DE GRUYTER
OPEN

10.1515/eual-2016-0001

Agrárne
ročník V.
vydanie 1/2016
právo EÚ

REMEDIES TO FRAUD IN DOCUMENTARY LETTERS OF CREDIT: A COMPARATIVE PERSPECTIVE

OPRAVNÉ OPATRENIA PRI PODVODOCH S DOKUMENTÁRNYMI AKREDITÍVAMI: KOMPARATÍVNA PERSPEKTÍVA

Hamed ALAVI*

I. Introduction

It is customary to face with disputes while practicing international trade. Diversified nature of such disputes range from arguments over on performance of parties in the sales contract to delays in delivery, quality of goods sold and etc. Among others, payment problems consist a major area of disagreements in international business disputes. Fraud is a common justification for importer (buyer) to refuse payment when documentary letter of credit is method of payment in international sales contract and courts of different jurisdictions have extensive experience in facing with LC fraud disputes[1]. In principle to apply fraud exception to in-

[1] Alavi, H .(2016). "Mitigating the Risk of Fraud in Documentary Letters of Credit." Baltic Journal of European Studies 6.1: 139-156

Abstract (EN)

Article 4 of the Unified Customs and Practices of Documentary Letters of Credit establishes the notion of autonomy principle by separating credit from underlying contract between account party and beneficiary. Article 5 by recognizing the autonomy principle confirms that effectuate the payment under credit, banks only deal with documents and not with goods. As a result, while documentary letters of credit are meant to facilitate the process of international trade, their sole dependency on compliance of presented documents to bank by beneficiary to actualize the payment will increase the risk of fraud and forgery in the course of their operation. Interestingly, UCP (currently UCP600) takes a silent status regarding the problem of fraud in international LC operation and leaves the ground open for national laws to provide remedies to affected parties by fraudulent beneficiary. National Laws have different approaches to the problem of fraud in general and fraud in international LC operation in particular which makes the access of affected parties to possible remedies complicated and difficult. Current paper tries to find answer to the questions of (i) what available remedies are provided to affected parties in international LC fraud by different legal systems? (ii) And what are conditions for benefiting from such remedies under different legal systems? In achieving its objective, paper will be divided in two main parts to study remedies provided by intentional legal frameworks as well as the ones offered by national laws. Part one will study the position of UCP and UNCITRAL Convention on Independent Guarantees and Standby Letters of Credit (UNCITRAL Convention) and remedies, which they provide to LC fraud in international trade. Part two in contrary will study available remedies to LC fraud and condition for access them under English and American legal system.

Keywords (EN)

documentary letters of credit, fraud, remedies, English Law, American Law, UNCITRAL Convention, UCP

Abstrakt (SK)

Článok 4 Jednotných pravidiel používania obchodných dokumentárnych akreditívov zavádza princíp autonómie. Článok 5 uznaním princípu autonómie potvrdzuje, že pri vykonaní platby za úver sa banky zaoberajú iba dokumentom a nie tovarom. Výsledkom je, že zatiaľ čo dokumentárne akreditívy sú určené na uľahčenie procesu medzinárodného obchodu, ich výhradná závislosť na predložení dokumentu banke príjemcom zvyšuje riziko podvodu a falšovania v procese ich používania. Je zaujímavé, že UCP (v súčasnej dobe UCP600) zaujíma pasívnu pozíciu vo vzťahu k problému podvodov v oblasti medzinárodných akreditívov a necháva priestor pre národné zákony, ktoré zavádzajú opravné opatrenia pre dotknuté strany. Vnútroštátne legislatívy uplatňujú rôzne prístupy k problematike podvodov všeobecne, a tiež k problematike podvodov v prípade dokumentárnych akreditív, čo značne komplikuje postup, najmä pri dostupnosti opravných prostriedkov dotknutými stranami. Predkladaný príspevok sa snaží zodpovedať otázky (i) aké opravné prostriedky sú dostupné pre dotknuté strany pri podvodoch s dokumentárnymi akreditívmi v rôznych právnych systémoch? (ii) aké sú podmienky pre prístup k takýmto opravným prostriedkom? Za účelom dosiahnutia stanoveného cieľa je príspevok rozdelený na dve hlavné časti, ktoré sa zameriavajú jednak na analýzu opravných prostriedkov poskytovaných medzinárodným právnym rámcom a jednak na tie, ktoré sú poskytované národnou legislatívou. Prvá časť sa zameriava na štúdium pozície UCP a UNCITRAL Konvencie a štúdium opravných prostriedkov, ktoré používajú v prípade akreditívou v medzinárodnom obchode. Druhá časť sa zameriava na štúdium dostupných opravných prostriedkov v podmienkach anglického a amerického právneho systému.

Kľúčové slová (SK)

dokumentárne akreditíva, podvod, opravné prostriedky, anglický právny systém, americký právny systém, UNCITRAL Konvencia, UCP

* Lecturer, Tallinn Law School, Tallinn University of Technology, Estonia
PhD. Candidate, Faculty of Law, Universitat Autónoma de Barcelona, Spain

dependence principle under LC transaction, national courts should establish the commitment of fraud by beneficiary.

Despite the fact that many legal problems seem similar anywhere they occur; their implication in different jurisdictions are different and different solutions should be applied by national courts in resolving them[2]. Logically, it is inevitable to consider different approaches of national legal systems while dealing with an international legal problem. In the same vein, current paper intends to study different approaches of international and national legal systems to LC Fraud Disputes to define what type of remedies exist for affected party in LC fraud dispute? And under which circumstances, affected party can benefit from such remedies?

In order to fulfil its objective, paper will study both international and national legal frameworks relevant to LC transaction. American and English Law are national laws to be studies for the purpose of answering our research questions where Uniform Customs and Practices in Documentary Letters of Credit, and Convention on Independent Guarantees and Standby Letters of Credit[3] (UNCITRAL Convention) are international legal frameworks chosen for this purpose.

There are two reasons for choice of studying American law. First, LC fraud exception was recognized for the first time in American legal System and extended to other jurisdictions later[4]. Second, LC fraud rule is currently codified under Article 5 of American Unified Commercial Code. Article 5 of the UCC is important for being the only statute covering LC fraud in Common Law System as well as being a strong and reliable reference for other national legal systems that intend to tackle similar problem. On the other hand, English law has an extremely rich history of resolving maritime disputes. Although, English case law shows an inflexible approach towards intervening in fundamental principles of Documentary Letters of Credit, study of the LC fraud exception rules in England will be significant help in finding answers to our research questions.

Paper has been divided into two main parts: first part covers approach of international legal frameworks to LC fraud, starting with the study of UCP view and continuing with approach of UNCITRAL Convention to this problem. Second part, with focus on national laws, will study the view of American and English Law to LC fraud, existing remedies and circumstances under which affected party can benefit from such remedies.

[2] Gordley, James (1995), 'Comparative Legal Research: Its Function in the Development of Harmonized Law', 43 Am. J. Comp. L. 555, Autumn.), p. 560.

[3] United Nations Convention on Independent Guarantees and Standby Letters of Credit, adopted on December 1995 and came into force from beginning of 2000.

[4] Principle case of *Szetjn vs Henry Schroder Banking Corporation* was the first authority, which applied the fraud exception to independence principle of documentary letters of credit.

II. International Legal Frameworks on LC Fraud Exception

II.1 UCP's view

The Unified Customs and Practices for Documentary Letters of Credit (currently UCP600) were published by ICC for the first time in 1933. UCP is considered as one the most successful private initiatives in regulating international trade practice. Article 5 of the UCP has recognized the principle of autonomy in LC transaction by emphasizing that bank deals with documents not goods and liability of bank is limited to pay to beneficiary against presentation of complying documents[5]. However, it takes an absolute silent position towards fraud and leaves it open for national laws[6]. To justify their approach, ICC authorities point at different ways to address the problem of abusive demand and fraud in different jurisdictions and consider protection of parties in good faith as responsibility of national courts[7]. Many scholars confirm the sensitivity of fraud and different approaches of national jurisdictions to it by considering the silent approach of UCP to fraud exception as a ground-breaking success[8]. They argue that current approach of UCP to fraud encourages national courts to deal with this problem with no negative effect on the market position of Documentary Letters of Credit as popular trade finance tool in international trade[9]. In the same vein, Goode comments: "the content and explanation of ICC Uniform Rules are influenced by the fact that these uniform rules are rules of best banking practice, not the rules of law..."while fraud is "the province of the applicable law of the courts of the forum"[10]. This would convey the meaning that despite recognition of the problem of fraud by drafters of UCP[11], they have intentionally set it aside[12].

[5] UCP 600, Article 5.

[6] ICC, edited by Bernard Wheble (1987), Opinions of the ICC Banking Commission – On Queries relating to Uniform Customs and Practice for Documentary Credits 1984-1986, ICC Publishing S.A., ICC Publication No. 434, p. 23; Kurkela, Matti (1985), Letters of Credit Under International Trade Law: UCC, UCP and Law Merchant, New York, London & Rome: Oceana Publications. Inc., pp. 31-32; Collyer, Gary, Presentation in Seminar 'UCP 600: Understanding the New Documentary Credits Rules', organized by ICC Finland, Helsinki, 21 March, 2007.

[7] ICC, Opinions of the ICC Banking Commission 1995 – 1996, ICC Publication No. 565, p. 22; 'Query: Rights of Recourse to the Beneficiary in the event of Fraud, in 'Latest Queries Answered by the ICC Banking Commission'', DCI (ICC), Spring 1997, Vol. 3, No. 2, p. 7.

[8] Dolan, John F. (2002), 'Commentary on Legislative Developments in Letter of Credit Law: An Interim Report', 8 Banking & Fin. L. Rev. 53p. 63.

[9] Ibid.

[10] Goode, R, (1995), 'Abstract Payment Undertakings and the Rules of the International Chamber of Commerce', 39 Saint Louis University Law Journal 725, p. 727.

[11] Dolan, John F. (1993), p. 63.

[12] Barski, Katherine A. (1996), 'Letters of Credit: A Comparison of

Leacock considers UCP approach to LC fraud as "unqualified liability"[13]. He further explains that with reference to independent principle, paying bank does not have any liability to beneficiary's fraud in case of paying against confirming documents even after receiving notice from applicant[14].

However, UCP's silent approach to fraud has been criticized by other scholars on the basis that regulations should provide secure and predictable environment for trading partners, where different approaches of national laws to fraud is unsatisfactory as there is not provide certainty for businessmen who intend to enter international trade[15]. Inclusion of fraud rule in UCP is one of the recommend solutions for non-harmonized approaches of national laws to this problem[16]. Drafting a set of transnational trade law with special focus on non-harmonized aspects of international LC operation including fraud is another scholarly proposal[17] which does not seem realistic due to time consuming process of ratification of such draft by different nations[18]. In brief, fraud exception is excluded from UCP and left under the discretion of national law. This approach of ICC has been denounced by some scholars who consider it as a reason for uncertainty in international trade while others call it as successful step towards increasing international marketability of Documentary Letters of Credit[19].

II.2 UNCITRAL Convention's View

In late 1995 the United Nations Convention on Independent Guarantees and Standby Letters of Credit came into force with the goal of facilitating the function of Independent Guarantees and Standby Letters of Credit in international trade[20]. The Convention is effective in contracting States[21] and despite the fact that its scope is limited to demand guarantees and standby letters of credit; it has application to Commercial Documentary Letters of Credit as well[22]. This convention is the first international effort to address the problem of fraud in international LC transaction and three of its articles (article 15, 19 and 20) directly deal with abusive and fraudulent demand for payment under standby letters of credit and independent guarantees plus ways to prevent them. Therefore, Convention is considered a supportive regulatory framework to UCP[23]. However; the word fraud has not been mentioned throughout the convention following the logic of preventing confusions, which may result from different interpretations of the term in different jurisdictions[24].

Article 15 is the guideline for beneficiary in making the demand under standby letters of credit and independent guarantees. It refers to condition under which beneficiary's demand can be prevented: "[t]he beneficiary, when demanding payment, is deemed to certify that the demand is not in bad faith (for example by providing confirmation letters from an authorized inspection firm regarding compliance of shipped consignment with terms of LC)and that none of the elements referred to in subparagraphs (a), (b) and (c) of paragraph 1 of article 19 are present."[25]

Article 19 titled: "Exceptions to payment obligation" provides list of situations, which provides issues with choice of refusing, demanded payment by beneficiary. Paragraph (1) provides that: "Any document is not genuine or has been falsified; no payment is due on the basis asserted in the demand and the supporting documents; or Judging by the type and purpose of the undertaking, the demand has no conceivable basis..."[26]. Paragraph 2 explains the meaning of "no conceivable basis" (a)The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialised; (b)The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking; (c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary; (d) Fulfilment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary; (e) or In the case of a demand under a counter-guarantee, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates".[27]

Further , paragraph (3) of the same article provides that: "in the circumstances set out in subparagraphs (a), (b) and (c) of paragraph 1 of this article, the principal/applicant is entitled to provisional court measures in accordance with article 20"[28]. Scholars consider article 19 of convention successful in achieving it political and technical objectives[29].

Article 5 of the Uniform Commercial Code and the Uniform Customs and Practice for Documentary Credits', 41 Loy. L. Rev. 735, p. 751.

[13] Leacock, Stephen J. (1984), 'Fraud in International Transaction: Enjoining Payment of Letters of credit in International Transactions', 17 Vand. J. Transnat'l L. 885 (Fall), p. 912

[14] Ibid. 913

[15] Buckley, Ross P. & Gao, Xiang (2002), 'The Development of the Fraud Rule Letter of Credit Law: The Journey So Far and the Road Ahead', 23 University of Pennsylvania Journal of International Economic Law 663 (Winter), p. 701.

[16] Kuo-Ellen, Lin S. (2002), 'UCP Needs to Change', Journal of Money Laundering Control, Vol. 5, No. 3, p. 231.

[17] Rowe, M, (1998), 'Do We Need a Transnational Law on Documentary Credits? Michael Rowe & Bernard Wheble Debate', DCI (ICC), Spring, Vol. 4, No. 2, pp. 16-17.

[18] Ibid.

[19] Buckley, Ross P. & Gao, Xiang (2002), 'The Development of the Fraud Rule Letter of Credit Law: the Journey So Far and the Road Ahead', University of Pennsylvania Journal of International Economic Law 663, (Winter) 676.

[20] Xiang , Gao, (2002), The Fraud Rule in Law of the Letters of Credit" ,The Hague, 125.

[21] UNCITRAL Convention, article 26.

[22] UNCITRAL Convention , articles 19 and 20.

[23] Goode, Roy (2004), Transnational Commercial Law - International Instruments and Commentary, Oxford: Oxford University Press, 1st ed., p. 341.

[24] Xiang , Gao (2002), 126.

[25] UNCITRAL Convention, article 15, para. 3.

[26] UNCITRAL CONVENTION , article 19(1).

[27] Ibid , article 19(2)

[28] Ibid , article 19(3)

[29] De Ly, Filip (1999), 'The UN Convention on Independent Guar-

Article 20 continues with providing possibilities for court action under the title of "Provisional court measures":

"**1.** Where, on an application by the principal/applicant or the instructing party, it is shown that there is a high probability that, with regard to a demand made, or expected to be made, by the beneficiary, one of the circumstances referred to in subparagraphs (a), (b) and (c) of paragraph I of article 19 is present, the court, on the basis of immediately available strong evidence, may: a. Issue a provisional order to the effect that the beneficiary does not receive payment, including an order that the guarantor/issuer hold the amount of the undertaking, or b. Issue a provisional court order to the effect that the proceeds of the undertaking paid to the beneficiary are blocked, taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm.

2. The court, when issuing a provisional order referred to in paragraph 1 of this article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

3. The court may not issue a provisional order of the kind referred to in paragraph 1 of this article based on any objection to payment other than those referred to in subparagraphs (a), (b) and (c) of paragraph 1 of article 19, or use of the undertaking for a criminal purpose".[30]

From technical point of view, the Convention is successful in addressing major apects of fraud rule developed by national courts in addition to offering a precise and useful guidelines. Article 19 (1) lists types of misconduct by beneficiary, which result in application of fraud rule both under LC contract and underlying sales contract. Also Convention provides guidance for actions which victim of fraud can take by either withholding payment or refusing to honour presentation (bank) and applying for injunction remedy at court (applicant) in order to prevent issuing bank from honouring fraudulent presentation[31]. Gao and Buckley consider fraud related provisions in UNCITRAL Convention as vital and positive development, which can be used as a guide for national courts while applying the fraud rule[32].

There are two main criticisms to UNCITRAL Convention articles on fraud. On one hand, scholars criticise vagueness of provisions, which might create problem in practice of independent undertakings[33]. On the other hand, other scholars express concern on possibility for different court interpretations as result of applying Convention's provisions which might increase the risk of international trade[34]. In conclusion, UNCITRAL Convention has provided a constructive development in international application of LC fraud rule despite existence of different interpretations among national courts, which will be discussed in later chapters of this paper.

antees and Standby Letters of Credit', 33 Int'l Law 831 (Fall), p. 843

[30] UCITRAL CONVENTINON, Article 20.

[31] UNCITRAL CONVENTION article 19 (3) and 20.

[32] Gao, Xiang & Buckley, Ross P. (2003a), 'A Comparative Analysis of the Standard of Fraud Required under the Fraud rule in Letter of Credit Law', 13 Duke Journal of Comparative and International law p. 333.

[33] Dolan, John F. (1997), 'The UN Convention on International Independent Undertakings: Do States with Mature Letter-of-Credit Regimes Need It?', 13 B.F.L.R.1, p. 23.

[34] Gorton, Lars (1996), 'Draft UNCITRAL Convention on Independent Guarantees', LMCLQ, Part 2, May, 42, p. 49.

III. National Laws Approach to LC Fraud Exception

III. 1 The American View

In this section, American approach to LC fraud will be reviewed. In doing so, principle case of Sztejn v. J.Henry Schroder will be studied. Sztejn case is known for laying the foundation of LC fraud exception in the United States of American and also in England. Further, Article 5-109 of Unified Commercial Code as statuary body of law, which regulates Fraud in LC operation in the United States and grant of injunction as a judiciary remedy to fraud will be analysed.

Sztejn v. J. Henry Schroder banking Corporation[35]

This is the leading case on fraud rule in the United States of America that seriously affected the development of fraud exception in documentary letters of credit.[36] Another importance of Sztejn case is being a reference in the process of codification of 1962 version of UCC as well as being the principle authority for latter cases on fraud in LC operation[37]. Gao refers to Sztejn case as "it shaped the fraud rule in virtually all jurisdictions"[38].

In this case, based on the international contract of sale between Sztejn (the buyer) and Transea Traders Ltd (the Seller), documentary letter of credit issued by Schroder (the issuing bank) as the method of payment with the draft drawn by issuing bank on the Chartered bank (presenting bank). Before presentation of documents to the bank, applicant (Sztejn) demanded court for granting injunction against beneficiary based on receiving "cow hair, other worthless material and rubbish with intent to simulate genuine merchandise and defraud the plaintiff"[39]. Szetjn also named Chartered bank as collecting bank not the holder in due course of the draft issued by issuing bank. Justice Sheintag of the New York Court of Appeal considered all allegations in case as truth and rejected to motion of Chartered Bank to dismiss the compliant of Szetjn on the basis of two arguments: allegation and established fact of fraud being committed within the framework of underlying contract. His statement started as following:

"It is well established that a letter of credit is independent of

[35] (1941) 31 N.Y. S.2d 631.

[36] Buckley, Ross P. & Gao, Xiang (2002), 'The Development of the Fraud Rule Letter of Credit Law: the Journey So Far and the Road Ahead', 23 University of Pennsylvania Journal of International Economic Law 663, (Winter)676.

[37] In 1964 version of UUC fraud rule was under Article 5 section 5-114 but after revision of 1995 it is under Article 5, section 5-109.

[38] Kelly-Louw, M. (2009). Selective legal aspects of bank demand guarantees(Doctoral dissertation). 179.

[39] 31 NYS 2d 631 (1941) 633.

the primary contract of sale between the buyer and the seller. The issuing bank agrees to pay upon presentation of documents, not goods. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade"[40].

And continued on necessity to overrule the principle of independence in case of committing fraud by beneficiary:

"Of course, the application of this doctrine [the principle of independence] presupposes that the documents accompanying the draft are genuine and conform in terms to the requirements of the letter of credit.

However, I believe that a different situation is presented in the instant actions. This is not a controversy between the buyer and seller concerning a mere breach of warranty regarding the quality of the 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 had been called to the bank's attention before the drafts and documents have been presented for payment, the principle of the independence of the bank's obligation tinder the letter of credit should not be extended to protect the unscrupulous seller... Although our courts have used broad language to the effect that a letter of credit is independent of the primary contract between the buyer and seller, that language was used in cases concerning alleged breaches of warranty; no case has been brought to my attention on this point involving intentional fraud on the part of the seller which was brought to the bank's notice with the request what it withhold payment of the draft on this account".[41]

Court dismissed the motion of Chartered Bank against complaint of plaintiff and granted injunction to Szetjn :

"Transea was engaged in a scheme to defraud the plaintiff..., that the merchandise shipped by Transea is worthless rubbish and that Chartered Bank is not an innocent holder of the draft for value but is merely attempting to procure payment of the draft for Transea's account".[42]

The case of Sztejn is also important for recognizing the immunity of the holder in due course as well as bank security as a supporting reason in application of fraud exception:

"While the primary factor in the issuance of the letter of credit is the credit standing of the buyer, the security afforded by the merchandise is also taken into account. In fact, the letter of credit requires a bill of lading made out to the order of the bank and not the buyer. Although the bank is not interested in the exact detailed performance of the sales contract, it is vitally interested in assuring itself that there are some goods represented by the documents".[43]

"On this motion only the complaint is before me and I am bound by its allegation that the Chartered Bank is not a holder in due course but is a mere agent for collection for the account of the seller charged with fraud. Therefore, the Chartered Bank's motion to dismiss the complaint must be denied, if it had appeared from the face of the complaint that the bank presenting the draft for payment was a holder in due course, its claim against the bank issuing the letter of credit would not be defeated even though the primary transaction was tainted with fraud."[44]

[40] Ibid 632.

[41] Ibid 633.

[42] Ibid.

[43] Ibid, 634–635.

[44] Ibid

Injunction

Injunction in the United States of America is court order which obliges enjoined party refrain or perform an action[45]. Federal Rules of Civil Procedure 65 (FRCP) define two types of temporary injunctive relief as preliminary injunction and temporary restraining order. Preliminary injunction is granted in a hearing and after notice to enjoined party where applicant has sufficient proof for preserving status quo till final hearing. Temporary Restraining Order preserve the status quo for defined number of days and it might be granted without notice of enjoined party. Both type of injunction can be named interlocutory injunction[46]. Permanent injunction is another judicial remedy to be granted on the basis of merit after trail[47].

Article 5 of the Unified Commercial Code

Article 5 of the Unified Commercial Code is governing the operation of Documentary Letters of Credits besides Case Law in the United States of America. The UCC had a permanent editorial board which published commentaries which are often cited by judges as an authority for explanation of different provisions[48]. Article 5 of the current version of UCC is fully allocated to Documentary Letters of Credit . Drafting committee was following the goal of finding a way for further harmonization of US law with international regulations besides flexibility in practice to meet technological changes and keep the competitive position of LC in international trade. Article 5 of the UCC also contains relevant provisions in LC fraud exception[49].

Current Article 5–109 is titled "Fraud and Forgery" covers circumstances necessary for granting interlocutory injunction the text of article such circumstances as following:

"(a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honour of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant: (1) the issuer shall honour the presentation, if honour is demanded by (i) a nominated person who has given value in good faith and without notice of forgery or material fraud, (ii) a confirmer who has honoured its confirmation in good faith, (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person, or (iv) an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obliga-

[45] Wunnicke, Brooke & Wunnicke, Diane B. (1996), Standby and Commercial Letters of Credit, New York: Wiley Law Publications, 2nd ed., p. 174.

[46] Ziegel, Jacob S. (1979) (Chief Ed.), International Encyclopedia of Comparative Law Volume IX Commerical Transactions and Institutions, under the auspices of the Internatioonal Association of Legal Science, Martinus Nijhoff Publishers', pp. 123–124.

[47] Liu, Yuxia (2007), 'Study of Legislation on Court Injunction in L/C Fraud', Economic and Social Development, Vol. 5, No. 7, Jul., 117.

[48] Zhang, Y. (2011). Approaches to Resolving the International Documentary Letters of Credit Fraud Issue. University of Eastern Finland. p 74.

[49] UCC , Article 5 –109.

tion was incurred by the issuer or nominated person; and (2) the issuer, acting in good faith, may honour or dishonour the presentation in any other case.

(b) If an applicant claims that a required document is forged or materially fraudulent or that honour of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honouring a presentation or grant similar relief against the issuer or other persons only if the court finds that: (1) the relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer; (2) a beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted; (3) all of the conditions to entitle a person to the relief under the law of this State have been met; and (4) on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honour does not qualify for protection under subsection (a) (1).”

Text of UCC article 5-109 follows two main directions of “fraud immunisation” and “fraud exception”[50]. An important aspect of Article 5-109 (a) is clarification of the fact that fraud is applicable both to forgery in documents stipulated in the Credit and in underlying sales contract. Article also comments on necessity of fraud to be material in order to issue injunctive relief. However, it does not define what does it mean for fraud to be material? Whereby, official comment on the Article provides: “the beneficiary has no colourable (meaningful) right to expect honour and where there is no basis in fact to support such a right to honour”[51].

Neither text of article 5-109 nor its official commentary refers to intention of beneficiary to defraud. As a result, it has been argued that UCC article 5-109 has focus on seriousness of fraud in the course of transaction not beneficiary’s intention and state of mind[52]. It is clear from the official commentary that standard of proof for fraud is set high and mere allegation of fraud is not sufficient for granting injunction to applicant[53]. Injunction will be granted only after meeting high standard of proof for the purpose of preventing threats to independence principle in LC operation. Commentary also stipulates that granting similar reliefs like attachment and declaratory judgement by court should follow similar high standards[54]. Attachment is a sort of preliminary relief to secure or seize the disputed property following the objective to force compliance with court decision on pending case[55]. Declaratory Judgement refers to court judgement in determining the rights of parties under, a statute, a contract or a will, on the basis of any fact or law.

Scholars consider the US approach[56] to fraud in documentary letters of credit as “unduly narrow approach” which limits the application of LC fraud exception[57]. Different interpretations of judges from standard of proof are also a discouraging factor[58]. This can be a disadvantage for American law to show different interpretations of judges from a single problem in presence of uniform standard of “material fraud”[59].

III.2 English Law

Under English Law, Documentary Letters of Credit are considered as the life blood of the commerce[60] while fraud is considered as “the most controversial and confused area”[61] as it affects the independence principle in international operation of LC. Historically, English courts take a restrictive approach in interfering in obligation of bank to pay unless there is a corroborate evidence of committing fraud by beneficiary. Even nullity and illegality of underlying sales contract does not affect the court decision to interrupt the regular operation of LC by issuing stop order payment to bank[62]. Unlike American law, there is no statute regulating LC fraud rules in England and this area of law has been consistently governed by case law from late 1970s till today[63].

English law does not have any definition for fraud and court should conclude its establishment on the case to case basis. However, according to existing authorities, there are four main types of LC fraud disputes distinguished in English Law. First, beneficiary sues the bank on the basis of bank’s rejection to pay despite receiving compliant presentation. Second, Bank has payed beneficiary, however, sues beneficiary due to presentation of fraudulent documents and request for restitution of the payment. Third, paying bank sues the issuing bank in request for reimbursement after effectuating the payment, and refusal of issuing bank to reimburse on the basis of fraud. Finally, before effectuating the

[50] Wunnicke, B & Wunnicke, Diane B. (1996), Standby and Commercial Letters of Credit, New York: Wiley Law Publications, 2nd ed,pp. 165-179.

[51] UCC Article 5 Letters of Credit, UCC§5-109 Forgery and Fraud, Official Comment 1.

[52] Buckley, Ross P. (1995), ‘The 1993 Revision of the Uniform Customs and Practice for Documentary Credits’, 6 Journal of Banking & Finance Law & Practice 77, p. 97.

[53] UCC Article 5 Letters of Credit, UCC§5-109 Forgery and Fraud, Official Comment 4.

[54] Ibid.

[55] Fletcher, George P. & Sheppard, Steve (2005), American Law in a Global Context: The Basics, Oxford; New York: Oxford University Press, p. 511.

[56] Barnes, James G. & Byrne, James E. (2001b), ‘Letters of Credit: 2000’, 56 Business Law. 4, reprinted in Annual Survey of Letter of Credit Law & Practice 13, 18 (2002).

[57] Barnes, James G. & Byrne, James E., ‘Letters of Credit’, in Byrnes, James E. & Byrnes, Christopher S. (Eds.) (2007), 2007 Annual Survey of Letter of Credit Law and Practice, MD: The Institute of International Banking Law & Practice, Inc., pp. 39-42.

[58] Gao, Xiang & Bukley, Ross P. (2003a), p. 322.

[59] Mooney, J. Lowell & Blodgett, Mark S. (1995), ‘Letters of Credit in the Global Economy: Implications for International Trade’, Journal of International Accounting, Auditing and Taxation, Vol. 4, Issue 2, Pages 175-183, p. 183.

[60] *Horbottel v. National Westminster Bank* [1978] QB 146;100.

[61] Buckley RP & Gao X (2002),p. 663.

[62] D’Arcy, Leo (2000), Schmitthoff’s Export Trade - The law and Practice of International Trade, London: Sweet & Maxwell, 10th ed, p. 166.

[63] Alavi , H. “Autonomy Principle and Fraud Exception in Documentary Letters of Credit, a Comparative Study between United States and England”. *International and Comparative Law Review*, Vol. 15, No. 2 ,(2015) ,45-67.

payment by bank, applicant request interlocutory injunction from court to stop bank from payment on the basis of beneficiary's fraud[64].

In similar way to American Law, it seems that under English law injunction is the most popular legal relief sought by applicant against either bank or beneficiary in cases of LC fraud. However, restrictive approach of English courts to interfere in independence principle of Documentary Letters of Credit creates doubt in usefulness of such remedy. This section explores non-harmonious approach of English courts to different types of LC fraud disputes with special focus on procedural aspects of interlocutory injunction in England.

Bank's rejection to pay

Upon presentation of confirming documents by beneficiary, issuing bank and conforming bank if any has the duty to honour the presentation.[65] In case of bank's decision not to effect the payment to beneficiary, it should prove the establishment of fraud based on existing standard of proof introduced by English Courts[66] (discussed in injunction chapter of current paper). However, it is rare that the bank refuses to honour the credit on its own initiative[67]. Banks generally do not reveal fraud and the information and instructions about fraud come from account party. After receiving allegation of fraud from account party, bank has the option to pay or not. In case it decides to effect the payment, obtaining the injection from court will be the only solution for account party to prevent payment to beneficiary[68]. If bank decides not to pay, then either beneficiary's fraud is established and bank will be excused from payment or if otherwise happened, bank will be in breach of contract. When bank decides not to effect the payment, beneficiary might apply for summary judgement against the bank in order to get quick remedy without going to full trail[69]. Issuing the summary judgement by court in England is subjected to the English Civil Procedural Rules (CPR). Part 24.2. Accordingly:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that: (i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) There is no other compelling reason why the case or issue should be disposed of at a trial"[70].

The decision of courts in Solo Industries v Canara Bank[71], Safa Ltd v Banque du Caire[72] and Banque Saudi Fransi v Lear Siegler Services Inc[73] show that in case of beneficiary's application for summary judgement, bank is subjected to a higher standard than what is required in CPR 24.2. Therefore, for court, it is not sufficient that bank can show a real prospect of successfully establishing fraud in its defence. In addition, bank is required to prove the real established fraud "which has the capability of being clearly established at the interlocutory stage"[74]. In occasions that bank does not resist payment on the basis of fraud rule like refraining to pay based on invalidity of letter of credit, it would be sufficient to satisfy the normal standard[75] while trying to show the real prospect of success under CPR 24.2.

Bank's Entitlement for Reimbursement

General rule is that the bank, which has paid against conforming presentation, is entitled for reimbursement. However, in case of fraud, bank has no obligation against beneficiary or entitlement against the account party to effect the payment. In case of payment in such circumstances, bank cannot claim for reimbursement[76]. However, the bank, which does not have information about the fraud of beneficiary, will not be prejudiced.

In the case of Angelica-Whitewear Ltd v Bank of Nova Scotia[77] which was referenced by English courts, Le Dien J. from the Supreme court of Canada argued that it case of improperly paid draft by issuing bank the standard of proof for fraud should be set in the question that "Whether fraud was so established to the knowledge of issuing bank before payment of the draft as to make the fraud clear or obvious to the bank"[78]. According to Le Dien J, standard of proof for such cases was different from standard of proof when applicant is trying to obtain interlocutory injunction against bank to restrain the payment to the beneficiary. He explained that in latter case the "strong prima facie test will apply"[79].

As it was discussed before, it can be understood that the bank which is trying to resist summary judgement against the payment to beneficiary is subjected to the higher standard of proof. However, this does not apply in the occasion that applicant, issuing bank or confirming bank try to resist the summary judgment as a result of being sued for reimbursement by the bank which has paid the fraudulent beneficiary.[80] In such occasions, defendant is expected to provide a real prospect of existing fraud and satisfy the normal test of CRP Part 24.2 at trail[81].

[64] Malek A & Quest D (2009), 'Documentary Credits - The Law and Practice of Documentary Credits Including Standby Credits and Demand Guarantees' 4ed , Tottel ., para 9.2, pp. 207-208.

[65] Malek A & Quest D (2009), 'Documentary Credits – The Law and Practice of Documentary Credits Including Standby Credits and Demand Guarantees' 4ed , Tottel 264.

[66] Ibid.

[67] Ellinger. P – Noe D. (2010) , The Law and Practice of Documentary Letters of Credit , 145.

[68] Ibid.

[69] Ibid.

[70] Part 24.2 of the Civil Procedure Rules accessed online: at http://www.hrothgar.co.uk/YAWS/rules/part24.htm#IDAZBHOB (Accessed 1 Feb 2016).

[71] Solo Industries UK Ltd v Canara Bank [2001] 1 WLR 1800.

[72] Safa Ltd v Banque du Caire [2000] 2 Lloyd's Rep. 600.

[73] Banque Saudi Fransi v Lear Siegler Services Inc. [2007] 2 Lloyd's Rep 47.

[74] Ibid, 31-32.

[75] Ibid 33.

[76] Ellinger .P, Noe. D , (2010), 147

[77] Angelica-Whitewear Ltd v Bank of Nova Scotia 36 D.L.R. (4th) , EYB 1987-67726.

[78] Ibid, 59, 84.

[79] Ibid.

[80] Ellinger .P, Noe. D , (2010), 147.

[81] Ibid.

In case of Banque Saudi Fransi v Lear Siegler Inc[82], the issuer of a performance bond was seeking for summary judgement against the instructing party who provided a counter indemnity. After making the payment to the beneficiary defendant, issuing bank raised the defence of not being bound for payment under the country indemnity due to dishonest claim of the beneficiary. In trial, defendant managed to successfully resist against the summary judgement by showing the real prospect, which was clearly established[83]. In the above decision, it is implied that although, beneficiary might successfully obtain the summary judgement against bank as a result of bank's failure to establish a clear evidence of fraud , there is no guarantee that bank can in return obtain summary judgement for receiving reimbursement against the instructing party. Because the instructing party should only meet requirements of the low test of real prospect of fraud in the trial.[84]

Fraud in deferred payment obligations

Under the deferred payment credits, the nominated bank has the obligation to pay on the maturity date in accordance with the credit terms. As under deferred payment system there is no immediate payment available to seller till the date of maturity of credit, the seller is responsible to ship goods and expects payment on maturity. Such process will impose financial burden on seller. Therefore, market demand in similar conditions resulted in creation of forfaiting practice. In forfaiting practice, nominated bank may agree to discount the beneficiary's documents and expect reimbursement from issuing bank on maturity date. In case of beneficiary's fraud before the maturity date, applicant and issuing bank will definitely try not to reimburse the nominated bank, which has paid to fraudulent beneficiary. Despite the fact that establishment of beneficiary's fraud will depend in facts of each individual case and in addition guideline for inter-bank reimbursements under differed payment is provided by UCP 600, it worth to review the right and obligations of involved financial institutions under deferred payment before and after coming into force of the UCP 600.

Banco Santander SA v Banque Paribas

In Banco Santander SA v Banque Paribas, the fraud of beneficiary created serious problems for Santander, which was the confirming bank under the deferred payment arrangement[85].

In 1980 Napa Petroleum Trade applied to open a deferred payment credit at Banque Paribas in favour of Bayfern Ltd. Based on the request of Paribas, Banco Santander advised the credit as nominated bank to beneficiary. Later, Banco Santander decided to add its confirmation to the credit. The deferred payment was due 180 days after issuing the bill of lading. Beneficiary presented confirming documents to Santander on 15 June 1998. According to the credit arrangements, Paribas as issuing bank and Santander as confirming bank had the duty to pay the beneficiary on 27 November 1998. However, Santander agreed to discount the credit before maturity. Therefore, Santander discounted the credit and sum of payment minus discounting fee was transferred to the Bayfern's account. Bayfern irrevocably assigned Santander to its rights under the credit. However, before the date of maturity, Paribas informed Santander about presentation of forged documents by beneficiary and refused to reimburse Santander on maturity. Santander sued the Paribas and the trial judge ruled in favour of Paribas as Bayfern assigned its rights under the credit to Santander. The Court of Appeal confirm the judgment of trial court as an assignee of Beyfern , Santander has no better position than assignor given that in case of non-discounting credit , Santander would not face any risk due to refusal of Paribas based on beneficiary's fraud . Alternative argument of Santander as holder the position of confirming bank was rejected by court because under UCP500 issuing bank was only undertaking to reimburse nominated bank in case of honouring the deferred credit at maturity. Judgement of Banco Santander v. Banque Paribas was an unwelcomed decision in the international banking society as banks were regularly discounting deferred payment credits. However, after coming into force of the UCP 600, it addressed the issue of deferred discounted payments under article 7(c) and Article 12 (c).

The article 7 (c) holds that assignment of rights from the beneficiary to the discounting bank is not necessary anymore and as a result ,bank is entitled for reimbursement at the maturity date.

"Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity"[86]

The new Article 12 (c) of the UCP 600 has been the subject of many discussions among commentators. The debate is on the impact of the authorization. There is an argument among commentators who consider this new rule as legal basis for mitigating the risk of fraud between the date of payment and maturity date while others consider it as a right given to the nominated bank, which might be used under its own discretion and definitely on its own risk [87].

'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'[88]

The most important objections are made by commentators who consider that UCP 600 is setting aside Banco Santander and similar cases. "Produced the undesirable result of effectively removing a useful option or risk apportionment".[89]

Injunction

According to the independence principle, courts should not

[82] Banque Saudi Fransi v Lear Siegler Services Inc. [2007] 2 Lloyd's Rep 47 , 18.

[83] Ibid.

[84] Ibid.

[85] Banco Santander SA v. Banque Paribas, [2000] CLC 906.

[86] UCP Article 7(c).

[87] Takahashi. K , (2009) , "The introduction of article 12(b) in the UCP 600: Was it a really step forward?", JIBLR 24 (6) , 285-286.

[88] UCP Article 12 (C).

[89] Takahashi. K , (2009), 285-286.

interfere in the process of documentary credit and demand guarantees operation and grant injunction unless a recognized exception is established[90]. Under English legal system, injunction is recognized as an equitable remedy in private law; therefore, court has discretion whether or not to grant it[91]. Injunction has a prohibiting nature, which means to stop doing, repeating or continuing, an act or to undo an act with wrongful nature[92]. There are two main types: interlocutory and perpetual injunctions in English law. The interlocutory ones also known as pre-trial or interim intend to preserve the status quo before going to trial. However, perpetual injunction will be granted after approval of the applicant's case in trail[93]. As it will be explained later, a Freezing order or Mareva Injunction is "an order of the court restraining a party to proceedings from removing assets from the jurisdiction of the court or otherwise dealing with assets located within the jurisdiction and, in more limited circumstances, from dealing with assets outside the jurisdiction"[94]. From the explanation, it is clear that Mareva Injunction is also a type of interlocutory injunction. It follows the objective of preventing actions against judgment by transferring assets out of jurisdiction or disappearing them within jurisdiction[95]. Freezing order can be granted as ex parte and without notice of beneficiary[96].

Since it will be really difficult for account party to recover payment in cases of real LC fraud, interlocutory injunctions provide some remedy for affected party by prohibiting payment to beneficiary. When there is doubt about fraudulent conduct of beneficiary, applicant may apply to court for interlocutory injunction against beneficiary, paying bank or both of them. However, application for injunction against beneficiary should be done before presentation of stipulated documents in the credit to the bank. After presentation of documents by beneficiary, it is only possible to require granting injunction against bank. This section will review approach of English legal system to interlocutory injunction when there is allegation of fraud in international operation of Documentary Letters of Credit.

Legal basis for granting injunction under English Law

Under the section 37 of the Senior Court's Act 1981, The High Court may order (whether interlocutory or final) to grant injunction in all cases in which it seems to the court to be just or convenient to do so[97]. Power of the High Court to grant interim injunction in support of foreign proceedings under section 25(1) of the Civil Jurisdiction and Judgment's Act 1982[98]. Therefore, account party has the right and option to require court for issuing interim injections in order to restrain beneficiary from demanding money under the demand guarantee or letter of credit which is payable in England in support of foreign proceedings. However, it is not easy to obtain injunction against the beneficiary or paying bank under English law. So far only three cases have managed to obtain injunction: Themehelp Ltd. v West[99], Kavaerner Jhon Brown Ltd v Midland Bank Plc[100], Lorne Stewart Plc v Hermes Kreditversicherungs AG[101] The general principles for granting injunction were set out in the case of American Cyanamid Co v Ethicon[102] based on the speech of the Lord Diplock . Applicant faces two main problems in application for interim injunction. First of all, he has to show an arguable claim against the party he is trying to enjoin. For this purpose, applicant should establish the fact that party owes him a duty either in contract or in tort which against that duty fraud is taking place and being enough evidences that beneficiary is knowledge about taking place of fraud[103]. Besides it should be proved that granting the injunction by bank is correct practice and will pass the test of balance of convenience.

There have been arguments on contradictory nature of intervening in the process of bank's operation via granting of interim injunction with independent principle. As a result, it was suggested that independent principle will not be violated in case of granting injunction against beneficiary to prevent demand on documentary credit or demand guarantee. A similar view was taken by court in the court of appeal of the Themehelp Ltd. v West[104]. In that case, the Court of Appeal ruled for granting injunction against the beneficiary of a demand guarantee in order to restrain him from demanding payment on the basis that the underlying contract was affected by fraudulent misrepresentation of him. However, the Themehelp Doctrine has been criticized heavily on the basis that enjoining beneficiary for demanding payment violates the assurance of payment provided by letter of credit. There will be no difference for beneficiary to be prevented from receiving payment by being enjoined from court or because of an injunction preventing the bank to pay him[105]. In addition majority decision in Themehelp did not receive any judicial support from succeeding cases for example it was rejected in the cases of Group Josi Re v Walbrook Insurance Co Ltd and Others[106], Czarnikow-Rionda Sugar Trading Inc v Standard Bank London[107] and Sirius International Insurance Corp

(90) Enonchung (2010) , 227.

(91) Ingman, Terence (1994), The English Legal Process, London: Blackstone Press Limited, 5th ed., p. 313; Treitel, Guenter (2003), The Law of Contract, London: Thomson Sweet & Maxwell, 11th ed., pp. 1040-1048; Atiyah, P. S. & Smith, Stephen A. (2005), pp. 377-388.

(92) Ingman, Terence (1994), pp. 314-315.

(93) Ibid, 315.

(94) Hapgood, Mark (1989), Paget's Law of Banking, London & Edinburth: Butterworths, 10th ed., p. 332.

(95) Ibid, p. 333.

(96) Sealy, L.S. & Hooley, R J A (2005), p. 852.

(97) Enonchung (2010), 227.

(98) The Civil Jurisdiction and Judgement's Act, 1982 (Interim Relief) Order 1997.

(99) Themehelp Ltd v West and Others [1996] QB 84.

(100) Kavaerner Jhon Brown Ltd v Midland Bank Plc (1998) CLC 446.

(101) *Lorne Stewart plc v Hermes Kreditversicherungs AG*, (1999) 2 Lloyd's Rep 187.

(102) American Cyanamid Co v Ethicon Ltd [1975] AC396.

(103) Ibid.

(104) Themehelp Ltd v West and Others [1996] QB 84.

(105) Ellinger .P, Noe. D , (2010),163.

(106) *Group Josi Re v Walbrook Insurance Co Ltd and Others* [1996] 1 Lloyd's Rep 345 (CA).

(107) Czarnikow-Rionda Sugar Trading Inc v Standard Bank London

v FAI General Insurance Co. Ltd [108]. Even May LJ in the case of Sirius International Insurance Corp v FAI General Insurance Co. Ltd, with whom the other members of the court of appeal agree, considered the decision of Themehelp as questionable[109].

The standard of proof

When account party is looking for injunction to prevent beneficiary from demanding payment or bank from enforcing payment on the basis of fraud exception, the first necessary step to take is meeting the standard of proof[110]. In the case of United City Merchants (Investment) Ltd v Royal Bank of Canada[111], the standard of proof for fraud was considered when Lord Diplock held the requirement as "Clear, obvious, or established fraud known to the issuer or confirmer of the letter of credit."[112]. Also Ackner LJ, in the case of United Trading Corp. SA v Allied Arab Bank Ltd[113] laid down the standard of "only realistic inference" in order to provide an alternative to the "clear evidence" provided by Lord Diplock in United City Merchants. Ackner LJ further emphasized that:

"The evidence of fraud must be clear, both as to the fact of the fraud and as to the [guarantor's] knowledge. The mere assertion or allegation of fraud would not be sufficient...We would expect the court to require a strong corroborative evidence of the allegation, usually in the form of contemporary documents, particularly those emanating from the buyer." [114]

Court also commented:

"for the evidence of fraud to be clear, it would be expected that the buyer was given the necessary opportunity to answer the allegation against him and he (buyer) fails to provide any, or any adequate answer in circumstances where one could properly be expected. If the court considers that on the material before it the only realistic inference"[115]

Other similar positon was taken by Mance LJ in The Court of Appeal of Solo Industries UK Ltd v. Canara Bank[116]. Mance LJ while responding to the contention of bank towards standard of proof which should preclude "any possibility of innocent explanation" took as very close position to the position of United Trading Corp. SA . From what has been discussed so far, it can be clearly understood that standard of proof for fraud under English law has been formulated differently. One reason can be that courts try to set not too high standard from one hand to safeguard the autonomy principle and on the other hand set it too high not to be attainable in practice. As a result, there are different standards of proof including "established or obvious fraud"[117],"good arguable case which is the realistic inference on the material available for beneficiary to be fraudulent"[118] or the "real prospect"[119] of establishing fraud.

As it was mentioned earlier, the second step for obtaining the injunction is satisfying the balance of convenience.

The issue was not always considered in English court's decision while deciding to grant injunction base on fraud. One reason is that in most cases evidence was not enough to establish fraud and as a result the case did not proceed to the stage for considering the balance of convenience.[120] Therefore, when claimant manages to establish the basis for injunction, court will consider the balance of convenience in order to issue the injunction. it has been mentioned that in the context of injunctions to prevent either beneficiary from claiming the payment or bank form effecting the payment in most cases balance of convenience is against granting the injunction.[121]

The main reasons against granting injunction can be named as resistance of adequate remedies for damages, imminent expiry date of credit, availability of freezing injunction and availability of final accounting between parties[122].

Mareva Injunction or Freezing Orders

It can be concluded from the discussion above that English courts are not willing to interfere in operation of Documentary Letters of Credit by issuing Interlocutory Injunction. However, there is possibility for plaintiff to apply for Freezing Order against belongings of the beneficiary[123]. Since freezing orders are also of the interlocutory nature, English courts are prudent in granting them and numerous conditions should be satisfied by applicant for obtaining it:

The first is that the plaintiff should show a substantive cause of action against the defendant[124]. Judgement of Fourie v. Le Roux[125] has approved this requirement, which was

[1999] 2 Lloyd's Rep 187([1999] Lloyd's Rep Bank 197.

[108] Sirius International Insurance Corp v FAI General Insurance Co.Ltd (2003) 1 All ER (Comm) 865.

[109] Ellinger .P, Noe. D , The Law and Practice of Documentary Letters of Credit , (2010), 163.

[110] Discount Record Ltd v Barclays Bank Ltd [1975] 1WLR 315; RD Harbottle (Mercantile)
National Westminster Bank [1978] QB 146; Edward Owen Engineering Ltd v Barclays Bank
International Ltd [1978] QB 159; Bolivinter Oil SA v Chase Manhattan Bank [1984] Lloyd's Rep 251;
Group Josi Re v Walbrook Insurance Co Ltd [1996] 1 WLR 1152.

[111] United Trading Corp. SA v Allied Arab Bank Ltd, [1985] 2 Lloyds Rep 554, 561.

[112] Ibid.

[113] United Trading Corp. SA v Allied Arab Bank Ltd, [1985] 2 Lloyds Rep 554, 561.

[114] Ibid.

[115] Ibid

[116] Solo Industries v Canara Bank [2001] 2 Lloyd's Rep 578.

[117] Edward Owen Engineering Ltd v. Barclays Bank International [1978] QB 159, per Lord Denning.

[118] United Trading Corporation SA v. Allied Arab Bank at FN 27 per Ackner LJ at 561.

[119] Solo Industries UK Ltd v Canara Bank [2001] 1 WLR 1800, [2001] EWCA Civ 1059.

[120] Enonchong (2011) 158.

[121] Enonchong (2011) 236.

[122] Ibid.

[123] Lord Denning, M. R., in Z Ltd v. A-Z [1982] 1 Q.B. 558, 574, under which he states: "The injunction does not prevent payment under a letter of credit... but it may apply to the proceeds as and when received by or for the defendant.

[124] Capper, David (2007), 'Case Comment: Asset Freezing Orders – Failure to State the Cause of Action', C.J.Q. 26 (APR), 181-184, p. 181.

[125] [2007] UKHL 1.

raised for the first time in the case of Siskina[126]. Second, a good arguable case must be established in order to grant Freezing Order. This requirement was established in case of Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft & Co[127]. Third, plaintiff should provide court with evidence that in cases of not restraining defendant's assets, there is a real risk for removing them out of jurisdiction before enforcement of judgement[128]. Since assets should be located in England [129], plaintiff should prove that defendant's assets are present within the jurisdiction[130]. Fourth, in case of considering freezing order as unjustified, plaintiff must have access to sufficient financial resources to cover damages[131]. Exceptionally, it is possible to obtain freezing order despite access to limited financial resources[132]. Fifth, all relevant information, which can affect the process of granting ex part injunction, should be disclosed by plaintiff[133]. This precondition is of extreme importance in granting freezing order due to possibility for creation of prejudice for defendant[134]. Finally, plaintiff should satisfy the court that granting freezing order is "just and convenient" otherwise court might reject issuing such another despite existence of other requirements[135].

Granting freezing orders will become crucial when defendant is located in the foreign jurisdiction or his assets in domestic jurisdiction are not sufficient [136]. Since 1988, issuing the globally effective freezing orders by English courts gain more importance[137]. There are three elements involved in international freezing orders: a defendant subjected to domestic jurisdiction, assets located abroad, third party with control over assets who is located either within the jurisdiction or abroad[138]. One of the main problems on the way of obtaining international freezing order is convincing the court on "just and convenient nature" of the plaintiff's claim due to oppressive effect of internationally enforcing court order on defendant who is located in a different jurisdiction[139]. Second issue is relevant to the third parties affected by global freezing orders. Generally, international banks are affected with such orders[140] and when such third parties are involved, enforceability of freezing order issued by English court in another jurisdiction is a valid question[141]. In general manner, banks are not subjected to freezing orders[142] as such orders will create inconvenience for their normal business process and place the customer's confidence to bank in danger[143]. Other problem is enforcing third party in a other jurisdiction to obey a court order issued by a foreign court. It has been argued that inserting a term in the court order, which binds parties who can obey, and excuse orders can be a solution to this problem[144].

In conclusion, English courts have a restricted approach in interfering with autonomy principle of Documentary Letters of Credit. Despite existence of remedies like interlocutory injunction and freezing order, difficulties on the way of obtaining them in LC fraud cases create doubts about their effectiveness. Possibility to obtain global freezing order can be a relief in LC fraud cases for trades involved in international business. However, grating them is under the discretion of court and subjected to precondition of being "just and convenient".

IV. Conclusion

Current paper discussed the possible access to remedies for affected party in case of fraud in Documentary Letters of Credit from a comparative perspective. For this purpose, paper has been divided into two main parts: part one studied problem of LC fraud from the lens of international regulations by scrutinizing approaches of Uniform Customs and Practices of Documentary Letters of Credit and UNCITRAL Convention on Standby Letters of Credit and Demand Guarantees. Part two reviewed English and American law perspectives on the subject matter. UCP is silent regarding fraud and leaves the ground open for national laws. UNCITRAL Convention does not use the term fraud. However, within the framework of article 15,19 and 20 defines condition under which payment can be prevented and provisional measures which can be taken by court .

Under American Law, LC fraud is regulated in Article 5-109 of the Unified Commercial Code which defines standard of proof for court and remedies for affected party. According to article 5-109 of UCC, injunction is the main remedy for LC fraud in the United States of America while scope of beneficiary's fraud include forgery in presented documents as well as fraud in underlying sales contract. Injunction has been considered a remedy because in case of effectuating payment

[126] Siskina (Cargo Owners) v. Distos Compania Naviera SA [1979] AC 210, HL.

[127] The Niedersachsen [1984] 1 All ER 398 pp. 414-415, [1983] 1 WLR 1412, p. 1417, CA

[128] Aiglon Ltd v. Gau Shan Co Ltd, [1993] 1 Lloyd's Rep. 164; The Niedersachsen [1983]; Great Future International Ltd v. Sealand Housing Corp, [2003] EWCA Civ 682.

[129] Derby & Co. Ltd v. Weldon (No. 3 and 4) [1990] Ch. 65.

[130] Suen, Henry & Cheung, Sai On (2007), 'Mareva Injunctions: Evolving Principles and Practices Revisited', Const.L.J. 23 (2), 117-136, pp. 120-121.

[131] *The Niedersachsen* [1984], p. 416.

[132] *Allen v. Jambo Holdings Ltd* [1980] 2 All E.R. 502, CA.

[133] *Third Chandris Shipping Corpn v. Unimarine SA* [1979] QB 645, pp. 668-669.

[134] *Bank Mellat v. Nikpour* [1985] F.S.R. 87, p. 92.

[135] *The Niedersachsen* [1984], p. 1426.

[136] *Derby & Co Ltd v. Weldon* (No. 3 and 4) [1989] 1 All ER 1002, p. 1007, [1989] 2 WLR 412, p. 419.

[137] Aslett, Pepin (2003), 'Cross-border Asset Protection: An Offshore Perspective', Journal of Financial Crime, 10(3), 229-245.

[138] Devonshire. P. (1996), 'The Implications of Third Parties Holding Assets Subject to a Mareva Injunction', LMCLQ, (May), Part 2, p. 269.

[139] Meisel, Frank (2007), 'Case Comment: Worldwide Freezing Orders - the Dadourian Guidelines', C.J.Q., 26 (APR), 176-180, p. 176.

[140] Ibid.

[141] Ibid, 177.

[142] 'Case Comment - Mareva Injunction on Bank's Assets in the Context of Tracing Action', J.B.L.1992, Jul, 416-419.

[143] *Bankers Trust Co. v. Shapira* [1980] 1 W.L.R. 1274.

[144] Capper D, (1996), 'The Trans-Jurisdictional Effects of Mareva Injunctions', C.J.Q. 15 (JUL), 211-233, p. 219.

by bank, account party will have very limited chance for returning the money from fraudulent beneficiary. Although, granting injunction is not easy in the United States, but its seems to be more difficult to obtain such remedy under English Law. LC fraud is regulated under case law in England. Despite the fact that English law also considers injunction as the main remedy for affected party before granting the final court order, scope of fraud in England is limited to forgery in presented documents by beneficiary to bank. Such limited scope of fraud rule has roots in historical tendency of English courts neither to interfere in smooth operation of international trade nor undermine the absolute application of independence principle in LC operation. Also high standards of proof for establishing fraud in court and limited access of applicant to interlocutory injunction in English legal system create doubts about usefulness of such remedies. Freezing orders (domestic and international) are alternative remedies for LC fraud in England, which affected parties, hence their advocates should keep that in mind. However, they should remember that English courts demand specific requirements for granting such remedies which are principally different from requirements for granting injunction. Therefore, it is recommended to plaintiff to define his defence strategy on the basis of either remedy from the beginning.

Therefore, it is recommended to parties in international trade to be aware of availability of remedies for fraud in applicable law to their contract and requirements for grating them, which are not the same in different jurisdictions.

References

1. Alavi, H. (2016). "Mitigating the Risk of Fraud in Documentary Letters of Credit." Baltic Journal of European Studies 6.1: 139-156.
2. Alavi , H. (2015) , "Autonomy Principle and Fraud Exception in Documentary Letters of Credit, a Comparative Study between United States and England". International and Comparative Law Review, Vol. 15, No. 2, (2015), 45-67.
3. Aslett, P, (2003), 'Cross-border Asset Protection: An Offshore Perspective', Journal of Financial Crime, 10(3), 229-245.
4. Atiyah, P. S. & Smith, Stephen A. (2005), An Introduction to the Law of Contract, Oxford: Oxford University Press, 6th ed, pp. 377-388.
5. Barnes, James G. & Byrne, James E. (2001), 'Letters of Credit: 2000', 56 Business Law. 4, reprinted in Annual Survey of Letter of Credit Law & Practice 13, 18 (2002).
6. Barnes, James G. & Byrne, James E. (2007)., 'Letters of Credit', in Byrnes, James E. & Byrnes, Christopher S. (Eds.) , 2007 Annual Survey of Letter of Credit Law and Practice, MD: The Institute of International Banking Law & Practice, Inc., pp. 39-42.
7. Barski. K, A. (1996), 'Letters of Credit: A Comparison of Article 5 of the Uniform Commercial Code and the Uniform Customs and Practice for Documentary Credits', 41 Loy. L. Rev. 735, p. 751.
8. Buckley, Ross P. & Gao, Xiang (2002), 'The Development of the Fraud Rule Letter of Credit Law: the Journey So Far and the Road Ahead', University of Pennsylvania Journal of International Economic Law 663, (Winter) 676.
9. Buckley, Ross P. (1995), 'The 1993 Revision of the Uniform Customs and Practice for Documentary Credits', Journal of Banking & Finance Law & Practice 77, p. 97.
10. Capper, D, (2007), 'Case Comment: Asset Freezing Orders - Failure to State the Cause of Action', C.J.Q. 26 (APR), 181-184, p. 181.
11. Capper D., (1996), 'The Trans-Jurisdictional Effects of Mareva Injunctions', C.J.Q. 15 (JUL), 211-233, p. 219.
12. D'Arcy, Leo (2000), Schmitthoff's Export Trade - The law and Practice of International Trade, London: Sweet & Maxwell, 10th ed, p. 166.
13. De Ly F., (1999), 'The UN Convention on Independent Guarantees and Standby Letters of Credit', 33 Int'l Law 831 (Fall), p. 843.
14. Devonshire P.,(1996), 'The Implications of Third Parties Holding Assets Subject to a Mareva Injunction', LMCLQ, (May), Part 2, p. 269.
15. Dolan, John F. (1997), 'The UN Convention on International Independent Undertakings: Do States with Mature Letter-of-Credit Regimes Need It?, 13 B.F.L.R.1, p. 23.
16. Dolan, John F. (2002), 'Commentary on Legislative Developments in Letter of Credit Law: An Interim Report', 8 Banking & Fin. L. Rev. 53p. 63.
17. Ellinger, E. P. and Neo, D. S. S. (2010). "The Law and Practice of Documentary Letters of Credit". Hart.
18. Enonchong, N (2011), The Independence Principle of Letter of Credit and Demand Guarantees, Oxford University Press.
19. Fletcher, George P. & Sheppard, Steve (2005), American Law in a Global Context: The Basics, Oxford; New York: Oxford University Press, p. 511.
20. Gao, Xiang & Buckley, Ross P. (2003), 'A Comparative Analysis of the Standard of Fraud Required under the Fraud rule in Letter of Credit Law', 13 Duke Journal of Comparative and International law p. 333.
21. Goode, R. (1995), 'Abstract Payment Undertakings and the Rules of the International Chamber of Commerce', 39 Saint Louis University Law Journal 725, p. 727.
22. Goode, Roy (2004), Transnational Commercial Law - International Instruments and Commentary, Oxford: Oxford University Press, 1st ed., p. 341.
23. Gordley, James (1995), 'Comparative Legal Research: Its Function in the Development of Harmonized Law', 43 Am. J. Comp. L. 555, Autumn.), p. 560.
24. Gorton, L, (1996), 'Draft UNCITRAL Convention on Independent Guarantees', LMCLQ, Part 2, May, 42, p. 49.
25. Hapgood, M, (1989), Paget's Law of Banking, London & Edinburth: Butterworths, 10th ed., p. 332.
26. ICC, edited by Bernard Wheble (1987), Opinions of the ICC Banking Commission - On Queries relating to Uniform Customs and Practice for Documentary Credits 1984-1986, ICC Publishing S.A., ICC Publication No. 434, p. 23.
27. ICC, Opinions of the ICC Banking Commission 1995-1996, ICC Publication No. 565, p. 22.
28. ICC (1997) 'Query: Rights of Recourse to the Beneficiary in the event of Fraud, in 'Latest Queries Answered by the ICC Banking Commission", DCI (ICC), Spring 1997, Vol. 3, No. 2, p. 7.
29. Ingman, Terence (1994), The English Legal Process, London: Blackstone Press Limited, 5th ed., p. 313.
30. Kelly-Louw, M. (2009). Selective legal aspects of bank demand guarantees (Doctoral dissertation). 179.
31. Kuo-Ellen, Lin S. (2002), 'UCP Needs to Change', Journal of Money Laundering Control, Vol. 5, No. 3, p. 231.
32. Kurkela M, (1985), Letters of Credit under International Trade Law: UCC, UCP and Law Merchant, New York, London & Rome: Oceana Publications. Inc., pp. 31-32.
33. Leacock S, J. (1984), 'Fraud in International Transaction: Enjoining Payment of Letters of credit in International Transactions', 17 Vand. J. Transnat'l L. 885 (Fall), p. 912.
34. Liu, Yuxia (2007), 'Study on l Legislation on Court Injunction in L/C Fraud', Economic and Social Development, Vol. 5, No. 7, Jul., 117.

35. Malek A & Quest D (2009), 'Documentary Credits - The Law and Practice of Documentary Credits Including Standby Credits and Demand Guarantees' 4ed, Tottel. 264.
36. Meisel, Frank (2007), 'Case Comment: Worldwide Freezing Orders - the Dadourian Guidelines', C.J.Q., 26 (APR), 176-180, p. 176.
37. Mooney, J. Lowell & Blodgett, Mark S. (1995), 'Letters of Credit in the Global Economy: Implications for International Trade', Journal of International Accounting, Auditing and Taxation, Vol. 4, Issue 2, Pages 175-183, p. 183.
38. Rowe, M, (1998), 'Do We Need a Transnational Law on Documentary Credits? Michael Rowe & Bernard Wheble Debate', DCI (ICC), Spring, Vol. 4, No. 2, pp. 16-17.
39. Sealy, L.S. & Hooley, R.J.A. (2005), Commercial Law - Text, Cases and Materials, Oxford: Oxford University Press, 3rd ed p. 852.
40. Suen, H & Cheung, S, (2007), 'Mareva Injunctions: Evolving Principles and Practices Revisited', Const.L.J. 23 (2), pp. 120-121.
41. Takahashi. K, (2009), "The introduction of article 12(b) in the UCP 600: Was it a really step forward?", JIBLR 24 (6) , 285-286.
42. Treitel, Guenter (2003), The Law of Contract, London: Thomson Sweet & Maxwell, 11th ed., pp. 1040-1048.
43. Wunnicke, B & Wunnicke, Diane B. (1996), Standby and Commercial Letters of Credit, New York: Wiley Law Publications, 2nd ed, pp. 165-179.
44. Xiang, Gao, (2002), The Fraud Rule in the law of Letters of Credit, Hague, 126.
45. Zhang, Y. (2011). Approaches to Resolving the International Documentary Letters of Credit Fraud Issue. University of Eastern Finland. pp. 74.
46. Ziegel. J, S. (1979) (Chief Ed.), International Encyclopaedia of Comparative Law Volume IX Commercial Transactions and Institutions, under the auspices of the International Association of Legal Science, Martinus Nijhoff Publishers', pp. 123-124.

Authorities

1. 31 NYS 2d 631 (1941) 633.
2. Aiglon Ltd v. Gau Shan Co Ltd, [1993] 1 Lloyd's Rep. 164.
3. Allen v. Jambo Holdings Ltd [1980] 2 All E.R. 502, CA.
4. American Cyanamid Co v Ethicon Ltd [1975] AC396.
5. Angelica-Whitewear Ltd v Bank of Nova Scotia 36 D.L.R. (4th) EYB 1987-67726.
6. Banco Santander SA v. Banque Paribas, [2000] CLC 906.
7. Bank Mellat v. Nikpour [1985] F.S.R. 87, p. 92.
8. Bankers Trust Co. v. Shapira [1980] 1 W.L.R. 1274.
9. Banque Saudi Fransi v Lear Siegler Services Inc. [2007] 2 Lloyd's Rep 47, 18.
10. Bolivinter Oil SA v Chase Manhattan Bank [1984] Lloyd's Rep 251.
11. Czarnikow-Rionda Sugar Trading Inc. v Standard Bank London [1999] 2 Lloyd's Rep 187([1999] Lloyd's Rep Bank 197.
12. Derby & Co Ltd v. Weldon (No. 3 and 4) [1989] 1 All ER 1002, p. 1007, [1989] 2 WLR 412, p. 419.
13. Discount Record Ltd v Barclays Bank Ltd [1975] 1WLR 315.
14. Edward Owen Engineering Ltd v. Barclays Bank International [1978] QB 159.
15. Great Future International Ltd v. Sealand Housing Corp, [2003] EWCA Civ 682.
16. Group Josi Re v Walbrook Insurance Co Ltd [1996] 1 WLR 1152.
17. Horbottel v. National Westminster Bank [1978] QB 146.
18. International Ltd [1978] QB 159.
19. Kavaerner Jhon Brown Ltd v Midland Bank Plc (1998) CLC 446.
20. Lorne Stewart plc v Hermes Kreditversicherungs AG , (1999) 2 Lloyd's Rep 187 .
21. Safa Ltd v Banque du Caire [2000] 2 Lloyd's Rep. 600.
22. Sirius International Insurance Corp v FAI General Insurance Co. Ltd (2003) 1 All ER (Comm) 865.
23. Siskina (Cargo Owners) v. Distos Compania Naviera SA [1979] AC 210, HL.
24. Solo Industries UK Ltd v Canara Bank [2001] 1 WLR 1800, [2001] EWCA Civ 1059.
25. Szetjn v. Henry Schroder Banking Corporation (1941) 31 N.Y. S.2d 631.
26. The Civil Jurisdiction and Judgement's Act, 1982 (Interim Relief) Order 1997.
27. The Niedersachsen [1984] 1 All ER 398 pp. 414-415, [1983] 1 WLR 1412, p. 1417, CA.
28. Themehelp Ltd v West and Others [1996] QB 84.
29. Third Chandris Shipping Corpn v. Unimarine SA [1979] QB 645, pp. 668-669.
30. UCC Article 5 Letters of Credit, UCC§5-109 Forgery and Fraud, Official Comment.
31. United Trading Corp. SA v Allied Arab Bank Ltd, [1985] 2 Lloyds Rep 554, 561.
32. Z Ltd v. A-Z [1982] 1 Q.B. 558, 574.

Contact address/ Kontaktná adresa

Hamed Alavi
lecturer, Tallinn School of Law, Tallinn University of Technology,
PhD. Candidate, Autonomous University of Barcelona, Spain,
email: hamed.alavi@ttu.ee