art.26 of UCP500, does not include multimodal transport operator as the one whose name (or the carrier) must be indicated and who may sign the document. Dissimilar to art.20, the document must indicate that the goods have been dispatched, taken in charge or shipped on board at the place stated in the credit, by a pre-printed wording or by a stamp or notation indicating the date on which the goods have been dispatched, taken in charge or shipped on board. Since the multimodal transport document is usually issued by a freight forwarder at an inland terminal, the document may evidence the dispatch or taking in charge of the goods by the carrier and unlike art.20 the evidence of actual shipment is not required.[381] Where the document shows a date of dispatch, taking in charge or shipped on board by a stamp or notation, that date will be deemed to be the date of shipment, otherwise the date of issuance of the document will be deemed to be the date of shipment.(Art.19.ii.) Even if the transport document states a different place of dispatch, taking in charge or shipment or place of final destination, or contains the indication "intended" or similar qualification in relation to the vessel, port of lading or port of discharge, the document must indicate the place of dispatch, taking in charge or shipment and the place of final destination stated in the credit.(Art.19.iii.) Similar to art.20, the document must contain the terms and conditions of the carriage or make a reference to an other source containing the terms and conditions of carriage, contain no indication that it is subject to a charter party and the original document or, if issued in more than one original the full set must be tendered.(Art.19.iv.,v.,vi.) An other disparity

[380] Todd, p.148
[381] Todd, p.182

is related with the issue of transhipment. Since transhipment is the esence in multimodal transport, not necessarily to take place in the same mode of transport but also may take place from land to sea or vice versa, even if the credit prohibits transhipment, a transport document indicating the transhipment will or may take place is acceptable provided that the entire carriage is covered by one and the same transport document.(Art.19.c.i.,ii.)[382]

7.1.1.4. Charter Party Bill of Lading

Charter party bills of lading are marine bills of lading which are issued subject to the terms of a charterparty. Charter party bills are not acceptable unless the credit expressly calls for or permits them.[383]

Art. 22 of UCP600 covers the charter party bills of lading. Although the article is similar to art.20, it has disparities. Firstly, the charter part bills need not name the carrier.[384] It must be signed by the master, owner, the charterer or one of their named agent.(Art.22.a.i.) The bill must indicate that the goods have been shipped on board a named vessel at the port of lading stated in the credit and indicate shipment from the port of loading to the port of discharge stated in the credit. The port of discharge may also be shown as a range of ports or a geographical area, as stated in the credit.(Art.22.a.ii.,iii.) The provisions of art.20 related to intended vessel(Art.20.a.ii), intended port of lading (Art.20.a.iii.), short form/blank back bill(Art.20.a.v.) and transhipment provisions(Art.20.b.,c.,d.) are omitted since these provisions would be inappropriate for a charter party bill of lading.[385] The original bill or, if issued in more than one original, the full set as indicated on the bill, must be tendered.(Art.22.a.iv.) Banks are excluded from examining charter party contracts, even if they are required to be presented by the terms of the credit.(Art.22.b.)

7.1.2. Commercial Invoice

[382] Todd, p.183; D'archy, Murray, Cleave, p.181
[383] Jack, p.182; Todd, p.177
[384] Özalp, p.411; Jack, p.183
[385] Jack, p.183

A commercial invoice sets out the quantity, unit price, delivery terms and conditions and description of the goods in respect of which presentation is being made and it states the price which is being claimed in respect of them.[386] The invoice must appear to have been issued by the beneficiary (except as provided in art.38) and must be out in the name of the applicant (except as provided in sub-article 38.g.).(Art.18.a.i., ii.) The exception is that where the credit has been transferred and there is a second beneficiary in relation to whom the first beneficiary stands as applicant.[387] The invoice must be made out in the same currency as the credit and in contrast with Turkish law it need not be signed.(Art.18.a.iii.,iv.) In Turkish law since the signature on the invoice is obligatory, it is suggested that the credit issued in Turkey must stipulate that the invoice will be signed.[388]

If the credit stipulates an invoice without any further description, this requirement will be satisfied by any type of invoice such as commercial invoice, customs invoice, tax invoice, final invoice or consular invoice except that "provisional" or "pro-forma" invoice. Unless permitted or called for by the credit provisional and pro-forma invoice will not be accepted.[389]

An invoice must state the price of the goods and unit prices, if any, and the total amount of the invoice which will include the cost of freight and insurance if these are to be borne by the seller.[390] Except that the words "about" or "approximately" are used in connection with the amount of the credit, the amount of the invoice can not exceed the amount stated in the credit. In that exception a tolerance not to exceed + - 10% is permitted.(Art.30.a.) In art.30.b. a tolerance not to exceed 5% more (and less) than the quantity of the goods is allowed subject to certain qualifications. Even in that case, the total amount of the drawings can not exceed the amount of the credit.(Art.30.b.) On the other hand, a tolerance not to exceed 5% less than the amount

[386] Jack, p.166; Şanlı,Ekşi, p.225-226; Özalp, p.340
[387] Jack, p.167
[388] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.187; Doğan, p.246; Bozkurt, p.71
[389] Özalp, p.340
[390] Jack, p.167; Özalp, p.341

of the credit is allowed, provided that the quantity of the goods, if stated in the credit, is shipped in full and a unit price, if stated in the credit, is not reduced or that sub-article 30.b. is not applicable.(Art.30.c.)

A 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 credit.(Art.18.b.) So the invoice may exceed the amount stated in the credit and a bank can accept that invoice, but it can not honour or negotiate the amount in excess. Otherwise its decision will not be binding upon other parties.[391]

7.1.3. Insurance Documents

Apart from the transport document and invoice, a credit will usually call for an insurance document which is covered by the art.28 of UCP600. An insurance document, such as an insurance policy, an insurance certificate or a declaration under an open cover, must appear to be issued and signed by an insurance company, an underwriter or their agents or their proxies. Any signature by an agent or proxy must indicate whether the agent or proxy has signed for or on behalf of the insurance company or underwriter.(Art.28.a.) Cover notes will not be accepted.(Art.28.c.) An insurance policy is acceptable in lieu of an insurance certificate or a decleration under an open cover.(Art.28.d.) If the credit requires an insurance policy, then an insurance certificate or a declaration under an open cover definitely can not be accepted instead. Insurance certificate and a declaration under an open cover can not be used instead of each other.[392] When the insurance document indicates that it has been issued in more than one original, all originals must be presented.(Art.28.b.)

A credit should stipulate the type of insurance required and, if any, additional risks to be covered. If the credit uses imprecise terms such as “usual risks” or “customary risks”, an insurance document will be accepted without regard to any risks

[391] Özalp, p.340
[392] Özalp, p.455

that are not covered.(Art.28.g.) It is suggested that the provision will not entitle a bank to accept an insurance document without any examination of its content. The insurance document must provide at least basic cover in respect of the relevant goods for the relevant carriage. And the provision should not protect a bank where a policy is accepted which is clearly defective in the sense that it provides a very limited or almost no cover at all.[393]

When a credit require insurance against "all risks" and an insurance document containing any "all risks" notation or clause, whether or not bearing the heading "all risks", will be accepted without regard to any risks stated to be excluded.(Art.28.h.) It is stated that there must be some limit to the risks that can be excluded and suggested that if the cover provided is so cut down by the exclusions that it would clearly fall short of the cover to be reasonably expected for the transaction in question, the document should be rejected.[394]

The date of the insurance document must be no later than the date of shipment, unless it appears from the insurance document that the cover is effective from a date not later than the date of shipment.(Art.28e.) Although the date of the insurance document is before the date of shipment, the document will be rejected if the cover is effective from a date later than the date of shipment.[395] The insurance document 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.(Art.28.f.iii.)

The insurance document must indicate the amount of insurance coverage and be in the same currency as the credit.(Art.28.f.i.) 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 required. 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 goods. When the CIF or

[393] Jack, p.198
[394] Jack, p.199
[395] Özalp, p.456

CIP value can not be determined from the documents, the amount of insurance coverage must be calculated on the basis of the amount for which honour or negotiation is requested or the gros value of the goods as shown on the invoice, whichever is greater.(Art.28.f.ii.) 110% is the minimum requirement stated by the UCP in the absence of any provision in the credit. So the beneficiary may tender an insurance document covering more than 110% of the CIF or CIP value of the goods.[396]

An insurance document may contain reference to any exclusion clause.(Art.28.i.) It is stated that although the provision does not reflect, the exclusion clauses should not effect the risks to be covered in the credit. They are acceptable as long as they do not render the risks in the credit uncovered. But the wording of the provision is inclined to be construed otherwise. For that reason a requirement in the credit must be stipulated to the effect that any exclusions which effect the risks to be covered in the credit are not acceptable.[397]

An insurance document may indicate that the cover is subject to a franchise or excess (deductible).(Art28.j.) A franchise is an amount or percentage stated in a policy which must be reached before any claim is payable. If it is reached, then the claim is payable in full. An excess or deductible is similar to a franchise save that after the amount or percentage is reached only the amount in excess of it is recoverable.[398] If the credit states that "a franchise or excess(deductible) is not applicable" or "irrespective of percentage", the insurance document must not indicate that the cover is subject to a franchise or excess.[399]

An insurance document must be in the form stipulated in the credit and be indorsed by the insured party, if necessary. If the credit is silent as to the insured party, an insurance document evidencing payment to be made to the order of the shipper or the beneficiary will not be accepted, unless it is indorsed by the shipper or the beneficiary. Where the credit stipulates an insurance document endorsed in blank, a document issued

[396] Özalp, p.458
[397] Özalp, p.460
[398] Jack, p.202
[399] Özalp, p.458

to the bearer will be accepted or vice versa. By the indorsement of the insurance document, the bank or the buyer will be entitled to the payment under the document, in case the goods are damaged during the carriage.[400]

7.1.4. Other Documents

In addition to transport documents, invoice and insurance documents, other documents such as certificate of origin, weight list, packing list, inspection certificate, certificate of analysis may be called for under a documentary credit. These documents provide more control to the buyer as to what is shipped.[401]

In order to enjoy the benefit expected from these documents, the buyer must state some details about the specific document in his instructions to the bank. These are; firstly who is to be the certifier or issuer of the document, what is he to do prior to issuing his certificate, what is he to cover in his certificate, the need to relate the goods certified to the goods shipped.[402] [403]

If the credit does not stipulate by whom the document is to be issued or its data content, banks will accept the documents as presented if its content appears to fulfil the function of the required document and otherwise complies with sub-article14.d.(Art.14.f.) Art. 14.d. states that: Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit. The predecessor of these two sub-articles, art.21of UCP500 did not mention the requirement that the content of the document appears to fulfil the function of the required document. That novelty of the UCP600 burdens the banks with the examination of the document's content whether it appears to be sufficient to fulfil the function expected from such a document or not. If the document satisfies that requirement, it will be accepted provided that the data it contains must not conflict with

[400] Özalp, p.463; Bozkurt, p.71
[401] Jack, p.202
[402] Though the bank will not be concerned with the second stipulation.
[403] Jack, p.202

the data in other documents and the credit. Thus, a document whose content appears to fulfil the function of the required document will be acceptable if its content is in conformity with other documents and the credit.

7.2. Presentation of The Documents

After the notifiaction of the opening of the credit to the beneficiary, it is the duty of the beneficiary to arrange shipment and present the stipulated documents to the banks.[404] The presentation of the documents is so crucial that if it is not fulfilled duly, the beneficiary will not be entitled to the money, even if he has shipped the required goods and did whatever he was asked for under the credit.

In the art.2 of the UCP600, presentation and presenter were defined. According to that; presentation means either the delivery of documents under a credit to the issuing bank or nominated bank or the documents so delivered and presenter means a beneficiary, bank or other party that makes a presentation. The tender of documents to an advising bank will not constitute a presentation in the sense of UCP. The presenter is not needed to be the beneficiary. An other party or a bank acting on behalf of the beneficiary may make a valid presentation.

7.2.1. Time for Presentation of Documents

All credits do and must stipulate an expiry date on or before which documents must be presented.[405] A credit is not accepted to be available for an uncertain period of time. An expiry date stated for honour or negotiation will be deemed to be an expiry date for presentation.(Art.6.d.i.) The documents can not be presented once the expiry date has passed (subject to the exception of art.29.a.)[406] A presentation including one or more original transport documents subject to art.19, 20, 21, 22, 23, 24, 25 must be made not later than 21 calender days after the date of shipment, but in any event not later than

[404] Carr, p.496
[405] D'Archy, Murray, Cleave, p.188
[406] Jack, p.86
[406] Jack, p.87

the expiry date of the credit.(Art.14.c.) The stipulation as to the presentation including a transport document was intended to enable the applicant to deal with the goods in time on arrival of the ship. Otherwise he might have to incur extra expenses such as storage charges.[407] With respect to the dates, if the credit calls for tender of a transport document, the beneficiary must make the presentation on or before the expiry of the credit or not later than 21 calender days after the date of shipment, whichever comes first.

The credit will likely stipulate that the shipment to be made within a defined period or by a particular date. In that case the transport documents presented to the bank must indicate a certain shipment date in accordance with the stipulation in the credit. Otherwise the bank will decline to take up the documents even if they are presented not later than 21 days after the shipment date and within the validity date of the credit. Thus, shipment date which is not a matter of presentation, must be complied with as in the case of any other terms and conditions of the credit. The UCP declares in art.2 that, the words “to”, “until”, “till”, “from” and “between” when used to determine a period of shipment include the date or dates mentioned and the words “before” and “after” exclude the date mentioned. The expression “on or about” or similar will be interpreted as a stipulation that an event is to occur during a period of five calender days before until five calender days the specified date, both start and end dates included. The terms “first half” and “second half” of a month shall be construed respectively as the 1st to the 15th and the 16th to the last day of the month, all dates inclusive. The terms “begining”, “middle” and “end” of a month shall be construed respectively as the 1st to the 10th, the 11th to the 20th and the 21st to the last day of the month, all dates inclusive.(Art.2)

In one exception, stated in art.29.a., the expiry date of a credit or the last day for presentation will be extended. According to the article; if the expiry date of a credit or the last day for presentation falls on a day when the bank to which presentation is to be made is closed for reasons other than those referred to in art.36, the expiry date or the last date for presentation, as the case may be, will be extended to the first following

banking day.(Art.29.a.) Banking day was defined in art.2 as a day on which a bank is regularly open at the place at which an act subject to these rules is to be performed. The provision excludes art.36 relating to force majeure. So, if the credit expires or the last date for presentation passes when the bank is closed for reasons stated in the art.36, the expiry date of the credit or the last day for presentation will not be extended to the following banking day. In fact that result is pointed out in the second paragraph of art.36 which states; a bank will not, upon resumption of its business, honour or negotiate under a credit that expired during such interruption of its business. This is an undesirable and risky situation from the point of the benficiary, since after he ships the goods he may not be able to present documents due to a force majeure and meanwhile the credit may expire. For that reason it is advised that a provision should be added to the credit to the effect of automatically extension of validity date of the credit or presentation date, in cases of closure of the bank for any reason, notwithstanding art.36.[408]

If presentation is made on the first following banking day to the nominated bank, it must provide the issuing bank or confirming bank with a statement on its covering schedule that the presentation was made within the time limits extended in accordance with sub-article 29.b.(Art.29.b.) Art.29.a. can not serve as a basis to extend the shipment period.(Art.29.c.) Since shipment, in contrast to presentation, is an act irrelevant to the banking days.

Art.33 states that a bank has no obligation to accept a presentation outside of its banking hours. The provision leaves the banks free. Thus the beneficiary may make a valid presentation out of banking hours, if the bank accepts to receive his tender.

7.2.2.Place for Presentation

The place of the bank with which the credit is available is the place for presentation. If the credit is available with any bank, then any bank is the place for

[408] Özalp, p.487-488; Reisoğlu, *HukukiAçıdan Akreditif ve Uygulama Sorunları*, p.42

presentation. A place for presentation other than that of the issuing bank is in addition to the place of the issuing bank.(Art.6.d.ii.) So, despite the fact that a credit is available with a nominated bank and the place for presentation is that nominated bank, the beneficiary is permitted to present the documents to the issuing bank too.

Since presentation is defined as delivery of documents under a credit to the issuing bank or nominated bank, the tender of documents to an advising bank will not constitute a presentation in the sense of UCP and an advising bank is not authorized to examine the documents presented. The date of presentation made to an advising bank will not be taken into account in determining whether the presentation was made in time or not. Since the advising bank will send the documents to a nominated bank or issuing bank, the date of arrival of the documents to one of these banks will be deemed to be the date of presentation and the period of examination will start after that date. If the credit expired meanwhile between the date of delivery of the documents to the advising bank and their arrival to the nominated bank or issuing bank, then it will not be a good tender.

7.2.3.Compliance of The Documents

After the presentation is made by the beneficiary, the bank will decide to accept or reject the documents. Acceptance or rejection of the documents by the bank is dependent on whether the documents conform on their face to the terms of the credit or not. If, on their face, they are in strict conformity with the terms of the credit, the bank will accept the documents. If they are not, the bank will reject the documents. The legal principle that the bank is entitled to reject documents which do not strictly conform with the terms of the credit is referred as doctrine of strict compliance.[409]

The nominated bank, confirming bank, if any, and the issuing bank will examine a presentation to determine, whether or not the documents constitute a complying presentation according to art.14. The UCP, defines a complying presentation

[409] D'Archy, Murray, Cleave, p.172; Carr, p.481-482; Jack, p.150; Goode, p.976-977; Doğan, p.271; Bozkurt, p.79; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif,* p.203; Reisoğlu, *Hukuki Açıdan Akreditif ve Uygulama Sorunları*, p.52

as; a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.(Art.2.)

The UCP states that the data in a document need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.(Art.14.d.) Thus, in order to ensure compliance, the documents should not be inconsistent with each other, apart from that being in accordance with the credit, UCP and international standart banking practice. Also the documents must relate to the same goods. For instance the analysis certificate must refer to the same goods with the bill of lading which shows that those goods have been shipped and similarly the insurance document must evidence that the goods shipped are covered during the transport.

The principle will be observed cautiously and carefully by; the beneficiary in order to be entitled to payment, the nominated bank and the confirming bank, if any, in order to be entitled to reimbursement from the issuing bank and lastly by the issuing bank in order to be entitled to reimbursement from the applicant. So the doctrine of strict compliance applies to all contracts involved in the credit operation.[410]

According to the strict compliance doctrine, the discrepancy of the document may be minor and insignificant or a discrepancy may not affect the value or merchantability of the goods and may appear merely technical, besides the stipulation in the credit may appear to the bank to serve no useful purpose. None of these constitutes an excuse to depart from the terms and conditions of the credit and to neglect them unless the bank is instructed by the applicant that the documents are acceptable. The de minimis rule also can not be relied on in the sphere of documentary credits.[411] In the doctrine it is argued that the strict application of the strict compliance doctrine may lead to irrational and unreasonable results. It is advised that the application of the strict compliance doctine must be limited by bona fides rule. According to the authors, the application of the rule may result inexpedient allegation of discrepancy and the discrepancy may be minor and insignificant for the applicant and may not be

[410] Goode, p.976
[411] Jack, p.151-152

unfavourable to him. If contending the discrepancy leads to a useless result, and if the discrepancy is insignificant and not unfavourable to the applicant, ın such cases the documents should not be refused owing to such discrepancies. The last view is called as essential or substantial compliance rule.[412]

The oft-cited passage of the case *Equitable Trust Co of New York v. Dawson Partners Ltd.*[413] should be recalled with respect to strict compliance doctrine, which is as follows:

> "It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, can not take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk."[414]

Errors which may be due to carelessness and of typographical nature will not be treated as discrepancy if they are insignificant. For instance, the name of the applicant may be written as ABC Industries Ltd, instead of ABC Industrial Ltd. This error should not be taken as discrepancy. On the other hand, if one of the documents state CIF, whereas the other state CIP, this will be taken as discrepancy since it is an essential term of the credit and the sale contract and crucial in determining whether the document is complying or not.[415]

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[412] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif,* p.203; Reisoğlu, *Hukuki Açıdan Akreditif ve Uygulama Sorunları*, p.52; Doğan, p.272
[413] (1927) 27 Ll L Rep. 49
[414] Jack, p.150
[415] Jack, p.153; Doğan, p.271

A few examples to the application of the strict compliance doctrine should be given. In the above mentioned Equitable Trust Co of New York v. Dawson Partners Ltd. case, the defendant applicant instructed plaintiff bank to make payment on delivery of certain documents including a certificate of quality to be issued "by experts". But the credit was available on tender of a certificate "by expert". The court held that the plaintiff bank was not entitled to be reimbursed by the buyers, because contrary to the instructions, it paid upon the presentation of the certificate of one expert only instead of at least two experts.[416]

In *Soproma SpA v. Marine & Animal By-Products Corporation*[417] case, the buyers bought fish meal, and stipulated in the credit that an analysis certificate stating that the goods had a content of minimum 70 per cent protein. But the tendered analysis certificate showed only a protein content of 67 per cent minimum. The court held that the presentation was defective since the analysis certificate showed low protein content.

In *J. H. Rayner & Co Ltd v. Hambro's Bank Ltd.*,[418] the sellers were advised that the credit was available upon delivery of documents evidencing the shipment of "coromandel groundnuts". The sellers tendered a bill of lading describing the goods as "machine shelled groundnut kernels" which was understood in the trade to be the same as coromandel grundnut. The court held that the bank had rightly refused payment on the ground that the bill of lading did not comply precisely with the terms of the credit. In addition to that the bank was not expected to know customary terms of the trade.

In *Seaconsar Far East Ltd. v. Bank Makazi Jomhouri Islami Iran*[419] the credit required that each document tendered should list the letter of credit number and the name of the buyer. One of the documents did not contain those statements. The seller argued that the omission of the credit number and name of the buyer was of a trival nature. The court held that the credit number and the name of the buyer could not be

[416] D'Archy, Murray, Cleave, p.173
[417] [1966] 1 Lloyd's Rep. 367
[418] [1943] K. B. 37, (1942) 74 Ll. L. Rep. 10
[419] [1993] 1 Lloyd's Rep. 236

treated as trivial, since they were specifically required. So the bank was entitled to reject the documents.

The UCP envisaged two different criterion for the description of the goods in relation to invoice and other documents. In documents other than the commercial invoice, the description of the goods, services or performance, if stated, may be in general terms not conflicting with their description in the credit.(Art.14.e.) It is accepted that the strict compliance doctrine has been relaxed by the UCP in the context of the documents other than the invoice and some latitude has been allowed.

On the other hand, art. 18.c. in relation to invoice prescribes that the description of the goods, services or performance in a commercial invoice must correspond with that appearing in the credit. The meaning that will be attributed to the word "correspond" seems crucial in defining an invoice as complying or not. There are views which asserts that description of the goods in the invoice must be a repetition of the one in the credit or it must be precisely the same or identical.[420] This view is not approved by the authers since, according to them, precisely the same or identical description is not required. Jack states that the invoice should set out a description of the goods which fully and accurately follows the description in the credit. In addition to that, after expressing that the word correspond does not mean the precisely the same, he declares; there should be no differences in the descriptive words themselves.[421] Rowe's words explain the meaning and the purpose of the provision so clear that they are worth quoted untouched:

> " The purpose of the provision seems to be to ensure that the goods described in the credit can be unambiguously identified with the merchandise covered by the commercial invoice. One approach would be to conclude that the invoice must contain at least the same information as that in the credit, and that any additional information in the former must not contradict or detract from the credit description.

[420] Doğan, p.245
[421] Jack, p.167

> Whilst it is desirable, it would not seem absolutely essential that exactly the same words be used to convey the same information in the two documents. It would at least have to be clear to any one reading the documents that the two meant the same."[422]

Özalp, after declaring that writing errors which do not impair the meaning or minor details may be acceptable in invoices, explains the situation with an appropriate example, according to which the credit defines the goods as "color tv model tx 2000". The invoice may describe the goods as "color television model tx 2000", where the other documents may describe as "color television model tx 2000", "tv model tx 2000" or "color tv" since the latter two describe in general terms not conflicting with the description in the credit.[423] Likewise in the *Soproma SpA v. Marine & Animal By-Products Corporation*[424] case the credit was issued for the sale of "fish full meal". The invoice described the goods as "fish full meal" and the bill of lading described as "fishmeal". The judge held that the description of the goods in the bill of lading in general terms (as "fishmeal") was sufficient, since the goods were correctly described in the commercial invoice.[425]

In order not to have problems with the banks, it is worth advising for the exporters as a safe course to follow the wording of the credit precisely in the invoices.[426]

7.3. Examination of The Documents

7.3.1.Examination of The Documents On Their Face

Upon the presentation of documents, it is the duty of the banks to examine the documents in order to ascertain whether the documents conform to the terms and

[422] Rowe, p.107
[423] Özalp, p.305
[424] [1966] 1 Lloyd's Rep. 367
[425] D'Archy, Murray, Cleave, p.173-174
[426] Jack, p.167

conditions of the credit. Art.14.a. states as follows; 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 presentation. The predecessor of the art.14.a., the 13.a. of the UCP500 prescribed the documents to be examined with "reasonable care" which is omitted from the text of the art.14.a. Keeping in mind art.34 and that the bank does not guarantee the accuracy, genuineness and legal effect of the documents, any degree of care beyond the reasonable care should not be expected from the banks. This omission of the term should not be construed as changing the degree of care expected from the banks in my view. But in any case, the degree of the care which the bank must exercise in examination of the documents will be determined by the national laws.

The decision of the bank whether to accept or reject the presentation will solely base on the documents. Any other matter, other than the terms of the credit and the documents will not be taken account. In fact, this is a consequence of art.4 and 5 which respectively set out the independence of the credit from the other contracts and that the banks deal with documents not goods. Extraneous matters can not have any effect on the determination of the bank with one exception of fraud. By stating "on their face" the UCP aimed to emphasize that the banks will take into account only the documents. It was not intended to distinguish between the face and the reverse side of the document.[427]

Moreover the banks will not concern themselves with the legal significance and value of the documents. Even if their legal value appears questionable or any requirement seems to be nugatory, the banks are bound to follow the instructions strictly since documents in the required form may have commercial value for the buyer.[428]

With respect to the subject, art.34 should be recalled which absolve the bank from any liability or responsibility for the form, sufficiency, accuracy, genuineness,

[427] Brindle, Cox, p.561; Jack, p.143
[428] D'Archy, Murray, Cleave, p.175

falsification or legal effect of any document, for the general or particular conditions stipulated in a document or superimposed thereon. Again it must be pointed out that the application of this and other disclaimer clauses is subject to national laws. In other words they will take effect up to the degree and as long as the national laws permit. In Turkish law these clauses wil be subject to art.99 of Code of Obligations.[429]

In *Singh(Gian) & Co. Ltd. v. Banque de I'Indochine*[430] case, the underlying contract was for the sale of a fishing vessel. One of the required documents was a certificate signed by Balwant Singh, holder of a Malaysian passport E-13276, which would be presented for the bank's comparison of the signatures. The tendered certificate was forged and it was not the certificate of Balwant Singh and the passport presented appeared on its face a Malaysian passport E-13276, issued in the name of the Balwant Singh. The court held that the bank was entitled to be reimbursed since the documents have been examined with due care and the customer did not succeed in making out any case of negligence against the bank in failing to detect the forgery.

A document presented but not required by the credit will be disregarded and may be returned to the presenter.(Art.14.g.) Banks will not examine the documents which were not required by the credit. The banks either return them to the presenter or forward them with other documents without taking any responsibility.[431]

Lastly art.14.h should be pointed out which states; if a credit contains a condition without stipulating the document to indicate compliance with the condition, banks will deem such condition as not stated and will disregard them. This is in fact a consequence of art.5. Apart from the documents, any extraneous facts will not concern the banks. So the applicant should state the document which evidences the facts in the credit. Instead of stipulating quality goods in the credit, he should require a quality certificate or an analysis certificate, as the case may be, to that effect.

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[429] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.227
[430] [1974] 1 W.L.R. 1234, [1974] 2 All. E.R. 754, [1974] 2 Lloyd's Rep. 1, [1974] 1 W.W.R. 1234, (1974) 118 S.J. 644
[431] Özalp, p.308

7.3.2.Acceptance or Rejection of the Documents and Notification

The bank to which the documents are first presented under a credit (may be nominated bank, confirming bank, or the issuing bank) has the duty of examining them for compliance with the credit, of deciding whether they will be accepted or refused, and in the event of refusal, notifying the refusal to the party presenting the documents.[432]

The nominated bank, 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 affected by the occurance on or after the date of presentation of any expiry date or last day for presentation.(Art.14.b.) The predecessor of the provision, art.13.b. of UCP500, stated that each bank have a "reasonable time not to exceed seven banking days" to examine the documents. The statement of reasonable time has been omitted and the limit of the period has been curtailed to five banking days. If the presentation is determined to be complying, it is the duty of the issuing bank to honour, duty of the confirming bank to honour or negotiate and forward the documents to the issuing bank. If the nominated bank determines that a presentation is complying and honours or negotiates, it must forward the documents to the confirming bank or issuing bank.(Art.15)

If the presentation is not complying the banks may refuse to honour or negotiate.(Art.16.a.) Alternatively, if the issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies.(Art.16.b.) Although the provison expresses only the issuing bank, its application is not limited to the issuing bank. If the confirming bank or the nominated bank which receives presentation finds the discrepancies, then they will seek the instructions of their principal, issuing bank which will in turn seek the instructions of its principal applicant whether the documents may be accepted. This practice is very common and it frequently results the acception of the documents which would

[432] Jack, p.91

otherwise fail.[433] Because the discrepancies in the documents may be insignificant for the buyer and receiving the goods may have more commercial importance for the buyer than the documents with minor discrepancies. It is rightly pointed out that the issuing bank may approach the applicant just for waiver of the discrepancy. In any case the bank is not allowed to permit the applicant to examine the documents himself. For it is the duty of the bank.[434] Lastly it should be noted that the provision gives a discretion to the bank, it does not place any obligation on the bank to approach the applicant.[435] Approaching the applicant (or the issuing bank, as the case may be) does not extend the period mentioned in art.14.b. In any case, even if the principal is approached, the banks have a maximum of five banking days to determine whether a presentation is complying.

UCP envisaged procedural steps which banks should follow in case of refusal. If a nominated bank, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter. The notice must state; firstly that the bank is refusing to honour or negotiate, and secondly each discrepancy in respect of which the bank refuses to honour or negotiate. And lastly the notice must state one of the following options; i)that the bank is holding the documents pending further instructions from the presenter, or ii)that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver, or iii)that the bank is returning the documents, or iv)that the bank is acting in accordance with instructions previously received from the presenter.(Art.16.c.) The bank may, after providing notice which states the first or second option, return the documents to the presenter at any time.(Art.16.e.) The notice must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation.(Art.16.d.)

[433] Jack, p.94
[434] Jack, p.95
[435] Jack, p.95

Speedy notification is required to give a chance to the beneficiary to rectify the discrepancies and to present the documents again. The beneficiary can make a second tender, thereby replacing discrepant documents with complying documents, provided that the presentation is in time. In other words a second tender is available if the credit has not expired and the last date for presentation has not passed. Although not stated in the UCP expressly but consistent with the aim of the provision, it is accepted that once the notice of refusal is given, it can not be changed, withdrawn and new discrepancies can not be raised with a second notice. If a second tender is made, again, new discrepancies, which existed in the first tender but not stated in the notification, can not be raised. Thus, a bank can not subsequently rely on discrepancies other than those included in its notice. [436]

The banks must act in accordance with the above mentioned provisions after determining that the presentation is not complying. The UCP imposed a heavy sanction for not following the procedure properly. Art.16.f. states that; if an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation. So, if an issuing bank or a confirming bank fails to comply with any of these requirements, it may be left with documents on its hands for which it must pay and which it can not oblige its principal (the issuing bank, or the applicant) to accept and pay for.[437]

As to the nominated bank, the position is not so apparent. The art.14.a. sets out the duty of the issuing bank, confirming bank and nominated bank to examine the documents. Art.15 sets out the position if a complying presentation is made to those bank, similarly art.16.a. states the position if a noncomplying presentation is made. All these provisions refer to the nominated bank, with the issuing bank and confirming bank. In contrast, art.16.f., which states the result of failing to act in accordance with the provision relating to the notification of refusal, does not make any mention about the nominated bank. So, what is the position if the nominated bank which does not have any

[436] Brindle, Cox, p.582-583; Jack, p.99-100
[437] Jack, p.93

obligation to honour or negotiate, fails to act in accordance with art.16? As stated earlier, a correspondent bank functions as an agent of the issuing bank. It is obvious that the nominated bank also must act in accordance with art.16. If it fails to do so, the effect may be to bar the issuing bank from contending against the beneficiary that the documents do not comply. So the issuing bank will be bound by the failure of the nominated bank as itself failed. The issuing bank will pay the beneficiary and claim repayment from the nominated bank with its loss as damages for breach of the attorney contract.[438] The situation will be different if the beneficiary is paid before the issuing bank examines the documents. In that case the issuing bank will refuse to reimburse nominated bank which will not be entitled to reimbursement. The third possibility may be that the issuing bank may have put the necessary funds in the nominated bank in advance and the nominated bank pays the beneficiary. In this case, again the issuing bank will demand repayment with the interest from the nominated bank.[439] The predecessor of art.16.f., art.14.e.of UCP500 also did not refer to nominated bank. This situation was criticized in Turkish law and it was claimed that an ambiguity exists. According to the view; on the one hand adopting the nominated bank as the agent of the issuing bank and that its failure in notifying the refusal will result the liability of the issuing bank and payment demand of the beneficiary from the issuing bank, on the other hand the conception that the issuing bank's own notification of refusal will absolve it from the liability, contradicts.[440] In my view a point is overlooked. After the nominated bank fails to give a notification of refusal in five days following the day of presentation and takes up discrepant documents, it will forward these documents to the issuing bank. The issuing bank also has to examine the documents and give a notification of refusal in five days. In that case giving an apropriate notice, will not absolve the issuing bank from the liability completely. Its liability will end only against the nominated bank from which it received the documents, not against the beneficiary. So the issuing bank will honour the beneficiary and then approach the nominated bank for repayment. If the issuing bank had also failed to give an appropriate refusal notice, it would be precluded from claiming that the documents do not constitute a complying presentation against the

[438] Assuming that the applicant refused to waive the discrepancy.
[439] Jack, p.93
[440] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.193-194; Bozkurt, p.85-86

nominated bank and it would be obliged to reimburse it, even if it itself is not reimbursed by the applicant. So, in such circumstances the issuing bank's notification effects the relationship between the two banks. If it gives the notification, it may refuse to reimburse the nominated bank, otherwise it can not. The beneficiary's entitlement to payment in any case will not be effected. In any case, once the five days period is passed by the nominated bank with silence, without giving a notice of refusal, the beneficiary will be entitled to money irrespective of issuing bank's notification to the nominated bank.[441]

When an issuing bank refuses to honour or a confirming bank refuses to honour or negotiate and has given notice to that effect in accordance with this article, it shall then be entitled to claim a refund, with interest of any reimbursement made.(Art.16.g.)

[441] Yeniaras, p.122; Bontoux, p.31

CHAPTER II

LEGAL ASSESSMENT OF THE UCP AND THE DOCUMENTARY CREDITS

1. LEGAL NATURE OF UNIFORM CUSTOMS AND PRACTICE

ICC was founded in 1919 with the aim to promote world trade, investment, open market for goods and services and the free flow of capitals.[442]

The increasing density of international trade after the first world war necessitated an international code governing the operation of documentary credits which will provide uniformity required in international business. A code could provide the uniformity in the rights and obligations to which the international contracts give rise. On the other hand it could reduce the differences of national laws relating to credits. [443]

The first "Uniform Customs and Practices for Documentary Credits" of ICC was published in 1933 which was adopted by banks in some European countries. After that, for the requirements of developing international trade, UCP was revised respectively in 1951, 1962, 1974, 1983, 1993 and recently in 2007 which is in force since July 1, 2007. Today UCP has been adopted almost all over the world.

Though the widespread acceptance of UCP in international trade, there is not a concurrence of opinions in the context of legal nature of those rules. In doctrine, various views have been put forward. These views approach the UCP as positive law rules, lex mercatoria universalis, customary law, commercial usage or as standard form contract provisions.

[442] ICC, What is ICC? Hıstory of The International Chamber of Commerce http://www.iccwbo.org/id93/index.html (15.06.2007)
[443] Jack, p.8

1.1. UCP as Positive Law Rules:

It is unanimously accepted that the UCP can not be conferred the status of law since ICC promulgating those rules is an inofficial business organization which does not have the power to legislate. Neither the ICC purports to legislate nor it has been entrusted tasks by the governments to prepare conventions on any subject. Moreover, the text of the UCP is stated to be neither systematic nor comprehensive enough to be characterized as code.[444] For these considerations it is unanimously accepted that UCP are not positive law rules and does not have the force of law.

1.2. UCP as a part of Lex Mercatoria Universalis:

Particularly after the second half of the XX. century an autonomous, universal commercial law(lex mercatoria), independent of national legal systems, has established as a result of rapidly developing international trade.[445] In the absence of an International Commercial Code, lex mercatoria was a result of desire of the merchants to certainty, clarity, stability, who are eager to solve their disputes rapidly, by efficient means and with the least costs. Sources of lex mercatoria were trade practices, general principles of law, standart form contracts, business customs, uniform rules such as trade terms and international conventions codified by either official or inofficial international organizations.[446]

According to authors supporting lex mercatoria view; by issuing UCP, ICC has codified customs and practices -which is already lex mercatoria- governing the

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[444] Goode, p.969; Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti,* p.42; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.70; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.47-48; Arslan Kaya, p.21; Doğan, p.31; Erdoğan, p.47-48; Dayınlarlı, p.407

[445] Mahmut T. Birsel, "The Evolution of International Economic Order Towards The Organic Concept of Law", **Banka ve Ticaret Hukuku** Dergisi, Vol.9, No.1 (1977), p.84-85; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.71

[446] Arzu Oğuz, "Hukuk Tarihi ve Karşılaştırmalı Hukuk Açısından Uluslararası Ticaret Hukuku (Lex Mercatoria) – Unidroit İlkelerinin Lex Mercatoria Niteliği" *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 2001, Vol. 50, N. 3, http://auhf.ankara.edu.tr/dergiler/auhfd-arsiv/AUHF-2001-50-03/AUHF-2001-50-03-Oguz.pdf (06.07.2007) p. 22

documentary credit transactions and UCP is part or example of lex mercatoria universalis.[447]

This view was criticized on the grounds that UCP rules are not comprehensive enough to be applied to all the legal issues which may arise. There is a considerable area left to national laws to decide on such as fraud or the claims of the applicant that the payment demand of the beneficiary constitutes abuse of rights. And some present provisions of the UCP shall be construed according to national laws such as assignment of proceeds(Art.39).[448] It is observed that UCP and lex mercatoria are far from responding completely to all legal problems relating to documentary credits.

1.3. UCP as Customary Law:

An other claim as to the legal nature of the UCP is that, those rules are customary law principles. Article 1 of Turkish Civil Code (hereafter T.C.C.) signifies that, judge shall decide according to customary law unless there is an applicable provision for the issue. Article 1 of Turkish Commercial Code (hereafter Comm.C.) states that; in the absence of a commercial provision relating to commercial affairs, the judge shall decide according to commercial customary law, in the absence of which the judge shall decide according to general provisions. So UCP can be applied to the legal matters about documentary credits as customary law due to Art. 1 of Comm.C. since documentary credits are obviously commercial affair and any provision relating to documentary credits does not exist in Turkish law.[449]

Two requirements must be satisfied for an ordinary practice to be adopted as customary rule; the first is the permenancy of practice which implies that the practice should not be provisional and should have been repeated for very long time in similar

[447] Arslan Kaya, p.22; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.49; Doğan p. 33; Bozkurt, p.11
[448] Arslan Kaya, p.22; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.49; Doğan, p.34; Şit, p.118
[449] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.73

situations. The second requirement is that there must be a common belief that it is obligatory to obey the rule which is expressed as opinio necessitatis.

The supporters of the view contends that both of the requirements are fulfilled by the UCP which rules were in fact unwritten customary rules that have been implemented for very long.[450] The amendments of the UCP do not detract from the permenancy of practice since these are, according to them, changes which are needed due to the development of technology. Besides, provisions conferring documentary credits its charasteristics never change.[451] As a result of these considerations UCP as customary law may be applied directly to issues by judge since no provision is available in Turkish law relating to documentary credits via Article 1 of Comm.C.

Authors in disagreement with the view does not accept that UCP rules satisfy the second requirement as to the opinio necessitatis.[452] Even authers exist who are doubtful about the sufficiency of period of time since the first UCP was published, to be qualified as custom.[453] At that point it should be noted that if UCP is accepted as customary law, its provisions will be directly applicable without need to inquire the intentions of parties by virtue of Artcle 1 of Comm.C. But UCP, itself does not confirm the view. According to Article 1 of the UCP600 which determines the applicability of those rules state: *The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600 ("UCP") are rules that apply to any documentary credit… when the text of the credit expressly indicates that it is subject to these rules.* Similarly UCP500 stipulated incorporation of those rules to the text of the credit for its applicability. These provisions show that these rules are not applicable without express intentions of the parties. For these considerations it seems diffucult to evaluate the legal nature of all UCP rules as reflections of customary law. On the other hand, I think one point shouldn't be ignored that some provisions of the UCP are characterising documentary credits, such as the independence of credit from the underlying transaction or that banks deal only with documents. These fundamental principles has acqired the

[450] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.73
[451] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.73
[452] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.48; Bozkurt p.10; Arslan Kaya, p.22
[453] Erdoğan p.48; Arslan Kaya, p.22, fn.99

status of customary law in my opinion. Though accepting all UCP provisions as customary law is not possible, some limited backbone rules should be regarded so.

1.4. UCP as Commercial Usage

An other view especially in German law and doctrine, assesses UCP rules as commercial usage[454] Commercial usage was defined in Uniform Commercial Code of United States as such "*any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to transaction*".[455] The view contends that UCP is composed of general provisions of credit contracts and codified commercial usage which are adopted and applied by banks and merchants. Although these rules do not have the force of law, the banks adopt these commercial practices and the courts make reference to them in their rulings. Moreover, Erdoğan alleges that even if there is no reference to the UCP in the credit contract, the merchants know that the transaction will be executed in accordance with UCP. [456]

According to Art.2 of Turkish Commercial Code, commercial usage can not be taken as a basis to a decision if it can not be established as commercial custom, unless provided otherwise in code. Commercial usage shall be taken into consideration in construing parties' declerations of intention. Given the legal concept in Turkish law, commercial usage can only be based in judgement if the parties expressly or impliedly agreed so in the contract. In that case it will be applied as lex contractus.[457]

Except those fundamental principles governing the docementary credits, many of the UCP provisions are not attributed as commercial usage since the revisions and amendments prevent them from having regular application for a long period of time, which is necessary to be qualified as commercial usage. But it is suggested that the basic rules of UCP which have not been amended such as independence of credit and

[454] Doğan, p.20
[455] Oğuz p.34 and fn. 59
[456] Erdoğan, p.50; Dayınlarlı, p.407
[457] Arslan Kaya, p.23, and fn. 103 thereof; Doğan, p.33

that banks deal with documents are to be regarded as commercial usage.[458] I am inclined to express here that those cardinal provisions of UCP should at least be considered as commercial usage if not as customary law.

1.5. UCP as Standard Form Contract Provisions

Merchants which have a bargaining power against consumers such as financially powerful companies, banks, insurance companies, travel agencies draft their standard contracts before the contract is concluded and impose it to the consumers. These contracts contain usually small printed standart terms and gaps which the parties fill before signing. The consumer is in an unequal bargaining position since he is not able to negotiate the terms of the contract. The consumer has two choices; either to accept the standart form contract or reject completely. Many times consumers even don't attempt to read the contract provisions.

It is asserted that UCP rules are standard form contract provisions since the UCP rules are beforehand designed for documentary credits by the ICC and these rules are imposed to applicants unilaterally by the banks. In practice while requesting the banks to issue a letter of credit, banks demand applicants to fill a form for the necessary informations in which it is stated that the letter of credit shall be subject to UCP. According to the view UCP rules can not be applied to documentary credits without a reference or incorporation in the text of the credit. When a reference is made to the UCP, the UCP forms part of the credit contract.[459] Above mentioned Art. 1 of UCP which requires the credit to indicate expressly that it is subject to these rules, seems strengthening the view.

Critiques made against the view, in the context of issuance of those rules, which are based on that, UCP rules were not issued by banks but by ICC.[460] The mere fact that UCP rules were issued by ICC but not by banks incorporating them in the contracts

[458] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.48-49; Arslan Kaya, p.23, fn.104
[459] Arslan Kaya p.24; Bozkurt p.11-12; Doğan p.35; Bahtiyar, p.79; Reisoğlu, *Hukuki Açıdan Akreditif ve Uygulama Sorunları*, p.40
[460] Aydos, p.45; Özel *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği*, p.73

does not seem to be a convincing reason for not regarding ICC rules as standard form contract provisions.

It should be noted that describing legal nature of UCP rules as standard form contract provisions will not effect some of those rules' commercial usage or customary law character.[461] As a result of these considerations, although all provisions of UCP can not be directly applicable to any documentary credit unless the conditions of Article 1 of UCP600 are satisfied in the credit, the rules characterizing documentary credits which have never been amended, should be taken into account as customary law by virtue of Article 1 of Comm.C. or at least as commercial usage in construing parties' intentions by virtue of Article 2 of Comm.C.

[461] Arslan Kaya, p.24; Bozkurt, p.12; Doğan, p.35

2. LEGAL NATURE OF DOCUMENTARY CREDITS

Letter of credit came into being as a result of lack of confidence in international sales. It was not contemplated, debated and designed by lawyers. It was created in practice by traders. Since it was not regulated by the national laws, various views have been put forward about its legal character. Some of these views tried to explain letter of credits as single contract, and others considered letter of credits as a process containing more than one contract, each of which have to be analysed seperately. [462]

2.1. Views Explaining Documentary Credit as a Single Contract:

There is not a consensus of opinions which explains letters of credit as a single contract. These views tried to interprete letter of credit as order, abstract undertaking of debt (bare promise), circular letter of credit, credit order, contract of surety, guarantee contract, contract in favour of a third party.[463] Here prominant views which have gained more or less support will be examined and the divergencies between these legal institutions and documentary credits will be pointed out.

2.1.1. Order

Order is also a triangular transaction enforced according to Articles 457-462 of Code of Obligations (hereafter CO.). It should be noted that although it was stated as a contract in Code of Obligations, order is not accepted as contract but is accepted to be based on dual authorization. In an order, the person(after that drawer), who sends a bill, cash or other fungible things, authorizes an other party (after that drawee) to pay, to give a bill or other fungible things to a third party (after that beneficiary) and authorizes the beneficiary for collection. Authorizations of drawer do not compose any obligations on the part of the drawee and the beneficiary. Neither the former is obliged to pay or give, nor the latter is obliged to collect. They just have authority to do so. If the drawee

[462] Uluç, p.446-447; Bozkurt, p.20; Akın Ekici, **Milletlerarası Ticaret Odasının Akreditifler Hakkında 500 Sayılı Yeknesak Teamül ve Uygulamaları Işığında Akreditifin Hukuki Niteliği ve Tarafların Yükümlülükleri**, 1.Edition, İstanbul, Beta Basım Yayım Dağıtım A.Ş., 1995, p.45
[463] Bozkurt, p.20

notifies the beneficiary that he accepts the order, then the authorization to pay becomes an obligation for him.[464] In that case the drawee can plead against the beneficiary only his personal demurrers stemming from other relations between them and the ones stemming from the content of the order.(Art. 459 CO.). Drawee can not plead against beneficiary any demurrer stemming from his relation with the drawer.

The drawer may revoke his authorizations any time with the exception that, in case that order is executed to the benefit of the drawee and particularly for payment of drawer's debt.[465] (Art. 461 CO.)

If we conform the transaction of order to the documentary credit, the situation is such that: drawer (applicant in case of a letter of credit) authorizes drawee (issuing bank) to honour or negotiate the drafts drawn by the beneficiary in case a complying presentation is made. Beneficiary is authorized to receive payment.[466]

Even the authors, who are trying to explain the legal basis of letter of credit as order, accept that the legal structure of order is insufficient to disclose all relations that the letter of credit contain.[467] There are many differences between a transaction of order and a letter of credit which can be summarised as follows: while in an order, drawer vest authority with the drawee to pay, the letter of credit places an undertaking over the issuing bank to honour or negotiate[468]. The subject of the order may be cash, commercial bill or fungible things but subject of the letter of credit is always payment.[469] The aim of the order may be payment of a debt, opening of a credit or collection of a sum, but in case of letter of credit the aim is always paying the price of the goods bought.[470] The drawer may be or may not be the debtor of the beneficiary, but the applicant is always the debtor of the beneficiary.[471] Although drawee notifies

[464] Cevdet Yavuz, **Borçlar Hukuku Dersleri (Özel Hükümler)**, 2.Edition, İstanbul: Beta Basım Yayım Dağıtım A.Ş., 2001,p.442; Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti,* p.48-49; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.8; Erdoğan p.53
[465] Erdoğan, p.54; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.9
[466] Tekinalp p.433; Tolun, p.269-270
[467] Tekinalp, p.432, and fn.43 thereof
[468] Tekinalp, p.431; Erdoğan, p.55
[469] Erdoğan, p.55; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.78; Tolun, p.270
[470] Erdoğan, p.55; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.78; Tolun, p.270
[471] Erdoğan, p.54; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.78; Bozkurt, p.22; Tolun, p.270

beneficiary that he accepts the authorization of drawer, the issuing bank does not notify beneficiary an acceptance. It just advises itself or through an advising bank that the letter of credit has been issued.[472] It is the drawer's right to revoke order. In documentary credits the revocable letter of credit may be revoked by the issuing bank, but not by applicant. An irrevocable credit can be cancelled only with the agreement of the issuing bank(confirming bank, if any) and the beneficiary. In any case the applicant can not cancel the credit alone.[473]

It is accepted that the legal structure of order can not explain the relations in the letter of credit. Usually four party take part in letter of credit -the fourth party being the advising bank- though order does not have a fourth party. Views in favour of order overcome this arguement by approaching advising bank as performance assistant of the issuing bank in the sense Art. 100 of CO.[474] In this respect an other counter claim can be put forward; a bank may issue a letter of credit on its own behalf. UCP500 envisaged this possibility in Article 2 and UCP600 defined issuing bank as the bank that issues a credit at the request of an applicant or *on its own behalf*. In this case the letter of credit contain two parties since the title of applicant and the issuing bank merge. Order can not be conceived in such a circumstance.[475]

The correspondent bank may take part in a letter of credit as a confirming bank which means that the bank undertakes to honour or negotiate a complying presentation, in addition to the undertaking of the issuing bank. It is obviously inexplicable the second bank's undertaking with the legal structure of order.[476] The recourse issues in a letter of credit also seem to be in the same position where the issuing bank and the comfirming bank can not recourse the beneficiary, on the other hand a correspondent bank which does not confirm, may recourse to the beneficiary if it negotiates the drafts drawn by the beneficiary.[477]

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[472] Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti,* p.51; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.79; Erdoğan, p.56
[473] Özel, p.78; Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti,* p.51; Erdoğan, p.56
[474] Erdoğan, p.56; Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti,* p.49
[475] Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.11
[476] Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti*, p.51
[477] Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti*, p.51

An other disparity exists in the sphere of demurrers. If the drawee notifies the beneficiary his acceptance of authorization, then he has to pay or give. After that, the drawee can plead against the beneficiary his personal demurrers and the demurrers stemming from the content of the credit. The authors considers that the bank can not argue his personal demurrers such as set off, deferment, novation against the beneficiary in documentary credits.[478]

2.1.2. Abstract Debt Undertaking:

An other idea about the legal character of the letter of credit is that the letter of credit is an abstract debt undertaking of issuing bank to the beneficiary in the sense of Art. 17 of the CO. The issuing bank notifies the beneficiary that the letter of credit has been issued in his favour and the conditions to be complied with. With this notification the bank informs the beneficiary that he will be paid by the bank if he complies with the conditions of the letter of credit. This notification constitutes an abstract debt undertaking of the bank to the beneficiary which is independent from the relations between the applicant and beneficiary, and between the bank and the applicant. The undertaking of the bank is conditional upon the presentation of the documents stipulated in the credit within a definite period of time. [479]

The view is criticised since it considers the letter of credit as a relation just between the issuing bank and the beneficiary. Although that view is acceptable for the relation between the issuing bank and the beneficiary, the letter of credits are composed of more than that one relation. The procedure starts with the application of the applicant to the issuing bank which then nominates a bank to advise the credit to the beneficiary.

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[478] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.80; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.10-11; Ekici, *Milletlerarası Ticaret Odasının Akreditifler Hakkında 500 Sayılı Yeknesak Teamül ve Uygulamaları Işığında Akreditifin Hukuki Niteliği ve Tarafların Yükümlülükleri*, p.50; Göğer, *Belgeli Akreditifin Hukuki Mahiyeti ve Yargıtayın Bir İçtihadı*, p.694

[479] Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti*, p.56-60; Ekici, *Milletlerarası Ticaret Odasının Akreditifler Hakkında 500 Sayılı Yeknesak Teamül ve Uygulamaları Işığında Akreditifin Hukuki Niteliği ve Tarafların Yükümlülükleri*, p.50; Arslan Kaya, p.70; Erdoğan, p. 57-58; Tolun, p.276; Uluç, p.464-465

The view is insufficient to clarify those relations between the applicant - issuing bank, issuing bank - correespondent bank.[480]

2.1.3. Circular Letter of Credit or Credit Order

An other triangular transaction, circular letter of credit was framed in Art. 399 of CO. The drawer who prepares the circular letter of credit, authorizes drawee to pay the bearer of the letter and he authorizes the bearer to receive the money from the drawee.[481] The drawee pays the bearer when he presents the circular letter of credit to the drawee.

The circular letter of credit is considered as a letter of recommendation. In middle ages, long distance travellers were obtaining cash from the drawee by presenting circular letter of credit, instead of transporting the money.[482]

Although the literal resemblance, the circular letter of credit has differences in comparison with documentary letter of credit. According to the art.399/I CO. circular letter of credit was held subject to the provisions of attorney contract and order which is already insufficient to explain documentary credits as stated above.[483] A circular letter of credit is a document held by the bearer and is submitted to the drawee to obtain payment. In a letter of credit there is not such a document given by applicant to the beneficiary which ensures payment when submitted to bank[484]. The circular letter of credit's aim is to grant credit to the beneficiary, though commercial letter of credit ensures payment of a debt arising from a contractual relation.[485] Commercial letter of credit is not available to grant credit to the beneficiary. Circular letter of credit is deemed to be a written instrument, commercial letter of credit does not have to be in a written form although in practice usually it is.[486]

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[480] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.81-82; Bozkurt, p.24, Aydos, p.61
[481] Yavuz, p.420-421
[482] Yavuz, p.421; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.82
[483] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.82
[484] Uluç, p.433; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.82; Aydos, p.61-62
[485] Uluç, p.433; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.82; Aydos, p.62; Erdoğan, p. 56
[486] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.82; Erdoğan, p.56

Özel appropriately points out to a significant structural disparity; the circular letter of credit does not have to define the maximum amount of the credit that the beneficiary may demand. This is unfamiliar to commercial letter of credit which is the payment of certain amount of debt stemming from the underlying contract. The letter of credit defines the amount to be drawn by the beneficiary.[487]

Art. 400 – 403 of CO. regulates credit order. Under a credit order, the drawee undertakes to open a credit or the renewal of the credit for the beneficiary and the drawer is responsible for beneficiary's failure to payment as a surety.

Credit order is substantially different from the letter of credit. Again credit order is also a process of opening credit, though letter of credit is a means of payment of the debt stemming from the underlying contract between the applicant and the beneficiary.[488] After receiving and accepting the credit order, the drawee grants credit to the beneficiary. The drawer is responsible for the debt of the beneficiary as a surety. So the relation between the drawer and beneficiary is suretyship, on the contrary the relation between the applicant and the beneficiary is a contract of sale in letter of credit.[489] Suretyship is not in any way concerned with the transaction of documentary credit since the bank does not give a loan of money to the beneficiary. The credit order must be in a written form to hold the drawer responsible for the debt. Again the written form is not a necesary insrument for any liability in letter of crdit.[490]

As obviously seen prominent disparities exist between a commercial letter of credit and circular letter of credit or credit order which makes impossible to explain legal character of commercial letter of credit.

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[487] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.83

[488] Uluç, p.434; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.84; Ekici, *Milletlerarası Ticaret Odasının Akreditifler Hakkında 500 Sayılı Yeknesak Teamül ve Uygulamaları Işığında Akreditifin Hukuki Niteliği ve Tarafların Yükümlülükleri*, p.54; Aydos, p.62

[489] Uluç, p.434; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.84; Ekici, *Milletlerarası Ticaret Odasının Akreditifler Hakkında 500 Sayılı Yeknesak Teamül ve Uygulamaları Işığında Akreditifin Hukuki Niteliği ve Tarafların Yükümlülükleri*, p.54; Aydos, p.62

[490] Uluç, p.434; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.84; Ekici, *Milletlerarası Ticaret Odasının Akreditifler Hakkında 500 Sayılı Yeknesak Teamül ve Uygulamaları Işığında Akreditifin Hukuki Niteliği ve Tarafların Yükümlülükleri*, p.54; Aydos, p.63

2.1. Views Explaining Documentary Credits as Including Contracts:

It has been alleged that commercial letter of credit, which is a complex transaction, can not be explained by a single legal institution and it has been accepted that letter of credit is composed of more than one contract which are legally independent but economically connected.[491] Each contract have to be analysed seperately since the letter of credit can not be clarified by a single contract.

In a documentary credit usually there are four parties; namely: applicant (buyer, importer), issuing bank, correspondent bank and the beneficiary (seller, exporter). The relations between these parties are as follows:

2.2.1. Applicant – Beneficiary

The relation between the applicant and the beneficiary which is called the underlying contract, is almost always an international sale contract.[492] A letter of credit is opened because of the existence of a sale agreement which provides that the payment will be made by it.[493] Rarely the underlying contract may be a contract of construction, service contract, financial leasing[494] or a guarantee contract in case of standby letter of credit which provides security against the non-performance of a party to a contract.[495]

2.2.2. Applicant - Issuing Bank

Two different views have been suggested about the relation between the applicant and the issuing bank. The first one claims that this relation constitutes a contract of construction. The other view contends that it is an attorney contract.

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[491] Brindle, Cox, p.551; ğilmezler, p.628-629; Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti*, p.52; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.87; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.10-11; Bozkurt, p.24; Yeniaras, p.115

[492] The internationality of the sale contract is not mandatory. A domestic sale contract also may be subject to letter of credit. See also Bozkurt, p.31

[493] Jack, p.35-36

[494] Yavuz, p.454

[495] Jack, p.34; Reisoğlu, p.12

2.2.2.1. Contract of Construction

According to the first view, contract of construction is a synallagmatic contract in which each party is bound to provide a consideration to the other party. Similarly letter of credit is also a synallagmatic contract in which the bank is undertaking to perform a work, and the applicant undertakes to pay fees, comissions and expenses. On the other hand agency contract is not a synallagmatic contract[496] since the principal is not obligated to pay if they did not agreed so in the contract or the payment is not a usage in the related transaction.(Art. 386/III CO.) The view contends that, relation between the applicant and the issuing bank can not be explained with the attorney contract in which the principal may not be bound to pay the agent.[497] Erdoğan states that the view is inspired by German law, according to which working in return for consideration is accepted for only contract of labour and construction. Attorney contract is gratuitous and available only for fulfillment of legal transactions. For that reason the legal relations, which are accepted as attorney contract in Turkish law, are defined as contract of construction in German law.[498]

An opinion about the subject matter of the construction contract suggests that the product may be in an immaterial form and may not be assignable. The important point is that it should be a product of a person's skill or effort which will have an economic value.[499] The authers point out that although that broad interpretation is adopted about the product, the relation between the aplicant and the issuing bank can not be accepted as a construction contract by reason of the distinctive feature of the construction contract, which is to generate a product or to get a result since the issuing bank is not undertaking to get a result. The beneficiary may present documents which do not comply with the credit, or he may not even present documents. In such a circumstance any result can not be obtained.[500]

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[496] In Turkish law attorney contract is qualified as "eksik iki taraflı sözleşme". See Oğuzman, Öz, p.44
[497] Göğer, *Belgeli Akreditifin Hukuki Mahiyeti ve Yargıtayın Bir İçtihadı*, p.689; Uluç, p.463; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.86-87
[498] Erdoğan, p.57
[499] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.87 and fn 77 thereof; Yavuz, p.265; Aydos, p.67
[500] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.87; Aydos, p.67-68; Erdoğan, p.61

2.2.2.2. Attorney Contract:

The second view claims that there is an attorney contract between the applicant and the issuing bank. The principal (applicant), nominates the attorney or agent (issuing bank) to pay the beneficiary if the conditions of the credit are complied with by the beneficiary. This connotes the attorney contract in which attorney undertakes to perform a task to the principal's benefit and according to his will.[501] The distinctive feature of attorney contract which justifies the view is that the attorney undertakes to work for fulfillment of a duty assigned to him. The attorney is not committed to get a result.[502] The risk of not getting a result is incurred by the principal.

Construction contract view is criticised also on the basis of Art. 386/III of CO. According to the article; attorney deserves fee if stipulated in the contract or there is a usage to that effect. It is accepted that even if the parties do not agree on bank's commission, it is common practice for the banks to be paid for their services.[503] In that case the attorney contract is also a synallagmatic contract. The only ground for not being qualified as a synallagmatic contract may not be a persuasive reason to interprete that relation as contract of construction.

The defective dimension of the view is pointed out as Art. 396 of CO. According to article the principal may dismiss the attorney from the post and the attorney may resign any time. The article is not in accordance with the legal facts of letter of credit. It is accepted as a mandatory principle, the contrary of which can not be arranged and the parties can not vaiwe the right to dismiss or resign.[504] It is suggested that letter of credit should be accepted as an exception of the article.[505]

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[501] Yavuz, p.349; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.88; Aydos, p.68-69; Reisoğlu, *Hukuki Açıdan Akreditif ve Uygulama Sorunları*, p.47; Erdoğan, p.53; Tekinalp, p.435; Doğan, p.87

[502] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.88; Ekici, *Milletlerarası Ticaret Odasının Akreditifler Hakkında 500 Sayılı Yeknesak Teamül ve Uygulamaları Işığında Akreditifin Hukuki Niteliği ve Tarafların Yükümlülükleri*, p 58; Aydos, p.69

[503] Uluç, p.463; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.88-89; Aydos, p.69-70; Erdoğan, p.62

[504] Yavuz, p.388

[505] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.89 and fn.89 thereof; Aydos, p.77; Erdoğan, p.62

Even if, the relation between the applicant and the issuing bank can not be descibed as attorney contract in strict sense envisaged in CO., Art.386/II states that the provisions of attorney contract shall still be applied to the affairs which are not subject to the provisions of other contracts in the code. Since the letter of credit is not regulated by any legislation in Turkish law, provisions of attorney contract shall be applied, as much as they conform to the facts of the letter of credit, via Article 386/II. [506]

2.2.3. Issuing Bank – Correspondent Bank

The relation between the issuing bank and the correspondent bank is divided and examined in two parts, namely the internal relation and the external relation.

2.2.3.1. Internal Relation

There is not a controversy about the legal nature of internal relation of the issuing and the correspondent bank which is being an attorney contract. The correspondent bank is nominated by the issuing bank to examine the documents and to pay the beneficiary since the issuing bank does not have a branch in the country of the beneficiary or the reason may be the desire of the beneficiary to deal with a specific bank in his own country.

2.2.3.2. External Relation

In Turkish law two different views have been put forward as to the legal nature of the external relation of the issuing bank and correspondent bank. The first view contends that the correspondent bank is a substitute agent in the meaning of Art. 391 of CO. The second view asserts that the correspondent bank is the performance assistant of the issuing bank in the sense of Art. 100 of CO.

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[506] Uluç, p.463; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.87; Ekici, *Milletlerarası Ticaret Odasının Akreditifler Hakkında 500 Sayılı Yeknesak Teamül ve Uygulamaları Işığında Akreditifin Hukuki Niteliği ve Tarafların Yükümlülükleri*, p 58; Aydos, p.68

The importance of the qualification of that relation is crucial, since in case of the adoption of the first view, the issuing bank's responsibility for the acts and omissions of the correspondent bank will be due to Art. 391/II CO. If the second view is adopted then the issuing bank's responsibility will be due to Art.100 CO. The application of the Art.100 CO. will revoke Art.37 of UCP600. [507] Art.391/II CO. envisages a narrow, limited responsibility. According to the article if the agent is authorized to appoint an agent (substitute agent or sub-agent), he is bound to act with diligence and care, in choosing and instructing the second agent. If the necessary diligence and care is exercised, the issuing bank will not be held liable for the defective acts and omissions of the correspondent bank.[508]

2.2.3.2.1. Substitute Agent

In Turkish law although the rule is that the subject matter of the agency contract is fulfilled by the agent himself because of the importance of the personality of the agent, Art. 390/III of CO. envisaged some exceptions to the rule. Firstly the agent may be authorized by the principal to appoint a second agent. Secondly as the case may be, the agent may be compelled to do so because of the circumstances. Lastly there may be a custom which allows appointing an agent. The letter of credit is considered to be in the last group.[509]

According to the view the correspondent bank is a substitute agent of the issuing bank.[510] For that reason the liability of the issuing bank will be determined according to Art. 391/II CO., in which case the issuing bank absolves itself from liability by proving that the necessary diligence and care has been exercised in choosing and instructing the

[507] Yavuz, p.457; Tekinalp, p.448; Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti*, p.60
[508] Tekinalp, p.448, Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti*, p.54; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.90; Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti*, p.54, 59-60; Eğilmezler, p.640-641
[509] Yavuz, p.373; *Göğer, Akreditif Muamelesi ve Hukuki Mahiyeti,* p.54; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.90
[510] Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti,* p.54-55, 59-60; Eğilmezler, p.640

correspondent bank. The applicant will be able to put forward the issuing bank's rights directly against the correspondent bank.(Art. 391/III CO.)[511]

Eğilmezler, after declaring his view in favour of substitute agency, states that in substitution, the performance of the debt is assigned to the substitute agent who works instead of the first agent independently without being under the supervision of the first agent.[512]

Yavuz defines the relation between the issuing bank and correspondent bank as sub-agency in which case the first agent makes the agreement with the second agent on his own behalf, not on behalf of the principal as in the case of substitute agency.[513] This minor difference does not have an effect on the outcome. Again the applicable provision is Art. 391 CO. and the legal situation is the same.

2.2.3.2.2. Performance Assistant

According to Art.100 of CO., a debtor, who confers the performance of a debt to persons who live with him or work under his supervision, is liable against the other party for the harm done by them during the performance. Although the article expressly states the persons who live with him and the ones working under his supervision, it is accepted in the doctrine by taking into account the source Swiss CO. that performance assistants are not restricted to those mentioned expressly. To be qualified as a performance assistant it is not necessary to be bound to the debtor with a contract or to be under his supervision. It is adequate and mandatory to assist the performance of the debt with the consent of the debtor. It is stated that even a person assisting the performance coincidentally, is qualified as performance assistant.[514]

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[511] Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti*, p.54, 60
[512] Eğilmezler, p.640
[513] Yavuz, p.457
[514] Oğuzman, Öz, p.350-351; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.93;Tekinalp, p.448; Ekici, *Milletlerarası Ticaret Odasının Akreditifler Hakkında 500 Sayılı Yeknesak Teamül ve Uygulamaları Işığında Akreditifin Hukuki Niteliği ve Tarafların Yükümlülükleri*, p.60-61; Aydos, p.72

The issuing bank requests the correspondent bank to pay the beneficiary in case a complying presentation is made by him. Thus, the issuing bank utilises the services of the correspondent bank.[515] The authers rightfully points out that the correspondent bank does not perform its duty completely independent from the issuing bank and without being subject to its supervision. On the contrary it fulfills its duty on behalf of the issuing bank. In addition, appointing a correspondent bank does not change the debtor of the letter of the credit.[516] Still the issuing bank is the debtor and the liable bank from the payment since the correspondent bank does not undertake to pay if it didn't comfirm. For these considerations the correspondent bank is the performance assistant of the issuing bank.

In sub-agency, the agent makes a contract with the sub-agent on his own behalf. The agent assigns his debt of agency, which was entrusted to him by the principal with the attorney contract, to sub-agent. In this way the agent frees himself from performing the debt actively. The sub-agent performs his duty independently, without being under the supervision of first agent.[517] Özel criticises the sub-agency view on the grounds that the correspondent bank is not wholly independent since it acts in conformity with the instructions received from the issuing bank. In fact it should do so in order to be reimbursed by the issuing bank. An example to the conception is that the correspondent bank does not accept indecisive documents before it receives instructions from the issuing bank. The correspondent bank does not replace the issuing bank to perform its obligations stemming from the letter of credit. [518] The performance of the debt of the issuing bank is not assigned to the correspondent bank. It is still the issuing bank's obligation. The issuing bank just utilises the services of the correspondent bank.

Again the author criticises the substitute agency view by reason of the fact that the issuing bank does not make a contract with the correspondent bank on behalf of the applicant and an attorney contract does not form between the applicant and the

[515] Jack, p.114; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.93
[516] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.93; Bozkurt, p.32
[517] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.91; Ekici, *Milletlerarası Ticaret Odasının Akreditifler Hakkında 500 Sayılı Yeknesak Teamül ve Uygulamaları Işığında Akreditifin Hukuki Niteliği ve Tarafların Yükümlülükleri*, p 60; Eğilmezler, p.640
[518] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.91

correspondent bank.[519] The correspondent bank does not take place of the issuing bank to perform the agency wholly independently and any of the obligations of the issuing bank are not transferred to the correspondent bank. The critiques stated in the preceding paragraph are still available.

For all these considerations, the definition of the external relation between an issuing bank and its correspondent can not be described as substitute agency or sub-agency. The legal structure of these institutions does not conform to the letter of credit. The fact on the one hand that the correspondent bank acts on behalf of the issuing bank and under its supervision, and on the other hand the remaining of the issuing bank as the debtor of letter of credit dispite the appointment of a correspondent connotes the relationship as performance assistance in the meaning of the Art.100 of CO.

Turkish Supreme Court of Appeals also ruled in its judgement in 04/11/1964 in the same direction in favour of the second view.[520]

2.2.4. Issuing Bank – Beneficiary

After the bank's acception of the applicant's instruction to open a credit, it is bank's duty to advise the opening of a credit to the beneficiary. Although it may itself advise the opening of the credit to the beneficiary, usually it will instruct a correspondent bank in the country of the beneficiary to advise the credit. After advising the credit a legal relation is formed between the issuing bank and the beneficiary. If the beneficiary does not refuse the offer in an appropriate priod of time, the contract is formed. It is widely accepted that it is an abstract undertaking of debt in the meaning of Art.17 of CO. That undertaking of the bank is limited with a definite period of time and conditional upon the presentation of the documents stipulated in the credit.[521]

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[519] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.92

[520] Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.92 and fn.96 thereof; Bozkurt, p.26 and fn.106 thereof; Aydos, p.71 and fn.305 thereof

[521] Göğer, *Akreditif Muamelesi ve Hukuki Mahiyeti*, p.60; Göğer, *Belgeli Akreditifin Hukuki Mahiyeti ve Yargıtayın Bir İçtihadı,* p.691; Özel, *Yargıtay Kararları Eşliğinde Akreditif ve Hukuki Niteliği,* p.100; Reisoğlu, *Türk Hukukunda ve Bankacılık Uygulamasında Akreditif*, p.12; Arslan Kaya, p.70; Doğan, p.131; Aydos, p.75; Reisoğlu, *Hukuki Açıdan Akreditif ve Uygulama Sorunları*, p.47; Tolun, p. 276; Uluç, p.464-465; Eğilmezler, p.638

Uluç examines the relation in two parts, before the advice and after the advice. The athor states that, before the advise of the credit to the beneficiary, there is an agency contract with a third party beneficiary clause in the meaning of Art 111/II of CO. between the applicant and the issuing bank. The third party beneficiary clause grant beneficiary a right to demand from the bank an abstract undertaking of debt. The practical consequence of the conception will be that the beneficiary will be able to apply to the bank to obtain an abstract debt dertaking in case of bank's failure to advise the credit in contradiction with the contract of attorney between the bank and the applicant.[522] Following the qualification of the relation as abstract debt undertaking after the advise of the credit, the author states that the issuing bank will not be able to put forward the demurrers to beneficiary stemming from the underlying contract between the applicant and the beneficiary and the demurrers stemming from the attorney contract between the bank and the applicant. The demurrers that can be put forward are the ones about the legality of the abstract debt undertaking, demurrers stemming from the content of the letter of credit and demurrer of unjust enrichment.[523]

Kaya states that there is an innominate contract between the issuing bank and the beneficiary which is independent of the relations between the applicant-beneficiary and applicant-issuing bank. Since the relation was not legally arranged in Turkish-Swiss obligations laws, the content of the contract will be determined by the uniform customs and practice. Dispite his rejection of the views of order and abstract debt undertaking, the author declares that the provisions of these legal institutions will apply to the relation as much as they conform.[524] Bozkurt also seems to share the opinions of Kaya.[525]

[522] Uluç, p. 464
[523] Uluç, p.464-465; Göğer, *Belgeli Akreditifin Hukuki Mahiyeti ve Yargıtayın Bir İçtihadı,* p.694
[524] Arslan Kaya, p.74
[525] Bozkurt, p.31

CONCLUSION

The documentary credits are opened after the parties of an international sale contract(underlying contract) agree to effect payment by a documentary credit. The underlying contract is almost always a sale contract, though rarely it may be a contract of construction, service or a guaranty contract. The importer buyer requests his bank to issue a credit in favour of the seller. The bank, after opening the credit, advises it to the beneficiary. Many times it will utilise the services of a bank in the country of the seller to advise the credit. The correspondent bank does not have any commitment against the seller, if it did not confirm the credit. It is accepted that a contract does not form between the correspondent bank and the seller unless it confirmed. The only duty of the correspondent bank is to determine the apparent authenticity of the credit and that the advice accurately reflects the terms and conditions of the credit received.

By opening and advising a credit, the isssuing bank undertakes to honour the credit irrevocably. The bank commits the seller to pay him provided that he presents the required documents which comply with the terms and conditions of the credit. A credit is an irrevocable and definite undertaking of the issuing bank to honour a complying presentation. The UCP600 excludes revocable credits. Moreover, a credit[526] is an independent undertaking of the bank. It is a separate transaction from the sale or other contract on which it may be based. The bank will in no way take into account the underlying contracts even if any reference to it is included in the credit. Similarly, the bank's undertaking is not subject to any claims or defences of the applicant resulting from its relationship with the bank or the beneficiary. In other words, the bank is not concerned with any claims of the buyer relating to underlying contract. Thus the buyer can not halt the payment or reduce the amount of payment by adducing the low quality of the goods. Furthermore the banks are in no way concerned with the goods, services or performance to which the documents relate. They only deal with documents. The bank's commitment is due when the beneficiary tenders the required, complying documents. The only prerequisite of the seller's entitlement to payment is presenting documents in compliance with the credit. The bank will honour the credit in exchange

[526] In the narrow sense, the credit is the contract between the issuing bank and the beneficiary.

for the documents which conform on their face, even if the buyer prooves that the seller has shipped low quality goods. The only exception of these principles is the established fraud on the part of the seller. Although the banks do not take account of the factual situations, if the fraud of the seller is proved with liquidated evidence, and the demand of the seller constitutes an abuse of the rights, in this case it is accepted that the bank must refuse to honour the credit.

The opening and the advice of the credit is a precondition of the seller's performance. Until he is informed the opening of the credit, he does not have to commence the performance of his obligation. The parties may also agree the opening of the credit as a condition of the contract to come into being. In that case there will not be a sale contract until the credit is opened. After the advice of the credit, the seller procures or provides the goods, ship them and do whatever he was asked for. Then he presents the invoice, transport and insurance documents with other required documents, if any, to the bank. The presentation, which include transport documents, must be made not later than 21 calender days after the date of shipment but in any event on or before the expiry date of the credit.

The bank makes an examination, on the basis of documents alone, whether or not the documents appear on their face to constitute a complying presentation. The banks have a maximum of five banking days following the day of presentation. If the bank determines that the presentation does not comply with the terms and conditions of the credit, it refuses to honour or negotiate. In that case the bank must give a single notice to that effect to the presenter. The notice must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation. In case of refusal, the sanction of bank's failure to obey these provisions is heavy. It is precluded from claiming that the documents do not constitute a complying presentation.

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