

THE LEGAL
IMPLICATIONS OF
ELECTRONIC LETTER
OF CREDIT AS A
CROSS BORDER
TRADE PAYMENT
MECHANISM:
BOTSWANA AS CASE
STUDY

2016

A dissertation submitted by Dorcas Kelebileone Basimanyane as partial fulfillment of LLM -Masters Degree on International Trade And Investments law in Africa. University of Pretoria

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DECLARATION

I declare that The Implications of Electronic Letters of Credit on Cross Border Trade; Botswana as Case Study, has not been submitted for any degree or examination in any University, and that; all the sources I have used or quoted have been indicated and acknowledged by complete reference.

Dorcas Kelebileone Basimanyane

Date: 30 July 2016

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LIST OF ABBREVIATIONS

All ER All England Law Reports

Burr Burrow's Kings Bench Reports Tempore (Mansfield)

BOLERO Bill Of Lading Electronic Registration Organization

BOL Bill Of Lading

BISS Botswana Interbank Settlement System

CHIPS Clearing House for Inter-Bank Payment Systems

CA Court Of Appeal

CLC Commercial Law Citation

CLR Commercial Law Reports

e-L.C Electronic Letters Of Credit

eUCP Supplement To The Uniform Customs And Practice For Documentary

Credit For Electronic Presentation Version 2.0

ICC International Chamber Of Commerce

ISP98 International Standby Practices

PC Privy Council

QB Queens Bench

SA South African Law Reports

SADC Southern African Development Community

SWIFT Society for Worldwide Interbank Financial Telecommunication

UCC Uniform Commercial Code

UCP Uniform Customs and Practice for Documentary Credit

UNCITRAL United Nations Commission on International Trade

ABSTRACT

Over the years, the electronic letters of credit evolved as one of the developments to meet the international trade demands coupled with the exponential technology advancements of the current times which whetted an appetite for superfluous trade and competitiveness in the trade industry. Just like legal discrepancies pursuant to the use of the letter of credit in international trade, this too demanded some legal architecture to govern its utilization. However, unlike the traditional letters of credit, there are more legal stumbling blocks concerning this form of letters of credit. The primary legal constraints being, lack of legal recognition by the courts because of their nature (being data messages); lack of recognition in the laws of contracts (digital signatures, digital contracts), public perception more especially most of the developing countries, who because of lack of technology, resources and skilled man power, lacked knowledge on the advantages of technology advancement.

So, the study interrogates the legal implications of an electronic letter of credit in the international trade transactions using Botswana as a case study. Importantly, it investigates the completeness and sufficiency of the legal regimes in Botswana to enable operation of the electronic letter of credit. The conclusions are that the Botswana e-legislation drafts so far are complete as regard to the legal principles enabling electronic transactions. It also argues that the laws are comprehensive enough, receptive to the electronic documents including the upcoming developments in technology and more importantly, the fact that it provides a level playing field for all the players by protecting the rights of the users of electronic transactions in general.

Key Words

International Trade, Digitization, Letter of credit, Regulatory Framework, Botswana

CHAPTER 1

1.1.INTRODUCTION AND BACKGROUND TO THE STUDY

The letter of credit also known as the documentary letter of credit and the banker's commercial credits,¹ constitutes a written undertaking or a promise by the bank (usually at the request of its customer or account party) to make payment of a specified amount to the beneficiary contingent upon compliance with the terms and conditions set out in the credit. The latter mainly implicates the presentation of documents² to evidence title ship of the goods shipped by the seller and payment thereof.³ The English Judges refer to the L.Cs as the "life blood of international commerce"⁴ due to their common use in international commercial trade. The L.C, in short, is the substratum of international commercial dealings.

While the proponents of this field have divergent views on the actual genesis of the letter of credit, the crux of the matter remains that the letter of credit (L.C) has an eminent and long antiquity; they go way back to the era of at least the 13th century Kings and the Queens commercial dealings.⁵ According to Davidson A, the first lawsuit involving a letter of credit was in 1763, an English case of *Pillans v Van Miero*.⁶

1.2.Research problem

The proliferation of modern technology has brought with it an integration of commercial law, international finance and information technology which has predominately stimulated a shift from reliance on paper-based communications to electronic modes in international trade.

Though consistent with other developing economies, commercial transactions in Botswana have also been pervaded by technological developments. The local and international sales and buying of goods and services are now largely digital, but it has not been easy to keep up with the pace of such developments in terms of putting in place the appropriate regulatory regimes. The laws of the country have for a long time been paper biased, creating uncertainties, and inconsistencies as well as a distrust by the consumers on the use of electronic communications.

¹ See Murray C et al the law and practice of international trade (2012)p.g189

² ibid

³ D Horowitz Letters of credit and demand guarantees defences to payments (2010)2

⁴Harbottle v National Westminster Bank [1977]2 All ER 870

⁵ See R J Trimble The Law Merchant and the Letter of Credit (1948) 61 Harvard LR. 981 ; Alan Davidson, "The Evolution of the Letter of Credit Transaction Journal of International Banking and Financial; F R Sanborn,Origins of the Early English Maritime and Commercial Law, New York, 1930, 347 Law (1995) Volume 10 128;

⁶ ibid

While electronic communications are certainly a valuable asset to international trade, more especially the payment mechanisms such as the electronic letter of credit (e-LC), they are also a double edged hatchet. On one hand, they are panaceas to the rigidity, incompleteness, inefficiency, costliness and the fraud risks of paper based modes while on the other subsists the inconclusiveness and incongruities of their regulatory frameworks; they are indeed a mixed blessing to the global trading arena.

1.3. Research question(s)

The main research question in this study is: what are the legal implications of an electronic letter of credit in the international trade transactions?

Based on the central research question, the study will also seek to address the following sub-questions:

- i. What is the genesis and the legal nature of letters of credit as an international finance payment mechanism?
- ii. Are electronic letters of credit legally accepted and recognised as a payment mechanism in the contemporary world and what are the underlying legal challenges?
- iii. How are the electronic letters of credit efficient and secure as compared to other modes of international trade finance payment mechanisms?
- iv. Are the electronic letters of credit legally accepted and recognised as payment modes in Botswana? Are the laws of Botswana as compared to the United Nations Commission on Trade Law (UNCITRAL) model laws on e-commerce and the Southern African Development Community (SADC) model law on e-commerce sufficient and complete enough to regulate electronic communications?

1.4. Thesis statement

This research argues in favour of electronic modes of payment and proves that their advantages outweigh their negatives; therefore, their operation should be enabled. Consequently, as there is nothing that could be put in place to stop the rate at which technology is advancing in relation to trade practices, a logical proposition is to acquire full benefits of these modes at the highest balance of affected interests as possible, ensuring less harm to the existing systems and protecting of consumer rights. Electronic letters of credit is one of the payment mechanisms that are capable of bringing about such results.

1.5. Significance of the study

This research seeks to bring to the fore, a better understanding of differences between electronic letters of credit and the paper-based modes, their regulatory regimes, interpretation and well as application thereof. It seeks to highlight the essential legal aspects of electronic trade regulation which Botswana has to consider in drafting adequate e-commerce legislation, as well as insurance of aligning such legal regimes with the international best practices.

Further, the study encourages full use of electronic letters of credit as has proven effective and secure for cross-border trade payments but taking in to account the prominence to adequately regulate their operation. This might have the potential to also deepen the African financial sector integration.

1.6. Literature review

A plethora of academic literature exist on African cross-border trade payment mechanisms, yet with great focus on paper based payments and physical cash transfers, as traditionally accepted methods succeeding from the primeval barter system. The reasons behind this are issues of lack of resources, lack of infrastructure and lack of technology and technical know-how which are influenced by a great trust on physical money handling and paper based documentary evidence. Only a little has been written on electronic payment mechanisms from legal point of view simply because these practices are generally not regulated, and not legally recognised despite having permeated the global trading practices. The African drafters of contract laws in the years also seem to have not foreseen this phenomenon. Almost all the laws in Southern Africa have been totally paper biased only until recently; some countries such as South Africa, Botswana and Malawi have decided to align their laws with electronic trading practices.

Electronic payment modes existed in the past, but were not as predominant and widely recognised as they are today. According to Poole, et al⁷ the history of electronic payments and banking goes way back as to the 1980's when it was in an infant stage and it is only now in the twenty first (21st) century that it is exponentially augmenting due to advancements in technology.

⁷ See Poole HW, Lambert L, Wood Ford C, Mochovitics CJ The Internet A Historical encyclopedia (2005) page 213

It is alongside this reasoning that this research on the legal implication of electronic letters of credit on international trade in made necessary and relevant.

This study agrees that most of the electronic payments such as electronic letters of credit are as traditional paper based but just in an intangible form with improved efficiency. The normal legal principles applicable to the traditional paper based, are also applicable to them which make no reasonable sense to exclude them from legal recognition based on their form and not rather on their ability to fulfil the functions of paper based modes.

Writers such as the United Nations Conference on Trade and Development (UNCTAD) group⁸ support the use of electronic modes as opposed to the paper based form, as it alleviates paper work load, efficient, and secure, further it is a safer way to keep up with technological advancement and the current trade practices. However, the issue of dispute surrounds areas of the legal validity, recognition and enforcement of these modes. The United Nations Commission on International Trade Law (UNCITRAL), International Commercial Centre (ICC) and other trading organisations attempted to address these limitations through promulgation of legal rules to guide operation of electronic modes. They adopted the non-discrimination principle, and the functional equivalence and other principles that seek to neutralise the harsh discriminations against the electronic modes. Nevertheless, writers have divergent views on the adequateness and sufficiency of these rules to govern the electronic transactions.

Some other writers such as Kelly-Louw,⁹ Zhang,¹⁰ contend that the legal rules governing electronic letters of credit are incomplete and insufficient to regulate same. They identified absence of explicit provisions regulating international credit fraud, and uncertainties of electronic signatures as detrimental factors which tend to promote their lack of acceptance and recognition by the consumers and the trading community at large.

However, the other group views the opposite, writers such as (Frida,¹¹ Zhang and Aywa¹²), acknowledge that despite the raised concerns electronic modes are a valuable asset to international trade; they are efficient and more secure compared to the paper based. They believe

⁸ Frida Youssef (2001) UNCTAD/ITCD/COM/Misc. 31 Documentary Risk In Commodity31

⁹ M Kelly-Louw Selective Legal Aspects Of Bank Demand Guarantees 2008 (unpublished)

¹⁰Y. Zhang (2011) Approaches to Resolving the international documentary letters of credit fraud issue

¹¹ See note 8 above

¹² S. Aywa Samuel Legal aspects of electronic banking in Kenya (unpublished)

that the authenticating systems are reliable, and difficult to sabotage due to the nature of signatures and the used cryptographic techniques. In the logical sense it should be acknowledged that as technology advances in our everyday times in a good way it will also do the same in a bad way, it is double edged. Though the common law fraud also have inconsistency problems, some nations have succeeded in establishing comprehensive data protection legal regimes which fills some of the gaps, which same could be done by all other trading communities.

Against the backdrop of the foregoing, Professor Byrne¹³, another proponent of the use of electronic commerce in line with the above, proposed four stages as a way out of the hurdles of using electronic modes of payment being; that

- (Step1) utilization of electronic commerce should legalised,
- (Step 2) The systemization of electronic commerce in that field,
- (Step 3) The acceptance of electronic commerce as the norm for transactions,
- (Step 4) the transformation or evolution of the product as a result of the utilization of electronic commerce.

This view advocates for the total transformation in to an electronic transactions provided the legal tools are adequate to enable electronic modes.

Finally, Dr. Davidson¹⁴ opines that the legal constraints to the use of electronic documents have long been eliminated. He considers the existing legal architecture complete and sufficient enough to govern the international operation of e-commerce in general. The e-commerce legislation he mentioned includes; Uniform Customs and Practice for documentary credits in 2007 as revised (UCP), Supplementary for the electronic documentary credits (e-UCP), The United Nations Convention on Independent Guarantees and Standby Letters of Credit, UNCITRAL issued the Model Law on Electronic Commerce (Model Law), International Standby Practices (ISP98). According to him the problems in mercantile law and practice, (international trade law transactions) where the electronic documents are used, can be addressed also through due risk assessment by the commercial parties at all levels of a commercial transactions. Concerning recognition of electronic documents as admissible evidence in courts, he opines that all interested parties (the states) should adequately and satisfactorily integrate and merge customs and

¹³ Professor James E. Byrne (2015)The Four Stages in the Electrification of Letters of Credit (unpublished)

¹⁴Dr Alan Davidson; 2011 Electronic Records in Letters of Credit; UNCITRAL paper (unpublished)

practices associated with electronic commerce into applicable law and the courts should take particular recognition of the *lex mercatoria* and international practice to treat certain documents and transactions like cash and notably often exclude the application of certain usual legal principles.

Davidson's view is in no doubt correct and comprehensive, and alongside his views this research argues that the legal qualms raised above are addressable, either through national laws or on contractual basis.

1.7. Research methodology

This research will be desktop based due to time constraints. A qualitative method through a critical legal review of literature and a comparative analysis will be used. The study will depend primarily on secondary data where (books, articles, journals, statutes and draft laws will be explored).

1.8. Overview of chapters

Turning to the structure of the research briefly the current study shall be conducted as follows;

Chapter 1

The chapter discusses introductory issues such as the background to the study. It will articulate the research problem, and formulates the research questions. Other issues included will be the thesis statement, literature survey, significance of the study, research methodology and overview of chapters.

Chapter 2

In this chapter, the nature of letter of credit as a trade financing instrument and its evolution will be explored.

Chapter 3

Legal recognition of electronic letters of credit will be established here, through analysing the relevant international legal regimes governing their operation. The legal aspects of non-discrimination and functional equivalence principles as well as the applicability of the contracts requirements on electronic modes such as written, signature and consensus will be explored.

Chapter 4

This chapter will establish or prove the efficiency and reliability of electronic letters of credit as trade finance payment instrument from a legal perspective, as compared to other modes of payment, through analysis of their advantages and disadvantages, in cross border transactions.

Chapter 5

In this chapter the research will establish the completeness and sufficiency to the Botswanan legal regimes to regulate electronic communications, through a comparative analysis of the Botswana electronic commerce laws (not yet in force), the SADC model law on e-commerce and the UNCITRAL model law on ecommerce (MLEC) and electronic signature (MLEs).

Chapter 6

The chapter will conclude the research and recommendations will be made.

CHAPTER 2

THE GENESIS AND NATURE OF LETTERS OF CREDIT

2.1.OVERVIEW

As mentioned in the previous chapter, the letters of credit (L.C) also known as the Documentary letters of credit and the banker's commercial credits,¹⁵ constitutes a written undertaking or a promise by the bank (usually at the request of its customer or account party) to make payment of a specified amount to the beneficiary contingent upon compliance with the terms and conditions set out on the credit. The latter mainly implicates the presentation of (a) documents¹⁶ to evidence title ship of the goods shipped by the seller and (b) payment thereof.¹⁷ The English judges refer to the L.Cs as the "life blood of international commerce"¹⁸ due to their common use in international commercial trade.

2.2.HISTORICAL EVOLUTION OF LETTERS OF CREDIT

Though the proponents of this field have divergent views on the actual genesis of the letter of credit, the crux of the matter remains that, letters of credit (L.C) has an eminent and long antiquity, they go way back to the era of at least the 13th century Kings and the Queens commercial dealings.¹⁹ According to Davidson A, the first lawsuit involving a letter of credit was in 1763, an English case of *Pillans v Van Miero*.²⁰

The use of the commercial letters of credit proliferated with time as commercial trade and practices correspondently augmented; however they raised a lot of legal qualms as to their utilization in international commercial transactions. The main concern became lack of legal architecture principal to their usage or lack of guidance pertaining to their enforcement in

¹⁵ See note 1 above

¹⁶ *ibid*

¹⁷ See note 3 above

¹⁸ See note 4 above

¹⁹ See note 5 above

²⁰ *ibid*

assessment of damages in cases of mal-performance. The common law jurisdictions applied the relevant principles of law based predominantly on case law and the law of contract, while the civil jurisdictions relied on the codification such as the *code civil* and the *Bürgerliches Gesetzbuch* law.²¹ In the ultimate, this was still not a panacea to the legal concerns; it raised even more problems such as issues of conflict of laws where the parties were to deal with each other from different jurisdictions. The merchants²² with time therefore established the principles of *lex mercatoria*,²³ of which they heavily relied upon to govern the international commercial transactions. Nonetheless, the lacuna in the legal architecture was not entirely filled up the need for generic sources of law governing the usage of letters of credits in international trade transactions remained.

Such a need for harmonisation and unification and enablement of the letters of credit as an international trade finance payment instrument, propelled states such as the United States²⁴ and even independent international bodies such as the International Chamber of Commerce in Paris (ICC),²⁵ to take major initiatives of promulgating the relevant codified rules. Till date, the most accepted generic codification²⁶ worldwide is the Uniform Customs and Practice for documentary credits (UCP) by ICC.

²¹ Ellinger P& Neo D The law and practice of documentary letters of credit (2010) 22

²² See Bolero as an example

²³ The *lex mercatoria*, also known as the law merchant, comprises a body of international trading principles independent from the national laws, which have been used by merchants as from the Classical Greek times and Roman ages, to resolve international commercial disputes outside the courts. “It was built upon the notion of uniform international trading rules with an aim to enable international commerce, mainly to circumvent the issues of disputes between varying national laws. It was grounded on the general principles of good faith, reciprocity, non-discrimination between merchants from different states and negotiated dispute settlement. It also encompassed rules specific to the documentation pertaining to commercial transactions (letters of credit, bills of exchange and other negotiable instruments). See also David B. Goldman, *globalization and the western legal tradition: recurring patterns of law and authority*, Cambridge University press *International commercial law and governance* (2007) pg. 277

²⁴ See United States Uniform Commercial Code

²⁵ There is also the International Standby Practices (ISP98) by the Institute Of Banking Law And Practice, the United Nations Convention on Independent Guarantees and Standby Letters Of Credit (2000) on the use of letters of credit Article 5 and all others which fall outside the scope of this research.

²⁶ Dr. Davidson A opines that more than 173 countries in the world operate the letters of credit under the UCP. see Davidson A electronic records in letters of credit (page3)

On the contrary, despite the UCP codifications not having a binding effect on any party to the commercial transactions they have been accepted as a universal codification governing the use of letter of credit in international trade. The states adopt and incorporate them in to their own domestic legislation and while the contractual parties too, incorporate them in to their contractual arrangements. The use of UCP codifications has eased operationalization of letters of credit throughout the industrialised world of international commercial trade. The first initiative by the ICC for international standardisation was in 1929²⁷ which was revised in 1963²⁸ and these codes are revised from time to time to meet the international trade demands. The last revision was done in 2006 which is the 6th version (UCP code 600).²⁹ The next section discusses a few types of letters of credit mostly used in international trade.

2.3.LEGAL NATURE OF LETTER OF CREDIT

There are various forms of letters of credits; the distinctions could be made between revocable (which may be cancelled by the buyer) and irrevocable (may not be cancelled by the buyer) confirmed; (the second bank in addition to the buyer's bank, guarantees payment) and unconfirmed (payment guaranteed only by the issuing bank)³⁰. The most commonly used³¹ is the irrevocable letters of credit because of their (i) uncancellable feature by the buyer and (ii) the second bank (usually the seller's bank) adding guarantee of payment to that of the buyer's bank³². However, their common characteristic³³ remains thus: the buyer arranges to pay the seller the agreed purchase / contractual price, compliance with the conditions as stipulated on the credit (the underlying contract), and the duty of the seller to present specified documents upon payment by the bank. As described by Murray et al,³⁴ the essence of the letter of credit transaction lies on its documentary character; it is mainly the transmission of documentation that forms the integral part of financing a transaction through an L.C. A greater picture on the nature of letters of credit and operation in international commerce transactions will be shown in Chapter 4 of this study.

²⁷ See note 21 above page 23

²⁸ *ibid* (page 25)

²⁹ *Ibid*

³⁰ A detailed discussion on the types of letters of credit will be done in chapter 4

³¹ See note 4 above

³² *ibid*

³³ See note 3 (page 190)

³⁴ *ibid*

2.4.TYPES OF LETTERS OF CREDIT

2.4.1. Documentary credits

Where there has been an agreement (in a contract of sale) by the buyer and seller that the payment instrument, shall be letters of credit, the procedure ensues that, the buyer (the applicant for the letter of credit) instructs his bank (the issuing bank) to issue or open the letter of credit (on his behalf) for the benefit of the seller (the beneficiary), in accordance with the terms specified by the buyer on his instructions to the issuing bank³⁵. The issuing bank would arrange with another bank (the advising bank) within the vicinity of the exporter to negotiate, accept or pay the exporter (the beneficiary)'s draft upon delivery of specified documents. The advising bank will then confirm a letter of credit opened by the issuing bank by notifying the seller that it will negotiate, accept or pay the exporter upon delivery of documentation.

2.4.1.1.Documentation principal to the L.C

As explained above the beneficiary (the seller) only get reimbursed for the goods upon presentation of the documents stipulated in the letter of credit. Murray et al buttressed this view by stressing that;

*“The course of international commerce involves the practice of raising money on the documents so as to bridge the period between the shipment and the time of obtaining payment against documents”.*³⁶

The following constitutes some of the documents the seller might be ordered to present for the letter of credit to be paid off by the advising bank.

- *The Commercial invoice*

This document directly works in line with the contract of sale (between the buyer and the seller). It encloses essential information such as the date of issuance, invoice number and

³⁵ See note 1 above (pg193), See also note 21 above (page 65)

³⁶ See note 3 above

the contract number, the due price for the merchandise, the quantity and terms of delivery, payment, shipping details and other descriptions of the merchandise to be sent to the buyer.³⁷ The fundamental rule is that there should be no variation between the terms of the commercial invoice and the contract of sale.

- *Draft or Bill of Exchange*

All letters of credit require the beneficiary (the seller) to present a draft (also known as a bill of exchange) and other specified documents in order to receive payment.³⁸ A draft is simply explained as an unconditional written order by which the party creating it such as the buyer (the drawer), orders another party usually the bank (also known as the drawee), to pay a specific sum of money to a third party which is often the seller (referred to as the payee), on demand or at a fixed or determinable future date.³⁹ There are two types of this document named: the sight and the time drafts. The former is payable as soon as it is presented for payment while the latter is payable only upon maturity of a stipulated fixed time period or future period as stated on the draft.⁴⁰ The bank is allowed a reasonable time to review the documents before making payment and also obliged to accept the draft as soon as the documents comply with credit terms. This document unlike most of the documents to be discussed herein is a negotiable instrument hence transferable.

- *Transportation Documents*

These documents are determined by the mode of transport used to send the goods to the buyer.

- a) Water transportation /sea

- Bill of lading (BOL)⁴¹

As described by Murray,⁴² from a legal point of view, this constitutes a formal receipt by the ship owner, in acknowledgement of receipt of the goods on board the ship, of the stated kind, quantity

³⁷ See article 37 of UCP 500 as read with article 18 on the UCP 600 all the requirements for a commercial note are set out under the above Articles.

³⁸ See the **Credit Research Foundation website** <https://www.crfonline.org/orc/cro/cro-9-1.html> last accessed on the 15 January 2016

³⁹ See Hinkelman a short course in international payments (1999) page 36

⁴⁰ See note 24 above

⁴¹ See the requirements BOL as set out in article 20 of the UCP 600

and condition, to be shipped to a stated destination. It can also be explained as evidence of contract of carriage and further as a document of title to the goods enabling the consignee to dispose off the goods by endorsement and delivery of the BOL.

Hikelman too explained the BOL comprehensively as a document issued by a carrier to the shipper, signed by the captain, agent or owner of a vessel, as written evidence of receipt of the goods, with the specified conditions, and the engagement to deliver the goods (the contract of carriage) to the specified lawful holder of the bill of lading⁴³. In simple terms, the BOL functions as evidence of receipt of goods, contract to deliver them as freight and as a document of title of the goods. However, on its own, the BOL is not a negotiable instrument as is the letter of credit and the draft above. Only the original of BOL is used, if issued in multiple originals then the full set of originals will be used.⁴⁴

There are different recognised types of bill of lading of which some are negotiable and transferable while others are not.

(i) *Straight Bill of Lading*

This BOL designates that the goods shall be delivered to a named consignee only, they do not give title to the goods, not negotiable and also not transferable. They are often used where the payment for the goods have already been effected in advance. The consignee simply has to identify himself as the owner of the goods in order to claim them⁴⁵.

(ii) *Non-negotiable Sea way bills*

The non-negotiable sea way bill is similar to the straight bill of lading. It is also not negotiable and non-transferable; it is issued by the carrier at the point of shipping only to evidence consignment of goods. But seaway B/L is different from straight B/L on following grounds: it is used where shipment takes place even if shipment takes place between two different companies where negotiation between the parties is not mandatory.

(iii) *Marine or the Ocean Bills of lading*

⁴² See note 21 above (page 307)

⁴³ See Hinkelman E A short course on international payments (1999) p.116;

⁴⁴ *ibid*

⁴⁵ See Article 25 of the UCP500

In contra-distinction to the above, this BOL is negotiable, transferable and it is a document of title. In simple terms, it means that upon transfer of this BOL (usually by endorsement and delivery) to another person, the title of the goods also passes automatically to such new owner.⁴⁶ Document such as the delivery order or a mate's receipt are not considered to be ocean or the marine BOL as they are not negotiable.⁴⁷

(iv) *Charter party bill of lading*

This is in substance similar to the marine or ocean bills of lading, even as to the procedure, save for the fact that it is issued subject to the terms of the charter party as opposed to a named carrier or shipping line.⁴⁸

b) Multi Modal Transport Documents

These documents are issued where goods are shipped through one or more forms of transport such as rail and sea. An example is where the goods are transported from the seller's depot by road or rail to the load port and from then on by sea to the discharge port and thereafter by air or road to the buyer's warehouse.⁴⁹ These documents evidence receipt of goods and not shipment to the place of final destination and they are not negotiable.

c) Air Transport

Where the goods are transported by air a document named the Air way bill⁵⁰ is used. This document is issued in three originals, one for the issuing carrier, one for the buyer (consignee) and the last one for the seller (shipper). It is non-negotiable as most of the above documents, it indicates the acceptance of goods only (it evidences contract of carriage only) and not title ship of the goods. In addition to all this where payment is to be made through documentary credit, this document is not as important to the banks as is the bill of lading simply because it is not a document of title nor can it serve as security for the bill of lading.⁵¹

⁴⁶ See Article 23 of the UCP 500 Article 20 UCP 600

⁴⁷ See note 21 (pg 250)

⁴⁸ Ibid (pg. 256) see also article 25 of UCP 500 and article 22 of UCP 600

⁴⁹ See article 26 of the UCP 500 and Article 19 of the UCP 600

⁵⁰ See article 21 of the UCP 600

⁵¹ See note 1 above (page 325)

d) Road, Rail or Inland Water Way⁵²

These documents cover transport of cargo via the road or inland water way modes as the name suggests. The documents are presented in their original form as a full set unless the letters of credit stipulates otherwise.

e) Courier and Postal Receipts⁵³

These are less commonly used in the credit transactions. They evidence receipt of goods for delivery to the named consignee and unless the credit postulates a specific courier or expedited delivery service the banks will accept a receipt issued by any courier. The same applies to the post receipt.⁵⁴

f) Transport Documents Issued by Freight Forwarders

They are only acceptable if it appears on the face of the credit. They indicate the name of the freight forwarder as a carrier or multimodal transport⁵⁵ operator, and they should be signed or authenticated by the freight forwarder.

g) Electronic Bill of Lading⁵⁶

This mode evolved as a result of advancement in technology. This has been introduced to eliminate the issues of late delivery of original documents, to curb fraud (to reduce the rate circulation of fraudulent documents) and also to secure transfer of data.⁵⁷ However, there has been a lot of legal challenges as to their operation in international commerce the question being whether these constitutes bill of lading for purposes of legislation. A more detailed discussion of this will be conducted in chapter 4 of this study.

h) Consular Document⁵⁸

⁵²See note 4, See also Comite Maritime International (CMI) rules on sea way

⁵³ *ibid*

⁵⁴ See article 29(a)&(b) of UCP 500 and article 25 of UCP 600

⁵⁵ See as explained above for the multimodal transport, see article 30 of the UCP 500

⁵⁶ See the CMI rules on electronic Bills of lading

⁵⁷ See note 1 above

⁵⁸ See note 4 above

It is also an important document which certifies that the goods satisfy the relevant regulatory requirements of the importing country.

i) Insurance Documents

These serve as a guarantee that the goods have been insured by the seller.⁵⁹

j) An Inspection Certificate

This document gives assurance that the goods have been inspected and they have passed a quality inspection (as per the buyer's order) prior to shipping.

k) The Certificate Of Origin

It simply states the country of origin for tariff assessment purposes.

There are other documents such as the export licenses, and any other relevant document not discussed here which the buyer may order the seller to present to the advising bank along with the Draft for payment of the letter of credit.

2.4.2. Standby Letters of credit

This type of L.C is more of an insurance for non - performance of contractual obligations by the seller in a contract of sale agreement. It is issued at the request of the applicant normally the (seller) in favour of the beneficiary (the buyer) as reassurance against any possible non-performance on the contract by the seller. It is honoured where the beneficiary presents the bank with the draft or the bill of exchange, and a certificate certifying that the seller failed to fulfil his obligations as per sales contract. This credit serves the converse function of a documentary credit; while it guarantees non-performance the latter assures performance. It is payable upon presentation of documentary evidence proving that the obligations under the contract of sale

⁵⁹ See article 28 the UCP 600

have been duly performed. Another difference is that while the commercial letter of credit is a primary mode of payment the standby credit is secondary, it is used only if a default occurs.⁶⁰

2.4.3. Electronic Letters of credit

Same as traditional letters of credit above, this type also evolved as one of the developments to meet the international trade demands. The effects of technology advancements on trade practices whetted the appetite for superfluous trade and competitiveness in the trade industry. As a way to alleviate some of the international trade transactions payment difficulties, ⁶¹some wise merchants⁶² initiated the use of an electronic letters of credit, where all the documents are in a digital form, with increased transactions speed, greater efficiency at lower costs. However, relative to the discussions made on the preceding paragraph, as to initial legal discrepancies pursuant to the use of the letter of credit in international trade; this too demanded some legal architecture to govern their utilization. However, unlike the above, there were more legal stumbling blocks concerning this form. The primary legal constraint being, lack of legal recognition by the courts because of their nature (being data messages); lack of recognition in the laws of contracts (digital signatures, digital contracts), public perception, more especially most of the developing countries, who because of lack of technology, resources and skilled man power, lacked knowledge on the advantages of technology advancements.

This mode was initially perceived as having adverse impacts on the way business is conducted. It was said to be affecting the aspects of contract laws, criminal, procedural and evidence laws, the banking laws, electronic commerce, information technology and it raised a lot of questions on efficiencies of electronic communications. However, the rapid use of the electronic mode exerted a greater push for harmonisation of the relevant laws in order to allow room for electronic letters of credit usage in international commercial dealings.

⁶⁰ See Hinkelman E A short course on international payments (2002) pg. 87

⁶¹ The problems aligned to the use of letters of credit in international trade, the fact that it takes longer time, fraudulent signatures and documents manual authentication of documents, a lot of documents for presentation/a lot of paper work, exorbitant costs for drafting such paper based documents.

⁶² Bolero as an example this will be discussed in more detail in the chapter 4.

In 1996, the United Nations (UN) in furtherance of its mandate to promote the harmonization and unification of international trade law,⁶³ implemented the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures in 2001 and furthermore, the Convention on the Use of Electronic Communications in International Contracts in 2005.

The rationale behind the above initiatives by the UN was to obviate the non-legal recognition predicament of electronic documents in general, an example being the cases where the operational laws imposed or implied restrictions on the use of electronic means of communication, giving legal effect only to the “written,” “signed” and “original” documents in commercial transactions.

As a tool to unravel the above concerns the UN invoked the principle of functional equivalence which has been incorporated in to the above codifications⁶⁴ proposing that:

“Electronic communications should not be discriminated against or denied legal effect simply because they are in electronic form”.

As for the electronic letters of credit distinctively, the ICC established a supplement for the Uniform Customs and Practice for Documentary Credits (eUCP)⁶⁵ which deals implicitly with electronic transmission of documents. The principle of functional equivalence as articulated briefly above has also been espoused into the eUCP⁶⁶. A more detailed discussion on the legal architecture for the electronic letters of credit will be made in chapter 3.

⁶³ David A Development of laws on electronic documents and e-commerce transactions

⁶⁴ See article 5 Article 5 of the Model Law on Electronic Commerce, Article 5bis of the eUCP

⁶⁵ It is imperative to note that this codification does not replace the UCP but only supplements the latter. It is subordinate to the UCP. Where it has been incorporated in to the letters of credit however, there will be no need to incorporate the UCP because in terms of article e1 (b) and e2 (b) the eUCP incorporates the UCP in any facility that is subject to it. Conversely, articles e2 (b) prevails the provisions of the eUCP to an extent where the will be different results from the application the UCP. Ellinger P in note 30 emphasised that the eCUP refers exclusively to UCP 500 only ,not to any other revision before or succeeding it, see note 3 above pg 30

⁶⁶ See Article 5bis of the eCUP

2.5. FUNDAMENTAL PRINCIPLES OF LETTER OF CREDIT

There are many fundamental legal principles of letter of credit as a payment mechanism, however only two of them are relevant to this research, which will consequently be discussed below.

2.5.1. The Principle of Autonomy

This principle denotes that the four contractual arrangements between the parties involved in an international commercial transaction, which are: the underlying contract of sale between the buyer and the seller, the application agreement between the buyer and the issuing bank, the agreement between the issuing bank and the advising bank, and lastly, the actual letter of credit contract, are separate and independent from each other with no privity between the parties⁶⁷. The letter of credit contract obliges the issuing bank to honour the L.C in favour of the seller (beneficiary), upon presentation of the accurate documents. In simple terms, the bank which operates the credit normally the issuing bank, should only be concerned of whether the documents tendered by the beneficiary are correct, and corresponds to the given instructions, whether the goods shipped complies to the terms of contract of sale agreement, is beyond the Bank's jurisdiction. The advising bank is liable only to the issuing bank and the seller (exporter); the buyer does not have any privity⁶⁸ against the advising bank under the letter of credit contract. Should there be any wrongful honour of the L.C, the buyer/ applicant has recourse only on the issuing bank based on breach of contract (the application agreement). The issuing bank will then institute a legal action against the advising bank under the letter of credit. There is only one exception to this rule, being the fraud exception, under which the bank can refuse to pay the beneficiary if it has been proved to its satisfaction that the documents are fraudulent and that the beneficiary was part of that fraud.

⁶⁷See Sakar R Transnational business law (2003) pag32

⁶⁸ Ibid

2.5.2. The doctrine of Strict Compliance

This legal principle obliges the banks involved in the transactions to ensure that the submitted documents strictly comply with terms and conditions of the L.C. This has been expressed by Lord Sumner thus;

*“There is no room for documents which are almost the same or which will do just as well”*⁶⁹.

However according to Sakar⁷⁰ there are 2 exceptions to this rule namely: the doctrine of substantial compliance and the doctrine of qualified compliance. These doctrines seem to have evolved from the English case law though not codified, which makes the weight of their universal acceptance less in international commercial practice. The former prescribes that, if an attempt of good faith was made to perform the terms of a contract, even if such attempt does not explicitly meet the terms of such agreement or any related statutory requirements, the performance shall be deemed complete if the essential purpose has been achieved.⁷¹ The latter equally states that, slight deviances are immaterial hence permissible in honouring the draft.⁷² Both these doctrines grant the banks discretion to reject or accept the documents which do not strictly conform to the terms of the credit. However, the doctrines above are not outright; they are subject to claims for contractual damages should there be any deficiency. These exceptions also raised a lot of legal of debates as they are inconsistent with the strict compliance rule. Some writers such as Tier J views that; the courts in upholding the above doctrines destabilize the value and certainty fundamental to the L.C. They are discounting the original financing purpose and function of the LC.⁷³ Sakar⁷⁴ in support of the arguments above concludes in short that; the above doctrines indeed contravenes the strict compliance rule, because the law of letters of credit prescribes that all the discrepancies in the L.C should only be cured after or upon its expiry.

2.6.CONCLUSION

Due to the esoteric nature of international commercial dealings, the factors such as distance, different state laws, unknown counterparty, the use of Letters of Credit have become more

⁶⁹ See equitable trust co of new York v Dawson partners ltd (1927) 27 L.I.R at 49,52

⁷⁰ See note 46 above

⁷¹ See First Nat'l Bank v Wynne 256 S E 2d 383 GA APP 1979

⁷² See note 50 above

⁷³ See also Tier J Letters of Credit : A Solution to the Problem of Documentary Compliance (1982)4 Fordham Law Review 855

⁷⁴ See note 51 above

functional and the most advantageous mode of payment as compared to other forms of payments. They secure their position through their features: (i) the documents as a form collateral security in terms of non-performance and also as (ii) a payment instrument. A lot of the legal stumbling blocks have also been eliminated through different codifications covering from paper based form to digital or electronic modes. This evidences a way forward on international trade. A detailed discussion on the laws underpinning the operation of letters of credit on international commerce will be made in the next chapter.

CHAPTER 3

LEGAL RECOGNITION AND ACCEPTANCE OF AN ELECTRONIC LETTER OF CREDIT

3.1. AN OVERVIEW

As explained in the previous chapter, technology has witnessed an extravagant growth in the current times and the need for even more advanced, effective, efficient and less costly modes of payment in international commercial trade correspondently has increased. Good initiatives⁷⁵ have been taken by the international trading community being the merchants, the independent international organisations (United Nations and the International Chamber of Commerce) as well as the States, resulting in model laws and rules, conventions and domestic legislation providing for the uniform regulation of international trade and electronic international payments mechanisms. The discussion on these initiatives will form an integral focus of this chapter.

Making the electronic international commercial transactions work for the benefit of us all, be it from individual economies, regional and even continental levels is very crucial. We ought to appreciate the enviable and astounding revolution that electronic international trade has brought to the developed countries in the Asian pacific, European Union and the United States.⁷⁶ The same could be achieved in our continent Africa as a whole and even in our local individual economies. In all, no community wants to remain a beggar, even the African communities. Despite having small economies, some have taken initiatives to enable the use of electronic payment mechanisms in their commercial trade transactions.

The use of electronic communications on trade was initially seen by the governments globally as a threat to their standardised systems of enforcing legal requirements of contracts and evidentiary records for litigation purposes. Whereby, with regard to the traditional paper based modes, they were considered valid and enforceable because of their nature; as manually written documents, manual signatures and being able to be physically presented as evidence. Truly, all the above could not be said about the electronic modes of payments however, this does not make them

⁷⁵ See Chapter 2 of this study

⁷⁶ Dr Soumien K Aid for eTrade: Accelerating the Global e-Commerce Revolution CSIS Europe Program November 2014

significantly deviant from the paper based form save for their electronic intangible nature. This view was supported by the United Nations Commission on International Trade Law (UNCITRAL) working group in their international payments report that; all the raised concerns about electronic communications are not absolute. However their findings became that: the most serious problem emanates from the requirements that the documents must be signed and must be in a paper form.⁷⁷As such, they came up with ways to deal with such matters in order to encourage development in the e-trade sphere.

The UNCITRAL from the outset recommended that the governments:⁷⁸

- (a) review their domestic laws inhibiting the use of computer records as evidence in litigation; that the unnecessary hindrances to their admission be eliminated in order to align such rules with developments in technology in order to provide apposite means for the courts to assess the credibility of data stored in such records;
- (b) review the legal requirements that trade documents, and other trade transactions be in *writing*; that they make provisions recognising the validity and the enforceability of the transactions conducted electronically and the electronic records;
- (c) review legal requirements of a *handwritten signature* or other paper-based method of authentication of trade documents making a room for the use of documents in an electronic form, thus empowering legal recognition and use of the electronic signatures, and their authentication; and
- (d) Review legal requirement that documents for submission to governments be in writing and manually signed, in order to allow the documents to be able to be presented in an electronic, computerised format.

However, despite such good ingenuity on the part of the UNICITRAL Working Group, not every government agreed to this, simply because not every country to date has electronic commerce

⁷⁷ See the UNCITRAL Report of the Working Group on International Payments on the work of its Twenty-Fourth Session, A/CN.9/360 (17 February 1992), see also UNCITRAL, *Report by the Secretariat, Legal Value of Computer Records*, A/CN.9/265 (1985).

See Gliniecki J & Ogada C Legal Acceptance of Electronic Documents, Writings, Signatures, and Notices in International Transportation Conventions: A Challenge in the Age of Global Electronic Commerce, note 9

⁷⁸ *ibid*

legislation⁷⁹ in their legislative collection. The operational electronic commerce legislation is only predominant in Europe, China, America⁸⁰ and other large economies who see a great potential in the use of electronic trade and payments, but the same cannot be said about Africa.

International trade from its own operation should be likened the wheels of a motor car, where there is some kind of reliance or dependent relationship on each other, of which if one wheel punctures, the motor car might overturn if not controlled well, and the car would not be able to proceed to the destination. So just as in the international trade community, each country relies on the other for something. If there is no concurrence within the community, where some countries are not willing to participate in the good initiatives that aim at facilitating economic development such as electronic commerce, it distorts progression of the whole system. This is one of the reasons why Africa remains the least developed continent because their contribution to international trade is very low.

3.2.UNITED NATIONS AND OTHER TRADING ORGANISATIONS INITIATIVES ON FACILITATING INTERNATIONAL ELECTRONIC TRADE

3.2.1. THE UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE

Of all the initiatives taken by the United Nations Working Group on International Trade (UNCITRAL), in relation to the enablement of electronic contracts and trade, only the 1996 model on e-commerce shows an advanced and comprehensive effort to alleviate most if not all of the legal constraints (written, signed or original documents) on the use of electronic documents hence promoting development of electronic trade.

The Scope of Application

The model law applies to any kind of data message used in the context of commercial activities and explains Data message as including; *any electronic data interchange, electronic mail, fax*

⁷⁹ See United nations conference on trade and development INFORMATION ECONOMY REPORT 2015 OVERVIEW EMBARGO Unlocking the Potential of E-commerce for Developing Countries

⁸⁰ See note 76 above

*and telex and any other information generated, sent, received or stored by electronic , optical or similar means.*⁸¹

Electronic data interchange (EDI) is defined as: *the electronic transfer from computer to computer of information using an agreed standard to structure the information.*

An explanation which could be given to the definitions above from their textual language is that they are broadly explicated. They have been broadly applied in order to provide a room for an immeasurable number of comparable transactions of electronic nature in order to provide legal neutrality among them on a functional and purposive basis in the future.⁸² Nonetheless, in terms of the scope of application, the guide on this model law⁸³ stresses that the provisions of this model do not intend to override any customer protection laws, and does not apply to all commercial transactions. Further, it embodies the principle of party autonomy⁸⁴ concerning the matters between the contracting parties. This Model Law purports to provide a guideline to the national legislators as to how the legal hindrances to the development of electronic commercial trading may be eliminated, and how to create a more secure legal environment for electronic commercial transactions.⁸⁵

The bed rock of this Model Law is *Article 5*, which states that:

"Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message."

This Article purposes to grant legal functional equivalence to the electronic documents as that given to the paper based form. It simply fortifies the point that, it should not be about the form but about the purpose and the function of a document. According to a guide to the enactment of the model law on e-commerce, this article/principle is based on the analysis of the purpose and the functions of the traditional paper based with an aim to ascertain how such purposes and functions could be achieved through the use of electronic commerce techniques. The functions and purpose constitute of the following;

⁸¹ See Article 2(a) of UNCITRAL model law on e-commerce

⁸² Goode R et al Transnational commercial law commercial instruments and community second edition (2012) pg 104

⁸³ *ibid*

⁸⁴ See article 4 of the model law on ecommerce

⁸⁵ See a guide on the model law on e-commerce

- Legibility; that the documents should be legible to all
- Inalterability; that the document is able to remain unalterable over time
- Reproduction of the documents; for the parties to be able to have documents of the same data
- Authentication; that the document could be authenticated by means of a signature
- They provide that a document will be in a form acceptable to public authorities and courts.

These model laws evidence the UNCITRAL's acknowledgement that the electronic documents/communication despite their nature, are proficient to achieve the same level of security entrusted in the use of paper based document and even a higher level of security than it is with the paper based more especially the aspects of identifying the source of documents and their content.⁸⁶

Legibility

Looking at its textual meaning it means the capability to be read by human eye or the ability to be clear enough to be read by human eye. This could be achieved in a lot better way with an electronic communication than through hand writing. The fact that no pen would be used, there will be no cancellations, electronic typed documents are more legible.

Inalterability

This requirement aligns more with the risk of fraud raised against the use of electronic documents. There is a perception that electronic documents can be very easy to manipulate, copied and even altered, updated or deleted with ease, but contrastingly the same could be said about the paper based. This renders this argument baseless. The international commercial community ought to look at this from a brighter perspective, just as acknowledged by Zhang.⁸⁷ First of all, fraud is like corruption; it will always be there, whether paper based or electronic, the community ought to look at what they aim to achieve which is trade facilitation and what

⁸⁶ See the guide on the model law of e-commerce above

⁸⁷ Yanan Zhang (2010) *Approaches to Resolving the international documentary letters of credit fraud issue* University of Eastern Finland (unpublished)

electronic modes provide for them. In other words it is an issue of balancing the interests in terms of advantages and disadvantages.

Authentication

This term simply means verifying that a party to the transaction is who he is professed to be. An electronic authentication of documents will in no doubt do a better job than when it was conducted physically by a human being. Even a slightest mistake or difference on signatures will be rejected by the system; this would work more efficiently than the paper based documents where a person assesses the documents based on their individual judgment. This will even reduce the fraud concerns raised on the international trade documents and the traders will promote carefulness in drafting documents and also encourage an intensive due diligence on any document to be used on international trade.

Reproduction

It is incontestable that the electronic mode could fulfil this function in a more secure way than a paper based mode. The paper based original documents are susceptible to tearing, or even getting lost, this is why in the modern days the paper based documents are scanned for better storage in an electronic form. Furthermore, the modern day technology printers and photocopiers make digital copies which are highly identical to the originals.

Be able to be presented in an acceptable form to the public authorities and court.

This requirement evolves from the principle named the best evident rule, used in both common law and civil law jurisdiction. According to this rule, the documents should be written, physically signed, in paper format, and on their original form, where they were able to be physically presented to the court as evidence. The copies were rejected as they were regarded as hearsay. This is why the electronic data messages were regarded as not fulfilling this requirement, for there is no way they could be produced in a physical form but other than being printed as a copy. This article (5) serves to do away with this stigma.

The principle of functional equivalence has been extended from 6 to 9 which will be discussed successively. Article 6 strives to eliminate the written requirement barrier on electronic

documents. It stipulates a standard to be met by electronic documents to be said that it complies with the legal requirement of being in writing, providing that;

“A legal requirement to present information in writing will be met by an electronic document if information contained in the document is “accessible so as to be usable for subsequent reference.”

In the main, it is the matter of whether the document is capable of being reproduced for future references as explained above under reproduction.

In Article 7 the UNCITRAL working group, acknowledged that, a digital signature can satisfy the same functions as those served by a manual signature in the paper based documents. It only stipulates that the method used to serve as a signature should be reliable and be able to (a) identify the signatory and (b) to indicate that the contents of such document have been approved by such signatory, in short “authentication” further, such method used must be reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.⁸⁸

An explicit definition for an electronic signature was not provided in the model law other than the above functions only. This albeit sounding like a flexible approach, does not entirely solve the predictability/ uncertainty concerns about electronic signatures. This concept is too vague and leaves unaddressed concerns of legal predictability of electronic signatures. However, to complement the application of this article, the UNCITRAL adopted a model law on electronic signatures, which will be discussed below.

Article 8 of the Model Law on Electronic Commerce addresses the legal qualm of retaining documents in their original document form. This requirement is fulfilled in terms of this article if:

- (a) there is a reliable assurance as to the integrity of the information from the time when it was first generated in its final form as an electronic document and

⁸⁸ See Article 7(a)&(b)

- (b) The information is capable of being displayed to the person to whom it is to be presented.

The criteria of establishing the reliability of such a document is to whether such information could remain whole and unaltered except in the normal cases where the changes will be accompanied by endorsements. This constitutes one of the exceptions to the *best evidence* rule explained above.

Article 9 of the Model Law on Electronic Commerce in addressing the non-recognition of electronic documents as evidence in courts provides that: the electronic documents shall not be denied legal admissibility in any legal proceedings on the sole ground that they are data messages or on the sole ground of best evidence rule that the person adducing it could be reasonably expected to obtain, on the grounds that it is not original form.⁸⁹

(2) Information in the form of a data message shall be given due evidential weight, depending on the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other.

This article overrides the applicable evidence rules that have an effect of denying admissibility to data messages where it is the best evidence reasonable available where there is no paper based document.

Article 10 addresses the legal requirement that certain documents be retained for a period of time or for specified purposes. This article sets out that this requirement will be fulfilled if:

- (a) the information contained therein is accessible so as to be usable for subsequent reference;
- (b) the data message is retained in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and

⁸⁹See Article 9 of the UNCITRAL model law on electronic commerce

- (c) Such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time when it was sent or received.

Another emphasis on the purpose of the Model Law on Electronic Commerce worth brushing through is Chapter 3, which seeks to instil certainty and legal recognition of the contracts that are concluded electronically. The model law discusses the formation of contracts, the form in which the offer and acceptance could be expressed, the time and place of dispatch and receipt of electronic documents. However the model law does not propose to change the law dealing with the formation of contracts. It is not the intention of the writer to go deeper in to the interpretation of this model law.

3.2.2. UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES

The UNCITRAL working team on trade in recognition of the incompleteness of Article 7 of the model law in e-commerce (the signature requirement), and the fact that electronic signature is one of the primary hindrance to the development of electronic commercial trade, In 2001 they promulgated the model law on electronic signatures. This model aims (a) to promote / encourage reliability and trust on the use of electronic signatures, (b) demonstrate the sufficiency of electronic signatures in fulfilling the functions of a hand written signature, (c) to inculcate the recognition of electronic signatures on the international commercial trade community, as legally binding and enforceable as the paper based. This model law as well as its predecessor above they are just model laws and not conventions, not legally binding, they were enacted too serve only as a guide which the countries use to promulgating their e-commerce legislation.

This model law unlike the discussion on Article 7 above defines an electronic signature as; *data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message.*⁹⁰

The principle of functional equivalence has also been reiterated on article 3 of this model, while Article 6 and 7 provides safe harbour criteria⁹¹ for using electronic signatures which are considered sufficient and reliable to gratify the functions of a signature. This Model Law

⁹⁰ See article 7 of the model law on electronic signatures

⁹¹ See note 82 above Page 108

espouses an approach under which the legal effectiveness of a given electronic signature technique may be determined or assessed prior to being operationalized⁹² “the reliability criteria”⁹³ as Professor Goodie had termed it.

The model law on electronic signatures further outlaws any discrimination against foreign electronic signatures and certificates providing that they should be granted legal effect as those that are local origin. According to literature these models laws have gained a wide acceptance globally and a lot of countries have adopted them in to their domestic laws.⁹⁴

3.3.THE UN CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL TRADE 2005

Above the two model laws *supra* the ICC further enacted a convention on the use of electronic communications in international trade in 2005 which came in to force on March 2013.⁹⁵ The convention is designed to strengthen the legal certainty of the rules relating to electronic commerce, as well as to update and complement certain provisions of the model laws above aligning them with the recent practice and satisfying the needs of international trade practice. This convention too seeks to remove legal uncertainty as to the validity of the use of electronic communications in international trade by setting forth the three fundamental principles of electronic commerce, which encompass non-discrimination, technological interoperability and functional equivalence. However this convention explicitly does not apply to any Contracts concluded for personal, family or household purposes including; *(i) Transactions on a regulated exchange (ii) foreign exchange transactions (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments (iv) the transfer of security rights in sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary (v) bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the*

⁹² See guide on the model law on electronic signatures Para 4

⁹³ See note 90 *supra* see also article 6(3) and article 7 of the model law on electronic signatures

⁹⁴ Davies A development of laws on electronic documents 2008 pg 5 (unpublished)

⁹⁵ See the ICC website last accessed 22 February 2016

*delivery of goods or the payment of a sum of money.*⁹⁶ For this reason it falls outside the scope of this thesis.

3.4.SUPPLEMENT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (e UCP) 2007

Taking a look at the chronological evolution of all these model laws and rules enabling electronic trading, one would agree with the researcher that this was one of the difficult areas of international trade on which the UNCITRAL group on trade had to work on. The above models (both the UNCITRAL model laws on ecommerce and the UNCITRAL model law on electronic signatures), laid a solid foundation for the use of electronic mode of payments in international trade such as the letters of credit. By the time the first supplement (eUCP) version 1.0 was enacted in 2002, the electronic signatures and electronic documents in their generality, had already gained legal recognition and certainty in the international trade sphere. The uniqueness of letters of credit as the most used and trusted payment mode in international trade demanded a special attention. The proliferation of technological developments, as well as the need to keep abreast of such technological developments on the other hand, they triggered such special attention. The UCP was long in operation however it only regulated the use of paper based letter of credit.

The scope of application

The International Chamber of Commerce commission (ICC) worked on the eUCP since 2000 and only in April 2002 they came up with a supplement to the UCP 500 version 1.0, which was later replaced by the eUCP version 1.1, a supplement to the UCP600 in 2007. This is only a supplement as the name suggests and it incorporates the UCP in any facility subject it,⁹⁷ it applies to all the electronic presentations and or part electronic records⁹⁸ for the reason that the drafters took recognition that the transition to the electronic documents will not be a sudden move but will occur in stages. The eUCP does not in any way intend to replace or to amend the UCP but only to act as a supplement, it only take precedence where the electronic letters of credit

⁹⁶ See the UN convention the use of electronic communications in international trade

⁹⁷ See article e1(b) and e2(a)

⁹⁸ Where some documents are electronic and some are in paper form. But where the documents are all in paper form the UCP shall apply

and electronic records/documents are used and to the extent that they will produce a result that is different from the application of the UCP. The eUCP does not deal with the electronic issuance or advice of letters of credits, as they had already been permitted on the UCP 600 article 11.⁹⁹ Nonetheless, it does not apply automatically to the credit but by expressed intent.

The eUCP refers to the 'electronic records' defining them in article e 3(b) *as the creation, generation, dispatch, communication, receipt, or storage of data by electronic means.*¹⁰⁰ Primarily, the supplement aims to enable the presentment of international commercial trade documents in an electronic form by upholding the functional equivalence principle, promoting trust and the integrity of electronic documents, promoting their legal recognition and validity. It also emphasised the validity and enforceability of electronic signatures, describing them *as data process attached to, or logically associated with an electronic record and executed to identify the person executing it to signify his authentication of the electronic record.*

Legal debates on the e-UCP

Many writers¹⁰¹ view this supplement as inadequate and vague with respect to the language used in the text. An example is article e4 which does not stipulate the exact format on which the electronic records may be presented, but rather gives the parties such a wide discretion to present any format. Another issue of primary concern vis-à-vis the eUCP is being a supplement to the UCP not an independent work. Furthermore, the fact that it does not have any provision dealing with fraud despite being perceived to be susceptible to fraud due to the nature of electronic transactions. The researchers¹⁰² view these as not helping the perceived legal uncertainty of electronic letter of credit, and they question whether the eUCP will survive in the e-commerce¹⁰³ world. Despite all the arguments raised, there had not been any revision on the eUCP while, a revision on the UCP has been made in 2006 which is for the paper based model only.

⁹⁹ See article 11 of the UCP 600

¹⁰⁰ See article e3 of the eUCP

¹⁰¹ Kelly-Low M selective legal aspects of bank demand guarantees 2008 University of South Africa Unpublished

¹⁰² Ibid

¹⁰³ Dr A Davidson electronic records in letters of credit pg 8

The above makes good arguments of which everybody is looking unto the ICC to provide answers thereto. Against this backdrop, Allison D contrastingly posits that, the main constraints to the success of electronic letters of credit is having to prove the validity of electronic documents on one hand and being frequently rejected by the courts on the other. However, he accepted that the ICC had done a great job on the model laws as he stated that the;

*“The 2007 revision of the UCP and the eUCP meet the practical and legitimate concerns of commercial parties, the UCP as a fluid and functional commercial document must be reviewed regularly by the ICC with great consideration of the needs of commercial parties and trade community for the commercial good”.*¹⁰⁴

The current research therefore agrees to the views raised by Davidson above, the e-commerce laws, rules, conventions as well as the states domestic legislation are certainly comprehensive enough to sufficiently govern the use of electronic letters of credit in cross border trade. The truth of the matter is that, the work is done; all that is left is for the trading community to make it work. Most of the arguments raised are based only on the individual perceptions of communities who are not ready to move forward, the distrust that the trade community do not want to let go against the modern technology and the fear of risk taking. Technology advances every day and putting a push on trade community, to keep up with it. Electronic trade also works for those that wish to make it work. Theoretically, rules or no rules serious traders who are ready to move on, they even end up resorting to private regulation through and the use of contracts between themselves and their trading partners abroad, in other words, technology usage cannot be stopped by lack of legal regimes.

The initiatives above had brought too much hope to the electronic trade domain in terms of certainty and predictability, even though there are some loopholes pointed out by research. It has to be acknowledged that the chief bottlenecks of electronic trade have been ameliorated. The fact that the use of paper based letters of credit has diminished in the international trade transactions, it means that the community slowly but showily is approving the electronic trading. There is however an ample need to fasten the legal regimes regulating e-trade

¹⁰⁴ Ibid see the summary (pg 14)

payments modes, as all the above are not legally binding and only applicable to the parties who wish to be bound by them. This will help in winning consumers trust on online trading with assurances that their interests will be protected.

While we are all waiting for the future work on this field from the UNCITRAL and the ICC more especially a development which will address the raised concerns arising out of the unfilled gaps. It is unfortunate that we cannot stop trade or the pressure that technology is putting on international trade. At least many countries are reacting positively to this by enacting e-commerce laws to provide statutory assurances seeking to secure confidence on the electronic modes. Below is a discussion on how the ICC further provided for the electronic version of the L.C under the international standby practices.

3.5.INTERNATIONAL STANDBY PRACTICES ISP98

The ISP98 and the e-UCP above are the two developments that evolved through the ICC as a way to facilitate trade. The latter came in to force in 1998, as 590¹⁰⁵ publication of the ICC. These rules were developed in collaboration with the Institute of International Banking Law and Practice, with the primary objective of providing a generally accepted practice, custom, and usage of standby letters of credit.¹⁰⁶

The ISP98 provides distinct rules for standby letters of credit in the same sense that the UCP do for commercial letters of credit. However this does not mean that the UCP¹⁰⁷ entirely excluded the standby letters of credit, the standby letters of credit can also be subjected to the UCP, nonetheless it has been found that the UCP provisions were not sufficiently adequate or rather they were inappropriate for the standby letters of credit¹⁰⁸ such as the provisions for extensions, transfers on demand and requests for undertakings. This is what triggered development of independent rules for standby letters of credit as they are the most used in international trade.

¹⁰⁵ See Professor Byrne JE ISP 98 International Standby Practices introduction ICC Publication 590

¹⁰⁶ Ibid

¹⁰⁷ See article 1 of the UCP

¹⁰⁸ See note 103 above.

On drafting of these rules, the ICC anticipated development of Society for Worldwide Interbank Financial Telecommunications (SWIFT)¹⁰⁹ messages for the ISP. Hence, good provisions that authorises presentation of electronic records were included in the ISP98. The ISP98 encourages to a great extent the use electronic records, signatures, and authentication in international commerce. The provisions of ISP98 compared to the UCP are unequivocal and more conducive for electronic presentations. As a result, the ISP98 has also been enacted to guide the lawyers and judges in the interpretation of standby practice.¹¹⁰

The ISP98 explains an “electronic Record” as an *information that is either stored in a tangible medium or an electronic or other medium, capable of being retrieved in a form that is perceivable; which could be transmitted by electronic means to another system for receiving, storing, re-transmitting, or otherwise processing*. The record should further be capable of being authenticated and then examined for compliance with the terms and conditions of the standby credit.

“Authenticate” has been explained as to *verify an electronic record by identifying the sender or the source as well as the integrity of information content*, while Electronic signature has been explained expansively as a *letters, characters, numbers, or other symbols in electronic form, attached to or logically associated with an electronic record that are executed or adopted by a party with an intention to authenticate an electronic record*. These rules are considered to be the solution to a lot of the problems that the UCP and its supplement failed to address therefore; they are generally accepted and operative.

¹⁰⁹ SWIFT is a Belgian cooperative society providing a special network that enables financial institutions globally to send and receive information securely and reliably in a standardised form. They use the soft wares called the SWIFT codes that they sell to the financial institutions which aid such transmission of electronic data. SWIFT is widely operative with more than 9000 users in 209 countries. See also the SWIFT Website at www.swift.com

¹¹⁰ See note 108 above

3.6.THE UNIFORM RULES FOR DEMAND GUARANTEES URDG 758

The URDG 758 which deals with the demand guarantees and bonds¹¹¹ also enables the use of electronic records presentations. The rules defined documents in article 2 of the 2010 revision as “signed or unsigned record of information in paper or electronic form that is capable of being reproduced in tangible form by the person to whom it is presented”. The provisions discussed above under the ISP98 are also applicable to URDG 758. This is the most recent development of the ICC, which makes them even more in line with the current international commercial practices and technology developments.

3.7.BILL OF LADING ELECTRONIC REGISTRATION ORGANIZATION (BOLERO)

Bolero was established by the Through Transport Mutual Insurance Association (TT club) in conjunction with SWIFT.¹¹² These organisations found the need to support the initiatives of the ICC and the UNCITRAL, through establishing ways in which the voids on electronic trade could be addressed. Bolero came up with an electronic bill of lading which is authenticated by a digital signature, regulated by the codified rules in the Bolero rule book. Although it is unclear whether the Bolero complies with the requisites of the Hague and Hague Visby Rules, the users make these rules effective through contractual arrangements guided by the Bolero Rule Book. Bolero’s techniques have gained recognition as have proven effective to the commercial community. However, the rules are also only binding on the members of Bolero association.

3.8.CONCLUSION

In overview, the ICC, UNCITRAL and other trading organisations aim to achieve an equivalent treatment for electronic and paper based documents, with more hope to promote confidence and trust on electronic transactions. Although adoption of these initiatives by countries in to their domestic legislation is a bit slow, in practice the commercial transactions are largely digital. This could be said to be an advantage to the trading community as the problems of too much paperwork, delays, inefficiencies and fraud are done with. The time for payment transactions have also been shortened at low costs while trade flow is increased in the process. In the next

¹¹¹ See note 105 above

¹¹²See note 109 above

chapter, a discussion on the efficiency of electronic letters of credit on international trade finance transactions will be made.

CHAPTER 4

4.0.HOW EFFICIENT IS AN ELECTRONIC LETTER OF CREDIT

4.1.INTRODUCTION

Despite the raised legal concerns on the use of electronic letters of credit as highlighted in the previous chapter, the letters of credit in the banking sector are no longer paper based but digital. This has alleviated the workloads associated with the paper based transactions, delays, inefficiencies and fraud issues. The time for payment transactions has also been shortened at lower costs, resulting in increased trade flows. In this chapter, the efficiency of electronic letters of credit as compared to other payment mechanisms of international trade finance will be made.

4.2.INTERNATIONAL TRADE FINANCE

There is no conclusive definition for trade finance. However, there are various definitions in practice of what trade finance is perceived to be. Some describe trade finance as a ‘science’ of funds management, while others refer to it as ‘an imprecise term covering a different activities’ in an international trade transactions.¹¹³ In short, trade finance may be explained as providing funds to enable selling and buying of goods; which may either be local or international, encompassing “...*pre shipment, post shipment, factoring, forfaiting and structured trade finance*,¹¹⁴” *issuing of letters of credit and confirmation, guarantees, export credit and insurance.....*,¹¹⁵ which, unfortunately, will not form part of the discussion in this study. This study will only focus on the payment mechanisms of international trade finance.

The different payment mechanisms usually used in international trade finance include cash in advance, open account, consignment purchase, down payment, documentary collections and the letter of credit of which will be discussed below.

4.2.1. Cash in Advance

This is the most desirable mode of payment for the seller and conversely the least desirable for the buyer in an international trade deal. As the name suggest, its simple explanation is nothing other than to say, payment for the goods before shipment. This mode is mostly used where: (i)

¹¹³ See Euro money institutional investor PLC <https://trade.financeanalytics.com/what-is-trade-finance> last accessed 11 February 2016

¹¹⁴ See K Aswathappa International Business (2010) page 588

¹¹⁵ See investopedia <http://www.investopedia.com/terms/t/tradefinance.asp> last accessed 11 February 2016

*the buyer's demands are higher than the budget of the seller, (ii) where the buyer is not well established, (iii) where the importer's credit status is questionable, (iv) and lastly, where the country political and economic risks are very high.*¹¹⁶ It secures the seller from payment and insolvency risks.

Cash in advance does not worry the seller about the possibilities of the buyer going bankrupt or refusing to pay for the goods after shipment. However, for the buyer, it is the riskiest mode of payment as it places him in a high position of non-performance and insolvency risks¹¹⁷ with little recourse against the seller in a foreign land. Mostly the traders use payments like the electronic funds transfer (EFT) or credit/debit card for this mode, which are very risky for international trade transactions as they generally do not have much legal recourse for the buyer. The buyer ends up having to rely solely on the underlying contract of sale and the receipts for proof of payment. Practically speaking, these receipts do not carry much evidential weight sufficient to establish a concrete case against an unknown party (seller) abroad, and enforcing a claim as this is never easy nor cheap and it takes a very long time. Nonetheless, this method is cheaper and quicker as compared to others as there is no need to engage the bank as an intermediary; the parties directly deal with each other.

4.2.2. Open Account

Antithetical to the cash in advance above, with the open account, the buyer is allowed to pay for the goods at a future determined date in to a designated account¹¹⁸ after shipment. In effect, the seller ships the goods as per terms of the agreement of sale, then send the receipt to the buyer for payment which is normally effected any time in the future, contingent on the agreement between the parties or even after the sale of the goods so purchased.¹¹⁹ In paying for the goods the buyer does not have to issue any negotiable instrument, electronic cash may be used such as credit card or Electronic Funds Transfer. This makes this mode less costly for the buyer as there are fewer

¹¹⁶ See Laryea ET Paperless Trade Opportunities Challenges And Solutions (2002) pg 114

¹¹⁷ See U.S. Department of Commerce International Trade Administration Trade Finance Guide 2008 pg 5

¹¹⁸ *ibid*

¹¹⁹ See note 114 above (pg 591)

constraints.¹²⁰ This mode is commonly used where the parties or companies are: of good repute, trust worthy, have a buoyant credit history, and have a long time commercial relationship.¹²¹

The aberrations of the open credit, however, just as the cash in advance above, emanates from the unsecured nature of the transactions involved, it is more of an international trade credit transaction. Basically, the buyer takes the goods on credit with an agreement to pay at a later date. It is no doubt that this mode might gain support from the economical perspective as it has the potential to augment export competitiveness for the seller,¹²² but, legally it is one of the distressing international trade payment mechanisms for the seller as it leaves him with little or no recourse in the cases of non-payment by the buyer.¹²³ It becomes the seller's accountability to see how he could minimise the risk of non-payment by an international buyer. In most cases, the international seller would propose a reduction of the repayment period, other than the prolonged time¹²⁴ coupled by retaining the title to the goods until full payment has been made, and finally, obtain credit insurance.¹²⁵

4.2.3. Consignments

Herein, the seller retains the title of the goods while the final sales and deliveries are being arranged with the final purchasers.¹²⁶ The importer provides a warehouse for the goods and gains only a physical possession and not their titles.¹²⁷ A prompt payment is made to the seller once the goods are sold to the final buyer after a certain commission has been deducted.¹²⁸ From this definition, it could be deduced that even though consignments are not secured transactions, they could be a judicious option for the seller as compared to the other modes above due to the reason that ownership is still retained by seller, but in real situations, how does an overseas producer per say trusts that the importer will act *bona fide* with the goods some long distance away? It merely

¹²⁰ See also Sakar R Transactional Business Law A development perspective (2003) Pg 14

¹²¹ See note 117 above

¹²² See note 116 page 11

¹²³ See note 120 above pg 115

¹²⁴ See note 121 above

¹²⁵ *ibid*

¹²⁶ See Seyoum B Export-import Theory, Practices, and Procedures page 307, See also note

¹²⁷ U.S. Department of Commerce International Trade Administration Trade Finance Guide 2012 PG 13 See also Sakar R Transnational Business Law A Development Perspective (2003) pg 14

¹²⁸ See note 2 above (page 590)

becomes a trial and error situation. It seems as this mode can only work effectively in the situations where there is a very high level of trust between the parties, while on the other hand, it should not be forgotten that trust is not international law nor a domestic law but just some common law principle, which can never be enforced easily in legal practice, worsened by the transaction itself being of international nature. The only wise option left for the seller is to insure the goods against non-payment.

4.2.4. Down payment

This is where a portion of the purchase price is paid up to the seller normally upon signing of a contract of sale or within a short period thereafter.¹²⁹ This method is advantageous as it prompts the seller to work on the order even before the payment of the full price; it gives the seller confidence that he will receive his payment and it is also a source of working capital.¹³⁰ However, it is a disadvantage to the buyer as it does not eliminate the non-performance risks by the seller despite a portion of payment in advance been paid up.¹³¹ This mode too as the previous ones, seem to be made practicable by existence of mutual trust between the parties and additional insurance covers taken.

4.2.5. Documentary collections

With this mode, payment is done strictly through exchange of documents as with the letters of credit (L.C). However, on the contrary, a go ahead in procuring payment here lies with the exporter.¹³²(1)The latter upon presentation of documents as prescribed in the contract of sale would instruct a bank (the remitting bank) to collect payment on his behalf for the goods he had shipped to an abroad buyer. (2) The bank (the remitting bank) will use its branch in the buyer's state or where the bank does not have such branch in the buyer's country, another different bank connected to it (the remitting bank) in the buyer's country (the corresponding bank) to collect money from the importer's bank. (4) Once the money has been collected the seller's account will be credited as settlement for the transaction.¹³³

¹²⁹ See trade port website trade tutorials <http://www.tradeport.org/> last accessed 18 February 2016

¹³⁰ *ibid*

¹³¹ *ibid*

¹³² Folsom R e-tal International Business Transactions 2000 Pg 156 See also Laryea ET above note 10, also see

¹³³ See note 117 above (page 9)

The two types of documentary collections¹³⁴ modes are the documents against payment (D/P), and the documents against acceptance (D/A). In the former option (D/P), the exporter only gives the shipping documents to the buyer upon full payment of the purchase price, which means the exporter retains title of the goods shipped and has the right to refuse their release if payment has not been effected.¹³⁵ As to the latter option (D/A), the seller after accepting the draft from the buyer will release the shipping documents to the buyer and the latter will only pay at a future predetermined date.¹³⁶The documentary collection mode works more as the letter of credit due of its documentary nature, and it carries higher evidential value compared to modes discussed above. This mode is fairly cheaper and less complicated than the letter of credit but riskier than the latter.¹³⁷

The documentary collection payment mechanism may sound compelling to a lay man's ears but in practice it is not entirely the case. It has a lot of hurdles, a simple example is in cases where an international seller does not really have any established good relations with the collecting bank, or cases where there are political risks and foreign exchange risks in the buyer's land, only a certain amount of money allowed to leave such country or nothing at all, it only means complications and disappointments for the poor international seller¹³⁸. Another delinquency of this mode is that there is nothing in this mode that obligates the bank to pay the seller for the goods purchased upon presenting documents.¹³⁹The buyer can still stop the bank from paying the seller for the goods purchased despite the latter having fulfilled his performance obligation. In other words, the seller does not have any absolute right to payment from the buyer.¹⁴⁰ On the other hand, should the payment be effected in favour of the seller while the goods are on board the buyer bears the risks of defective performance by the seller.¹⁴¹ However, this mode is well accepted in practice and governed by the ICC publication named the Uniform Rules for Collections (URC).¹⁴²

¹³⁴ Ibid, see also note 116 above (page115)

¹³⁵ See note 116 above (page 589)

¹³⁶ Ibid

¹³⁷ ibid

¹³⁸ Wolf L The law of cross boarder business transactions principles concepts and skills(2013)172

¹³⁹ ibid

¹⁴⁰ ibid

¹⁴¹ ibid

¹⁴² ibid

4.2.6. Documentary letters of credit

While in the normal international trade transactions an exporter would rather prefer an upfront payment for the goods by the importer before shipment, the risks to the importer become that the exporter might just appropriate the money and forget about his obligations to perform according to the terms of the contract of sale.¹⁴³ Equally, the exporter would not ever want to ship the goods to some foreign stranger without any assurance as to the payment thereto. If the exporter agrees to give the goods to an international buyer on a credit arrangement for instance in the cases of an open account mechanism, the latter may simply refuse to pay or delay payment inordinately.¹⁴⁴ The most practical and functional panacea to these kinds of complications has been found in the use of the letters of credit.

The international traders learnt to assuage the international trade dilemmas through the use of letters of credit considering it to be the most secure, most efficient and the mostly preferred payment mechanism in the history of international commercial practice, the '*life blood of international commerce*'¹⁴⁵ as described by the English courts.¹⁴⁶ This mode will form the central focus for discussion in this chapter.

A simple example of a financed transaction with a letter of credit as a payment tool is where a trader for instance wishes to buy machinery from abroad but have no available funds, or wishes to reduce the international trade risks by involving the bank. What will normally happen is that a) the buyer presents his documents/proposal to the bank/ the financier requesting the bank to pay on his behalf for the machinery/goods he wish to buy from overseas. b) The bank in satisfaction of the buyer's proposal, knowing the buyer's creditability, the availability of collateral and all the other risks being assessed, will approve the proposal, thus agrees to pay such purchase price to the seller overseas. c) Upon delivery of merchandise the loan will be repaid at a future determined date by the buyer as agreed between the parties.

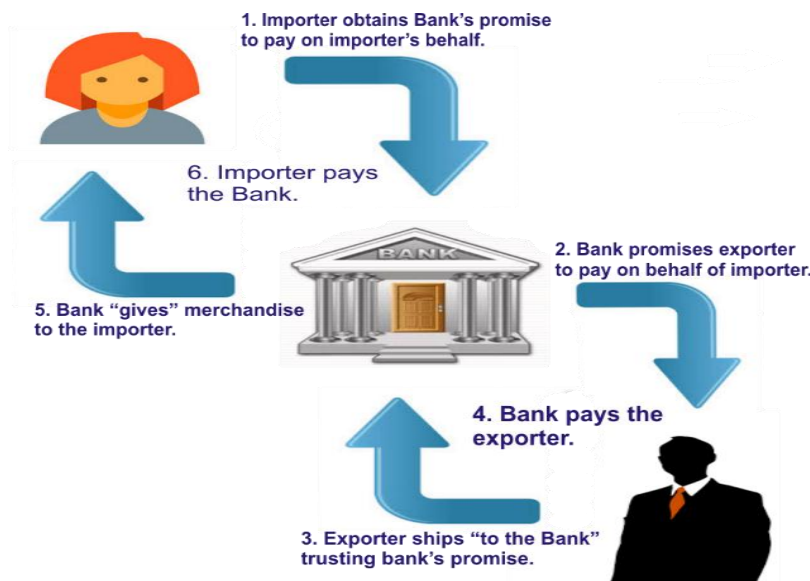
¹⁴³ Zhang Y Approaches to Resolving the International Documentary Letters of Credit Fraud Issue (2011) pg 17 University of Eastern Finland 15

¹⁴⁴ Youssef F United Nations Conference On Trade And Development Documentary Risk In Commodity Trade Unctad/Itcd/Com/Misc Pg 1

¹⁴⁵ See *Harbottle v National Westminster Bank* [1977]2 All ER 870

¹⁴⁶ See chapter 2

Picture 1 illustrating the transaction above



Advantages of Documentary Credits

The following are the advantages of documentary credit as payment mechanism in the international trade transactions.

i. Security function

As the seller in most cases will be worried that the buyer might default in paying for the goods, more especially in cases of pre-shipment arrangements, in the cases of pre-payment similarly, the also buyer becomes in the same position, fearing that the seller might default performance or even sell the goods to another person despite payment having effected in advance. The essence of using documentary credit in this respect is that it provides all the parties with necessary security against non-payment and non-performance risks.¹⁴⁷ Normally the commercial letters of credit used in international trade transactions are usually irrevocable¹⁴⁸ unless the parties stipulated otherwise, this adds security to the transactions as no party would be able to unilaterally alter/ amend the terms of the credit without a prior agreement of the other parties involved. Further, the documents circulated to the parties becomes a collateral for the

¹⁴⁷ See note 143 above

¹⁴⁸ See note 132 above

performances and have high evidential value, should one party fail to perform, the other may rely on them to institute legal proceedings against the other, it secures the interests of all the parties involved. Of great importance furthermore is that the operation of letters of credit is directed by universally accepted and recognised uniform rules (UCP),¹⁴⁹ which though not binding law, if incorporated in to the credit becomes binding on the parties, this operation has proved effective and reliable in practice. This is the reason why the international legal advisers will unhesitatingly advice their clients to use an L.C as a payment mechanism for their international trade deals.

Below the researcher will analyse the security function of the L.C taking different parties involved in an international trade finance deal individually.

a) Seller

The L.C provides double security to the seller,¹⁵⁰ firstly; it is an assurance for payment of the shipped goods, and the seller retains the title of the goods until the buyer pays or accepts the draft. *Secondly*, by requesting that the L.C be confirmed by a reputable bank in the terrains of the seller, makes things easier for the seller as compared to dealing only with the issuing bank in the buyer's country. This further, provides an additional security to the seller for cases of the importer's non-payment and insolvency.¹⁵¹ In rare cases of the banks going bankrupt on the other hand, the seller has a validly enforceable legal recourse against the buyer directly.

This function was illustrated in the leading English case of *United City Merchants (Investment) Limited v Royal Bank of Canada* where the working staff of the shipping company fraudulently issued a bill of lading on the 15th of December well consistent with the terms of the contract of sale while the actual shipment was made on the 16th of December. The bank after taking note of this discrepancy approached the court to adjudicate the matter on the question of fraud. In the normal practice; the bank would have been entitled to dishonour the credit because of the discrepancy. However, the court rejected the issue of fraud holding that the discrepancy was not a material and that fraud was not conducted by the seller as the beneficiary. This was accentuated by Lord Diplock's in his distinguished speech that:

¹⁴⁹ See chapter 2 above

¹⁵⁰ See note 117 above (page 120)

¹⁵¹ *ibid*

*“The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods. That does not permit any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment”.*¹⁵²

This approach serves as precedence to the letters of credit commercial practice worldwide, for instance in the Botswana case of *African Handling Equipment Company V. Monitor Kamaz Trucks (Pty) Ltd*, the applicant sought an interdict order from the High Court of Botswana trying to stop the bank from honouring an irrevocable letter of credit issued in favour of the respondent by Standard Bank South Africa. The applicant alleged breach of the underlying contract of sale however, the court dismissed the application holding that; the letter of credit is independent from the contract of sale, and the fact that the applicant agreed on the letter of credit to be irrevocable, they obliged the bank to pay upon receiving the necessary documents from the beneficiary.

Therefore, the confirming bank was legally obliged to honour the credit irrespective of any dispute between the parties and the court is not supposed to interfere unless there were any allegations of fraud, which was not the case in the matter before the court.¹⁵³

b) The Buyer

Except where there are fraudulent actions by the seller,¹⁵⁴ the documentary compliance requirement underlying the whole process, assures the buyer that the goods as ordered have been shipped by the seller, in other words, the L.C protects the importer against the seller's non-performance risks. The buyer pays knowing that the goods have been shipped, because of the presentment of the Bill of lading obtained from the carrier¹⁵⁵ unlike on the other modes.

c) Issuing bank

¹⁵² See *United City Merchants (Investment) Limited v Royal Bank of Canada [1983] 1 AC 168*

¹⁵³ See *African Handling Equipment Company V. Monitor Kamaz Trucks (Pty) Ltd*

¹⁵⁴ See the case of *Sztejn v. J. Henry Schroder Banking Corporation (1941) 31 NYS.2D 631*, the case will be discussed under the fraud exception below.

¹⁵⁵ See the pictorial illustration above

The issuing bank's security comes from the documents, the shipped goods as well as other general assets of the importer as per the agreement between the importer and the issuing bank.¹⁵⁶

d) The advising bank

The advising bank on the other hand, relies on the undertakings of the issuing bank and /or the shipping documents.¹⁵⁷

ii. *The legal doctrine of Autonomy*

To refresh the reader's mind concerning the application of the doctrine of autonomy as discussed in chapter 2 above, it was discussed that, the letter of credit transaction encompasses about four contractual arrangements,¹⁵⁸ which because of the legal nature of the letters of credit are separate and independent from each other. The independence and the separateness of the contractual arrangements imply that the breach of one contract does not necessarily mean the same for the other.¹⁵⁹ Another benefit of this arrangement is also that, it grants all the parties some propinquity¹⁶⁰ and a clear sense in terms of enforcing their claims against each other. It is not a matter of first figuring out who to face, in a legal action or where to go. The contracts can only be enforced by the parties that are directly bound by them. As Laryea¹⁶¹ stated;

*"...it grants each party a proximate entity for suit thus saving the parties litigation costs and time".*¹⁶²

¹⁵⁶ See note 32 above

¹⁵⁷ *ibid*

¹⁵⁸ See chapter 2, these arrangements consist of 1.The contract of sale between the seller and the buyer. 2. The application for the L.C between the issuing bank and the applicant (buyer) 3.the advising of the letter of credit between the issuing bank and the advising bank 4.the carriage agreement between the seller and the carrier . See as illustrated above in the picture.pg... See also Lord Diplock's statement in the *United City Merchants v Royal Bank of Canada*: 'it is trite law that there are four autonomous though interconnected contractual relationships involved.'

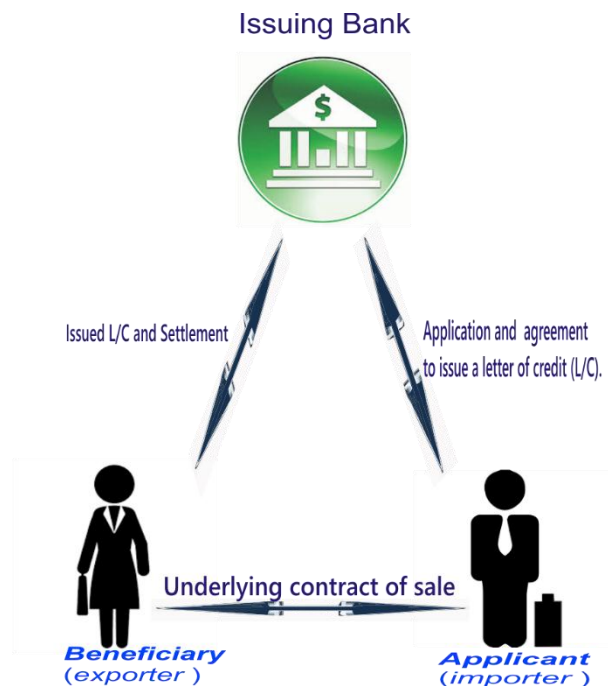
¹⁵⁹ The principle of autonomy of credit is enshrined in the UCP600 article 4; it expressly stipulates that the credit is separate from the contract of sale.

¹⁶⁰ See note 30 above

¹⁶¹ See note 4 above pg 121

¹⁶² *ibid*

Picture 2 illustrating the autonomy of the credits



The autonomy of credit principle makes the L.C more reliable and efficient compared to other modes discussed above.

iii) It fills the financial gap / liquidity

From the definition of documentary letters of credit, it guarantees payment to the seller and it is negotiable. This means that after the draft has been accepted upon the seller fulfilling the documentary presentment obligation, the seller is free to reassign/ sell it to another creditor at a discount in order to fill his financial gaps.¹⁶³ Conversely, excluding the cases of pre-shipment payment arrangements, the importer in normal cases only pays for the goods after they have arrived¹⁶⁴ this too closes the financial gap of the buyer for some time until actual payment.

iv) Distribution of risks and balancing of interests

¹⁶³ *ibid*

¹⁶⁴ *ibid*

Intrinsically, the export-import trade transactions risks evolve from the nature of the transaction itself being a cross boarder transaction where there are some encounters with issues of;

*(i) great distances between the parties, (ii) the parties not familiar with the each other as to the identity, credibility, (iv) trustworthiness, (v) the different applicable laws, (vi) the fact that all the activities involved are only of transactional basis, (vii) exchange control status of the countries or the exchange risk, whether they will hinder the payment processes and lastly (viii) the delays in the payment of the full price.*¹⁶⁵

All these factors give rise to a myriad of commercial risks to the traders, including, performance risks, payment risks, political risks, foreign exchange risks and all others. The L.C is preferred over all the over modes because it is entrusted with the competence to balance the interests of all the parties to the transaction. What the L.C does is that, unlike other modes of payments discussed above, it segregates the inherent cumbersome risks in to smaller quantifiable risks¹⁶⁶ which are then endured by each party involved in such a transaction, it may not be proportionally but every party becomes accountable some way. As stated by Professor Folsom, “*It creates a win- win situation.....,*” a levelled playing ground “*.....not a zero sum game*”.¹⁶⁷ It eliminates the possibilities of cases where only one party have both the ownership title of the goods and payment at the same time or the cases where one party bears all the risks.

In carrying out this function, the L.C works along with the intercoms usually incorporated in to the agreements. These are the universally accepted and recognised commercial terms created by the International Chamber of Commerce (ICC), reviewed from time to time with an aim to facilitate communication and international trading.¹⁶⁸ These terms clearly stipulate the terms of contract of sale, the individual accountabilities of the buyer and seller, the details on the transfer of risks from one party to another, the required documents, division of costs as well as the

¹⁶⁵See note 132 above (page 157)

¹⁶⁶ *ibid*

¹⁶⁷*ibid*

¹⁶⁸ See the ICC website, <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/>, last accessed 12 February 2016

shipping arrangements.¹⁶⁹ Their most important function is to determine which party bears which risk at what time according to the agreement. The most recent are the 2010¹⁷⁰ intercoms.

Though the obnoxious and cumbersome process, from opening up the L.C to its settlement, which is the primary reason the LC is so expensive, the L.C remains predominantly ideal for trade finance transaction in comparison to the other forms.

Professor Boland summarised the whole issues fundamental the use of an L.C in his 4s criteria¹⁷¹teaching the trading community that, the success of the letter of credit in trade finance comes from that the transaction is; 1) *self-liquidating*, (the financed imports are then resold to repay the financier), 2) *secured* (by the financed goods and the letter of credit as a negotiable instrument, it is enforceable and has a great evidential value)3) *short term*, (compared to the long term loans that the banks end up writing off because of failure to repay by the clients, these are mostly short term and 4)*Speedily* concluded within the short life span of the letter of credit).Above all, the rest is left for literature to find out if there is any other payment mode which could serve the same purpose as the L.C with more advantages than the latter.

Dis-advantages of the L.C

Despite the inimitable advantages of the L.C, the precious international trade finance payment mechanism does not only have the good sides it has its own flaws like any other payment mechanism. Below will be a discussion on its dis advantages.

i) Time consuming and delays

The traditional commercial letter of credit cumbersome paper work, to open the L.C and further to circulate the documents to the relevant parties on their own constitutes an encumbrance. In addition to this, should there are any discrepancies in the documents whether numeric or textual, it means additional workload for the parties and it is not free of charge. Similarly, where the documentary prescriptions are unreasonable, the seller may end up not being able to meet the

¹⁶⁹ *ibid*

¹⁷⁰ *ibid*

¹⁷¹ Boland PJ Risks Involved in International Trade Finance: A Banker's Perspective (2003) website...please check

documentary presentment obligations on time, sometimes even resulting in rejection of his documents by the bank.¹⁷² These issues delay the delivery process of the goods to the buyer as well as payment.

ii) Expensiveness

Due to the cumbersome workload of documentation highlighted in the preceding paragraph, this process is expensive than other modes. Any discrepancy in the documents adds extra costs. The bank charges for its “*tasks, time invested, the risks, liabilities and the cost of capital*”¹⁷³ they invested on these transactions. This entirely results in huge costs mostly to be borne by the buyers.

iii) Physical Examination of documents and Authentication

For the traditional paper based letter of credit documentary, due diligence is conducted physically, which naturally means some mistakes could be tolerable; the process of authentication immensely relies on the individual judgment of a person conducting it. Correspondingly, the strict compliance doctrine is not absolute; the ICC publication on International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP)¹⁷⁴ provides that there is no need for a mirror image in examining the documents. This constitutes a fatal deficiency on the paper based L.C, the traders with a fraudulent motive could easily get away with this.

iv) Fraud issues and fraud exception

Literature¹⁷⁵ proves that the documentary letter of credit is profoundly susceptible to fraud and this is the main source of its downfalls. Despite this, there is no international codification specifically designed to deal with fraud and fraud related issues, the UCP does not have any provisions for fraud except the UNCITRAL convention which provides for fraud issues in

¹⁷² Danute Kračovska Impact Of The Doctrine Of Strict Compliance On A Letter Of Credit Transaction (2008) pg 3 University of Aarhus unpublished

¹⁷³ See note 116 (page 122)

¹⁷⁴ See ICC International Standard Banking Practice for the Examination of Documents under Documentary Credits (2007) revision for UCP 600 ICC Publication No. 681 E.

¹⁷⁵ See note 143 above (page 5), see also note 116 (page 123)

standby credits and bank guarantees only and not the documentary credit.¹⁷⁶ Some writers such as (Kelly–Loew and Xhang)¹⁷⁷ believe for the unknown reasons that the ICC intended to leave the letter of credit fraud issues to the domestic courts, while to date no comment or response has ever come from the ICC concerning this issue, indeed the custom has been that the L.C fraud and related cases be brought before the domestic courts.

Nonetheless, common law recognises fraud as an exception to the doctrine of autonomy,¹⁷⁸ customarily referred to as the fraud exception. This principle originates from the Latin phrase of '*ex turpi causa non oritur actio*' interpreted by the courts to be "from a dishonourable cause and action does not arise". In simple and practical language this principle as known from the English case of *Holman v. Johnson*,¹⁷⁹ means that the bank should not honour the credit if it reasonably suspects an element of fraud in the documents presented for payment.¹⁸⁰

The leading case for this rule is American case of *Szteyn v. J. Henry Schroder Banking Corporation*;¹⁸¹ where the seller fraudulently shipped the crates of rubbish instead of the crates of bristles as agreed under the contract of sale. The seller produced the documents which indicate that the goods shipped were the bristles. The buyer noted the fraudulent actions of the sellers and applied for the injunction preventing the bank from accepting the documents and honouring the credit. The court accepted the application holding that, in such instances where the fraud has been noticed before documentary presentation obligation has been fulfilled for payment by the seller, the principle of independence should not be extended to shield the fraudulent actions of the seller.¹⁸²

This approach has been applied universally by the courts under several international commercial trade disputes involving fraud, including another well-known case of *United City Merchants v Royal Bank of Canada*, in which Lord Pollock interpreted the application in his speech saying;

¹⁷⁶ See Article 15 Of the UNICITRAL convention

¹⁷⁷ Ibid see also Kelly Loew and Xhang, chapter 1.

¹⁷⁸ See chapter 2 above

¹⁷⁹ (1775) 98 Eng. Rep. 1120

¹⁸⁰ *ibid*

¹⁸¹ *Szteyn v. J. Henry Schroder Banking Corporation* (1941) 31 NYS.2D 631

¹⁸² *ibid*

“The exception of fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application of the maxim *ex turpi causa non oritur actio* or, if plain English is to be preferred, ‘fraud unravels all.’ The courts will not allow their process to be used by a dishonest person to carry out the fraud”.

Laryea in his view however, criticises the efficiency of fraud exception rule in practice, he opines that despite this exception sounding irrefutable “*it is narrow and not easy to apply in practice.*”¹⁸³ Further, *the credits have already been given a strong autonomy from the contract of sale, which means the fraud exception can only be applied under very limited circumstances*”.¹⁸⁴

An example to support the above view is found on the Mauritius Appeal case of; *Alternative Power Solution v Central Electricity Board*¹⁸⁵ in which according to the facts of the case, the *Central Electricity Board (CEB)* accepted a tender from *Alternative Power Solution (APS)* to supply light bulbs. The parties agreed on the irrevocable letter of credit issued by Standard Bank to be used as a payment tool for the transaction. According to the contract of sale, CEB had the right to inspect the goods prior to shipment; although the required list of documents for documentary presentation compliance did not provide that there should be confirmation for acceptance of the goods by CEB. CEB did not conduct any inspection before shipment of the goods as was agreed in the contract of sale. Thereafter, CEB applied for an injunction intending to stop the Bank from drawing on the LC in favour of APS, alleging some fraudulent conducts by the latter. An injunction was granted in the lower court, restraining the bank to pay out the credit on the reasoning that, there was sufficient evidence of fraud on the part of APS to the knowledge of Standard Bank to engage the fraud exception. However, this ruling was overruled by The Privy Council (P.C) on appeal, holding that to *engage the fraud exception in this way is a wrong approach*. The P.C held that for the fraud exception to be successful an inference should be able to be drawn (a) *that the beneficiary could not honestly have believed in the validity of its demands under the letter of credit and (b) that the bank was aware of the fraud which was not the case in this matter*. PC also criticised the courts *a quo* for having relied on the performance under the underlying sale contract, which according to the L.C’s principle of independence

¹⁸³ See note 116 above

¹⁸⁴ *ibid*

¹⁸⁵ *Alternative Power Solution Ltd v Central Electricity Board and Another*. [2014] UKPC 31

constitutes an independent obligation. Further, the PC after examining the evidence before them held that there was no evidence on the issue of fraud, and the issues such as lack of inspection should be left for arbitration and have no bearing in the liability of the bank under the L.C.

This case illustrates that the courts strongly advocates for the autonomy of credit principle, and are not willing to easily relax it. It will only be in serious cases of fraud that this exception will be invoked. Lastly, it ought not to be forgotten furthermore that, fraud is a criminal offence, in normal circumstances it should be resolved through litigation, but, the difficulties in trying to institute legal proceedings against the wrongful party in another country, taking in to account the parties different jurisdictions and applicable laws is only unthinkable. Application of the rule by the domestic courts also gives rise to innumerable inconsistencies in practice. The courts have discretion to apply the rule as they deem fit which means diverse approaches from jurisdiction to jurisdiction.¹⁸⁶ No trend can even be established from the application of the rule and it is also uncertain as to the extent of application of the fraud exception rule. This is why it remains imperative to have a legal architecture to govern fraud and fraud issues in international trade transactions.

Below the researcher will conduct a study to establish whether the electronic letters of credit could out serve the interests of the international community better than the traditional paper based above.

4.3.Can an electronic letters of credit solve the deficiencies of a traditional paper based letters of credit?

This question is not new to the scholars' research pool; it has been one of the hottest topics for legal and economic writers lately. According to Zhang it had formed the central part of legal debates as from 1980.¹⁸⁷ What the writers has been frantically trying to establish is whether there is an alternative mode of payment to the L.C which could serve the above functions and purpose

¹⁸⁶ See Meral N The Fraud Exception In Documentary Credits: A Global Analysis (2012)2 Ankara Bar Review 45 See also the Canadian case *Bank of Nova Scotia v Angelica-White wear Ltd* [1987] 36 D.L.R. 161 in which the Supreme Court of Canada 'took note that the English and American decisions differed on the extent to which the fraud exception to the autonomy principle is applied'. See Dr. Davidson A Fraud and the UN Convention on Independent Guarantees and Standby Letters of Credit.

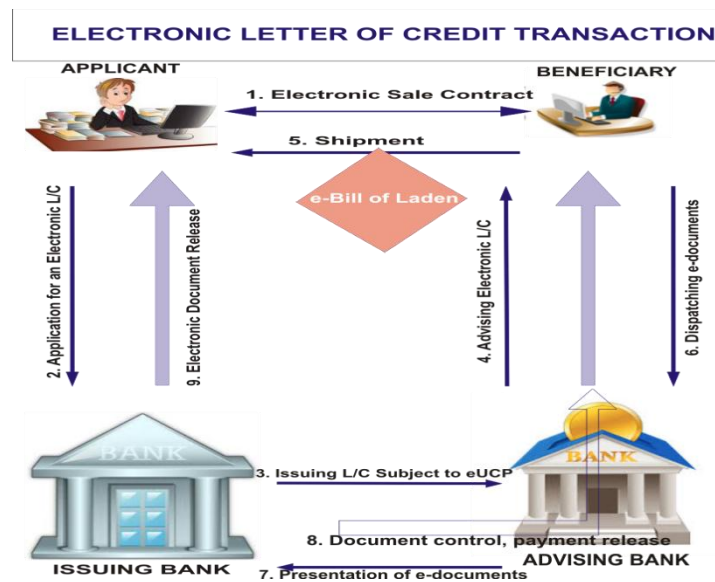
¹⁸⁷ See Note138 above

of the L.C with more advantages than the latter, or whether the documentary credit could be more efficient in a digitalised form.¹⁸⁸ Unfortunately literature is divided on this.

With the legal impediments vis-à-vis the use of an electronic letter of credit now slowly getting nugatory, universal recognition and usage of a digitalised electronic letter of credit could only come from an enriched enlightenment to the consumers and traders on how electronic letter of credit practically operate and more so as to what are the advantages the electronic mode compared to the paper based.

- *The first step that has to be looked at is to establish if an electronic letter of credit is practically viable.*

According to Zhang, an electronic letter of credit can only be viable in an environment where; *electronic communication, electronic creation of documents and documentary compliance* could be digitally conducted.¹⁸⁹ This approach will become clearer after the discussion on each contractual arrangement to the L.C transaction below.



Picture 3¹⁹⁰

- *Application and issuing of the letter of credit*

¹⁸⁸ ibid

¹⁸⁹ Ibid pg 234

¹⁹⁰ Extracted from [www. Letters of credit.biz](http://www.Lettersofcredit.biz)

Although to date there is yet no universal standardised operative electronic letter of credit in the international commercial arena, a number of merchants and banks worldwide have already created their own electronic letter of credit in their systems, as a way to align their trade practices with the modern technology and further to facilitate trade. This saves their customers time from queuing and having to deal with cumbersome paper work.¹⁹¹ Equally, the contractual arrangements for issuing such L.C too are made possible by the fact that law of contract now recognise the electronic contracts as legally binding¹⁹² and enforceable. Further, the deemed reasonable time for the bank to assess documents under the L.C issuing process is seven banking days¹⁹³ which may take less than an hour in cases of an electronic mode depending on the effectiveness of the system in the case of an electronic mode. This becomes a normal contract regulated by the domestic contract laws. This proves that it is indeed possible to issue a letter of credit in a digital format.

- *The agreement between the issuing bank and the advising bank*

This chiefly deal with whether electronic data transmission between the banks as legally authorised by the UCP would be possible. The banks in order to fulfil this role in practice mostly employ the most recognised and widely accepted electronic messages transmission system called Society for Worldwide Interbank Financial Telecommunication (SWIFT) for this purpose. SWIFT specialises in the conveyance of financial transactions messages between the banks.¹⁹⁴ Practically, after the electronic letter of credit has been issued, immediately the issuing bank which is supposed to be the user SWIFT system will electronically convey the message to the nearest SWIFT access point, which will then be transmitted to the regional processor for validation, then to the operating centre, which will finally route the message to the advising bank for payment to the seller after documentary compliance.¹⁹⁵ The transmission of messages takes a very short time period of minutes from the time of issue by the bank, provided the system is well functioning and the right procedures have been accordingly followed.¹⁹⁶ SWIFT however does not provide transfer of funds or settlement services. The parties normally choose another

¹⁹¹ See note 116 above (page 142)

¹⁹² See the discussion on chapter 3 above

¹⁹³ See UCP 500 Article 13

¹⁹⁴ See 191 above (page 143), See also note 132 (Page 178), See note 143 (Page 234)

¹⁹⁵ *ibid*

¹⁹⁶ *ibid*

organisation along with SWIFT for settlement, such as the Clearing House for Inter-Bank Payment Systems (CHIPS).¹⁹⁷ The au current economies such as Botswana already have their own clearing system, Botswana Interbank Settlement System (BISS) which works along with SWIFT for effecting electronic international trade payment transactions.¹⁹⁸ SWIFT has been successful in dealing with international interbank electronic data transfer from a very long time which is what makes the trade community to believe that it has successfully proven the effectiveness of its systems. This organisation assures its users of the safeness, user friendliness, convenience and most importantly less costliness of their system.¹⁹⁹ They use numerous and complex security mechanisms such as the log in procedure, application-selection procedures, message numbering, error checking, and control of access to the processors and system control centres, encryption and authentication which have been effective in keeping away the non - parties from exploiting the system operations.²⁰⁰ They rely on SWIFT codes, which are only available to the parties to the transaction, with a high level of confidentiality upheld. The communication of the messages by SWIFT is conducted in a much closed manner, thus only the parties involved could access the messages and these are the tools that increase its security.²⁰¹

The main benefit of an electronic letter of credit is speed, efficiency and lower costs at which an international transaction is conducted.²⁰² In normal circumstances of a traditional L.C, the UCP²⁰³ prescribes seven days for the application opening an L.C and assessment of documents, which will take only minutes with the electronic modes. The electronic trade transactions of this type also lessen the customs authorities work since clearance for the imported goods carries less paper work and is conducted within a single window system. Costs will also be reduced as the cumbersome paperwork drafting would have been eliminated from the equation also human labour is to a less extent needed. The discrepancies will be reduced considerably as one set of agreed on data will be used throughout in the transaction on the other hand also reducing fraud

¹⁹⁷ Sometimes parties may employ CHIPS or any other settlement method which will facilitate the process. This mechanism

¹⁹⁸ The Botswana Interbank Settlement System (BISS), is an electronic interbank payment system that allows funds to be transferred between participating institutions on an irrevocable and real time basis. See the bank of Botswana website: <http://www.bankofbotswana.bw/index.php/content/2009103012044-botswana-interbank-settlement-system> last accessed on the 20 of February 2016

¹⁹⁹ See swift website at <https://www.swift.com/> last accessed on the 18 February 2016

²⁰⁰ *ibid*

²⁰¹ *ibid*

²⁰² *ibid*

²⁰³ See note 193 above

due to the digitalised signatures as well as the cryptographic system which would make the reproduction of data difficult as compared to the paper based form.²⁰⁴

According to some writers²⁰⁵ a complete electronic letter of credit is not possible even in this era. Thus; the cases where all the processes of the letters of credit are all digital cannot yet be possible. This argument is based on the concern of lack of provisions on advising, confirmation and negotiating of an electronic letters of credit in the Uniform Rules. Supporting the above view with the practical operations Zhang stressed that;

*“While it is possible that the bank to bank communications could be purely electronic, the seller and buyer communications are still paper based”.*²⁰⁶

This research views the opposite because lack of legal infrastructure has not ever stopped the operation of electronic mode in the first place, the current international commercial trade practice also have proven this view futile as the electronic letter of credit has operated since even before the electronic transmissions were provided for in the UCP and the Model laws. There is of course, a need for harmonising the system, but no one and nothing can ever stop the current world’s technological exponential growth. Only by accepting and recognising them in our local jurisdictions can we be able to benefit from them.

- *The advising bank and the beneficiary/ the seller*

Since it is a fact that the uniform rules do not provide for advising of credits and their negotiation electronically, it is said that advising and negotiating the credit have remained mostly paper based in practice.²⁰⁷ However, this does not mean there is any forbearance of advising an L.C electronically; lack of regulatory regime just limits it. There is legally nothing impeding the technology advanced banks to advise the L.C electronically, the universal rules for electronic commerce grants the electronic letter of credit functional equivalence to the paper based. This discussion proves that the second contractual arrangement in the letter of credit is possible and even highly operative.

²⁰⁴ See note143 above

²⁰⁵ *ibid*

²⁰⁶ *ibid*

²⁰⁷ *ibid*

- *Electronic documentary compliance*

For a digital electronic letter of credit, the documents are meant to be transmitted entirely electronically. However, there are arguments raised in literature concerning the electronic bill of lading (BOL) thus; there is no universally accepted electronic bill of lading and the legal regimes are not sufficient or complete to govern their operation. However as discussed in chapter 3 researchers such as Professor Byrne²⁰⁸ believe that, Bolero²⁰⁹ in conjunction with SWIFT had been entrusted to address this issue. To date, the electronic bill of lading from Bolero is worldwide accepted and highly operative in the international space.²¹⁰ Bolero specialises in facilitating the transmission of documents electronically in international trade deals. All the processes and procedure of the transaction are guided by the Bolero rule book which binds only the member parties to the transaction. The use of digital signatures and the secret pins ensures the security of the transactions.²¹¹

After the above contractual arrangements have been concluded, the seller with an arrangement with Bolero will ship the goods and obtain a BOLERO bill of lading (BOL), which will be transmitted to the advising bank with other documents as prescribed on the credit, as fulfilment of documentary presentation obligation in order to enable the bank to proceed with payment. The corresponding bank, in turn will pass the documents to the issuing bank for reimbursement, the issuing bank then conveys the documents to the buyer who in turn pays and transmit the BOL to the bolero for the release of the imported merchandise.²¹² There is no doubt that electronic documentary compliance is possible both legally and practically.

- *Arrangements between the issuing bank and the seller*

This arrangement as mentioned by Laryea,²¹³ is applicable to the cases where there is no confirming bank and the issuing bank directly communicates the credit to the seller. This case is legally recognised under article 5 of the UCP 500 but very rare in the practice. This would be

²⁰⁸ See Professor Byrne's view on chapter 1

²⁰⁹ See Bolero website [Http:// www.bolero.net](http://www.bolero.net) last accessed 12 February 2016 See also Burnett R & Bath V The Law Of International Business In Australia (2009) pg112

²¹⁰ According to Burnett and Bath, some companies such as SEADOC, TRADE CARD and @GLOBAL TRADE, are said to have tried this business but failed, because of lack of recognition. See Burnett R & Bath V The Law Of International Business In Australia (2009) pg113

²¹¹ Ibid (page 112)

²¹² Ibid

²¹³ See note 116 above Page144

feasible for the traders who already have high technology mechanisms, and are able to connect with the banks directly.²¹⁴

4.4. CONCLUSION

The stumbling blocks of lack of recognition and acceptance of the digitalised documents and payment modes such as the L.C more especially in Africa do nothing but distort the electronic trading progress. It hinders economic growth both of individual countries and continentally (for instance, Africa). The countries not active in the borderless world have to shift their focus to the brighter side. The advantages such as increased international trading activity, ability to penetrate other markets such as the European world, fast, efficient and secure international trading, simplification of the trading processes in a very less costly way, should have been enough to trigger the communities to participate.

It is ironic how one of the reasons to attract foreign investors in developing countries is the desire to acquire an upgraded technology, while on the other hand they are not willing or ready to adopt such ‘enhanced technology’. Most of the developing countries hide behind the reasons of both technical and legal limitations of the use of digital signatures, being the risks of the costs of encryption soft wares, lack of knowhow, costs of services and lack of resources. In reality, there is no technology without risks and like one would say success comes with risk taking. International commercial trading generally is a trial an error situation what matters is the ability and proficiency to manage such risks. All this makes the next chapter to focus on things impeding the electronic letter of credit to work for the economy of Botswana, including the review of the electronic commerce legislation, the e-readiness and other technological factors involved.

²¹⁴ ibid

CHAPTER 5

5.0.ARE THE E-COMMERCE LAWS OF BOTSWANA SUFFICIENT ENOUGH TO ENABLE OPERATION OF THE ELECTRONIC LETTER OF CREDIT?

5.1 OVERVIEW

In the previous chapter, the legal implications of electronic letters of credit (e-LC) was discussed and their full operationalization in cross border trade deals was advocated for, based on the reasons of its efficiency, reliability and security as compared to other international trade payment modes. It was proved in the same chapter that electronic letters of credit are practically operative in Botswana, but nothing has been provided as to whether the Botswanian laws allows such operations. In Chapter 3 it was concluded that, the e-L.C operation has gained recognition and acceptance internationally and is fully operational in places such as Europe where their enablement through enactment of necessary legislation has been highly marked. It is alongside these issues that the study will be completed by analyzing the laws of Botswana with an aim to establish their completeness and sufficiency to regulate electronic letters of credit.

It is acknowledged that some of the contents of this chapter may not unprecedented; therefore this will be an update to research pool. To kick start this chapter the laws regulating letters of credit in Botswana, and their previous application in the local courts will be examined.

5.2.LETTERS OF CREDIT REGULATION IN BOTSWANA

Unfortunately there is no law specifically regulating the letters of credit in Botswana. It could be said that the Bank of Botswana Act, and the National Payment Systems Acts regulate all payment modes in the country but all that could be found in both laws is a confusing statement that; ‘the operation of all payments modes’ is regulated by Bank of Botswana²¹⁵ but as to how, it is not provided.

Against this backdrop therefore, it will only make sense to conclude that Botswana relies on the Uniform Customs and Practice of Documentary credits (UCP) rules to regulate operation of the letters of credit. However, this is only an assumption and should not be wrongly interpreted either to mean that the UCP is Botswanan law, or that it has an automatic legal binding effect,

²¹⁵ See Bank of Botswana Act 1996 Chapter 55:01

and/or even be given a multilateral agreement status. This error has already been identified²¹⁶ in the Botswanan case of African Handling Equipment Company V Monitor Kamaz Trucks PTY Ltd where one of the prestigious judges observed that;

*“The practice which is subject to a body of rules formulated by the international chamber of commerce is an old one, and has been applied by the courts to the extent that it can be said to be a legal rule”.*²¹⁷

Even though it has been accepted in some jurisdictions that the courts also make laws through interpretation, it is incontestable that in this case the Judge was way out of the mark. Firstly, the observation above by implication grants the UCP a legal rule status, which is not provided in any Botswanian statute or custom²¹⁸. Further, the UCP explicitly stipulates that it is merely a codification of trade practices which is meant only to guide operation of letters of credit and it does not have a legal binding effect unless incorporated in to the credit or have not been expressly excluded from operation in the credit by the contracting parties.²¹⁹ The judge’s view above only exemplifies a common error in law with regard to interpretation and application of the provisions of the UCP in our developing economies, perhaps due to limited judicial precedence on the subject matter but the stated facts above clearly nullify the above judges’ view.

However, the above being said, it only could be presumed that the e-LC regulation in Botswana will be governed by the UCP and its electronic version; the UCP supplement (e-UCP), which inconsistencies have already been highlighted under chapter 3. The e-UCP is highly operational, as a supplement to the UCP but as shown in chapter 3 cannot efficiently operate without a hand from adequate e-commerce laws. It is in this line that, the e-laws of Botswana will be examined for their completeness and sufficiency to govern electronic communications.

The core issue that the study seeks to address is that, despite the practical digital transformation of commercial practices and documents almost in the whole African continent, the laws regulating their practices are still incomplete, unclear and incoherent resulting in a lack of trust

²¹⁶ See the UCP 600 Preamble

²¹⁷ See African Handling Equipment Company V Monitor *Kamaz Trucks (Pty) Ltd* 1995 BLR 800 (HC).

²¹⁸ Maripe, B. (1997) The legal aspects of documentary credits in international trade: The case for Botswana. *The Comparative and International Law Journal of Southern Africa*, 30(2), 199-207. Retrieved from <http://www.jstor.org/stable/23250181>

²¹⁹ *ibid*

and non-acceptance by the consumers, which slows development of electronic cross border trading. This is why the chapter is addressed to two groups of the developing countries in the African continent, 1) to those who have decided to exclude themselves from the electronic trade encouraging them to reconsider enabling it in their territories, hence close those open international e-trade gaps within the continent; and 2) to those economies that are rethinking their legal regimes in order to ensure that in the process they align their regimes with the international best practice and international trade laws. The simple reason to this is that there is no ideal model law in e-commerce, even the mother laws, (model laws in e-commerce from UNICITRAL working group) have proven to have some loop holes, the remaining solution becomes perhaps as highlighted above will be to look at the practices and the legal regimes of those who qualify to be named the trend setters in the field.

The model laws on e-commerce (MLEC) and the Model law on signatures (MLEs) as discussed in chapter 3 of this study, do not have a legal binding effect in application but were meant to serve only as guide, also to encourage the governments to promulgate domestic e-trade legal regimes.²²⁰ Previously to this also, the UNCITRAL, recommended to the governments and the regional economic communities to create and/or change their existing laws, in order to create an e-commerce enabling environment.²²¹ They found this to be one of the trade facilitation tools, with a potential to improve cross border trade and increase competitiveness, increase reachability hence better international trade.

It was in this anent that just as any other developing country that has already been infiltrated by technological advancements; Botswana finally saw the need to enable same through enactment of necessary legislation and amendment of the existing by neutralizing their paper biased language. The same could be said for Southern African Development Committee who recently passed their e-commerce model law (SADC model law) as a way to promote e-commerce in the region.

The thought of a critical comparative analysis of the Botswana e-laws (the Electronic Transactions and Communications Act (ECTA) (as yet not enforce) against the SADC model law in e-commerce goes along the reasons that; i) Botswana is a member of SADC, therefore

²²⁰ See the preamble of A guide to model law in e-commerce.

²²¹ See chapter 3 of this Study

their legal regimes should be in line with regional trade legal regimes as well best practice in the region. ii) Also as we all learn from others, it is also sound to take in to account the practices and regimes of such economies which have been active in this field and have proven successful such as South Africa, to find out whether their regimes could be classified as the best model and therefore be followed. The laws above are also suitable for this analysis as they are both relatively new, which makes their scrutiny against the mother law of e-commerce (MLEC and MLEs) relevant in order to establish if they are in line with international trade laws. Furthermore, due to the borderless nature of e-commerce transactions most of the legal enforcement issues arise from international infringements therefore, the comparative analysis of the laws of different scope of application (national, international, regional) is of utmost importance.

Below is the comparative analysis study of the above legal regimes.

5.3.THE EXTENT OF CONSISTENCY AND COMPLETENESS OF BOTSWANA ELECTRONIC COMMUNICATIONS TRANSACTIONS ACT (ECTA) COMPARED TO THE UNCITRAL MODEL LAWS ON E-COMMERCE AND ELECTRONIC SIGNATURE (MLEC & MLES) AND THE SADC MODEL LAW ON E-COMMERCE.

The laws will be scrutinized together to assess their sufficiency through their scope of application and interpretation as given to them in each law. This will help bring out a better understanding and application of different legal aspects of e-commerce as incorporated in the laws above. The Legal aspects such as data message, electronic communication, electronic signature, writing and admissibility in courts and weight of evidence granted to electronic documents in court will be explored and compared as defined in each model.

Data message definition is one of the prominent keys that unlock an analysis of the sufficiency and completeness of any e-commerce law. This definition is meant to outline the scope of application of the laws and would enable one to establish as to what extent the laws under review applies within the context of the electronic communications and practices *en masse* and what could have been left uncovered in such a regime.

Under the MLEC, Data messages has been given a broad definition to include: *information generated, sent received or stored by electronic, optical or similar means including, but not*

limited to electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. Conversely, the SADC model data message definition tend to be more comprehensive and a bit more extensive, as even though the definition has been adopted from the MLEC it has stretched over to also cover, data stored by magnetic means, mobile communications and audio or video recordings.

What could be deduced from the above is that of course the SADC model emanates from the MLEC, but to meet the demands of the current practices in the region, the definition had to be drawn-out as wide as possible to cover what is currently happening on the ground bearing in mind the future development in technology. It is for this reason that we find the use of the words such as or ‘*similar means*’, ‘not limited to’, which aims further to broaden the scope of application of this law.

Unlike the MLEC, the SADC model law does not include the telefax, telegram or telecopy simply because the MLEC was enacted in the era when such modes were the prevailing electronic modes of the time. It would thus be unreasonable to expect these to be accounted for in any recent e-commerce law unless it would be reasonably believed that they will in the future return to practice.

This *genus* of electronic practices covered by SADC also, called for regulation as they were initially not regulated by any statute. They were not accepted as legally enforceable nor as admissible evidence before the courts, despite on the other hand technology advancement rapidly evolving. An example is the South African leading case of *Jafta v Ezemvelo KZN wildlife* where the questions: “what is an electronic communication” and “is a short message service (sms) an electronic communication” formed the subjects of dispute.²²² The court had to rely on the interpretation of MLEC 6(1), (as incorporated in to South Africa Electronic Transactions and Communication Act section 12,) for best practice, in order to qualify a short sent message service (sms) as valid and legally binding contract. This view became precedence to cases such as *Sihlali Mafika v South African broadcasting*.²²³

The disputes of this kind have been common in the region which despite the above provision in the MLEC, would have been better off addressed through unequivocal, consistent provisions in

²²² See *Jafta v Ezemelo KZN Wildlife* 2008 10 BLLR 954

²²³ See *Sihlali Mafika v. South Africa Broadcasting corporation Ltd* 2010 5 BLLR

order to also curb any non-uniformity in application and interpretation. SADC model therefore has gone this extra mile. According to their definition of data message even the contracts concluded through an SMS are now regulated. This indeed shows a determination to enable and encourage the electronic practices in the region. Further evidence that the SADC model was created to meet the current trading practices in the SADC region is shown by Botswana fully adopting the SADC model laws definition of Data message, into their ECTA not that of the model law despite the MLEC being the mother law for all e-commerce laws.

Conversely, it does not mean that the SADC members are bound to adopt the model law word by word it will be a case by case issue, determinant on the needs of a particular individual jurisdiction, it would not be wrong to find other jurisdiction in the SADC region having not adopted this definition, but rather using the MLEC one, as each country has a discretion to incorporate what they deem necessary to govern their own practices. However, what may negatively result from this could be issues of *lex mercatoria* in terms of enforcement.²²⁴

The SADC model goes on to the define an electronic transaction and an electronic communication, the latter has been explained to mean a “*transaction, action or set of actions of either a commercial or non-commercial nature*”, and it includes the provision for information or government services, while the former means a communication made by means of data message. Botswana ECTA has in whole adopted the above definitions, save for electronic communications which though it matches with that of SADC it looks a bit extended.

The two definitions above are in no doubt comprehensive though they left a lacuna for the transactions that are partially electronic and paper based. Some would argue that it is wrong to totally ignore that transformation in to full digital world moves in stages, paper should not be completely ignored at this point, while on the other hand it could also be argued that this evidences acknowledgement that electronic commerce is no longer a precision but a reality.

On an account of the MLEC, however, the provisions above have not been accounted for, and a loop hole in the MLEC is that unlike the SADC model law and ECTA they have not made any provision for non-commercial matters MLEC is only intended to cover the commercial

²²⁴ See chapter 2 of this study.

matters.²²⁵ It should be appreciated that the approach adopted in the SADC model and ECTA is a good one, as it would enable them to entirely regulate the practices electronic world as a whole under one roof. It could be believed however that had the scope under the MLEC be extended to non-commercial practices, it would have encouraged the whole world to extend it in the same way, hence make it easier to create uniformity and harmony in regulating all electronic practices in the world at large. Also, may contribute to gaining public confidence on digital practices. Consequently, it should not be forgotten that the UNCITRAL working group's scope of work principally lies within the borders of trade and trade related matters only. That being said it is apparent that the ECTA and SADC model laws are a bit broader than the MLEC definitions, and not prescriptive or restrictive, which should only be acknowledged as a good initiative.

The more fundamental issues of e-commerce being, the principles of non-discrimination and functional equivalence, will be discussed below taking in to account the traditional contractual requirements such as written, and signature.

These are the keystones all e-commerce laws, they are the factors or rather the tools that facilitate legal recognition of electronic records, they thrived in smoothing e-commerce practices universally by having advocated for legal recognition and acceptance as well as equal treatment of digital documents and transactions to paper based.

Non -Discrimination Principle

This is the core principle of electronic commerce regulation, and it serves to alleviate the harsh applications of traditional contract formations requirement on the electronic records, which tends to deter their use rather than encourage them. The requirements such as writing, signature, and admissibility as evidence, have for a long time been stumbling blocks for development in this field. Therefore, this principle seeks to eliminate any disparity in treatment between paper based and electronic based documents, mainly based on the form, or the presentation format of such documents.

²²⁵ See a guide to the model law on e-commerce Para 25

Article 5 and 5bis of MLEC provides that “information should not be denied legal effect, validity or enforcement solely on the grounds that it is in the form of a data message, or that it is not contained in a data message purporting to give rise to such legal effect”.²²⁶

The textual interpretation of these clauses read collectively could be that the electronic communications should not be discriminated against or be given a prejudicial treatment as compared to paper based modes, based on their form of presentation (being digital), These clauses could in other words be jointly named a non-discrimination clause. However it should be noted that this clause does not provide any other phrase or provision that could be interpreted to have an effect of conferring any legal validity and enforceability to the electronic records, the clauses simply seek to eliminate any kind of discrimination based on the form of the document. This view will become clearer as we proceed with the legal analysis of this principle below.

Non-Discrimination Based on the ‘Writing’ Requirement

Article 6 of MLEC provides that the written requirement is met by data message if the information contained therein is accessible for subsequent reference, further this shall apply, even if a written requirement is an obligation, or simply a law providing consequences for the information not being in writing. This requirement is abstruse for interpretation more especially that in interpretation regard may have to be heard to the natural morale behind the written requirement in relation to the paper based modes in the first place.

The whole list of non-exhaustive underlying functions of written requirement in a paper based document are set to fulfill such as reliability, traceability and inalterability have to be taken in to account. To this effect, it could be presumed that the working group on e-commerce by initially proposing that the digitally written records be given a functional equivalence and not be discriminated against based on the form of presentment, had already tested the waters. They should have reasonably deduced that though the form of presentation of digital records would not be physical, the digital records are able to fulfill if not all but the (prominent) functions of written requirement, hence worthy to be awarded an equal functional recognition as manual written documents. However, what should also not be forgotten is that writing requirement alone, cannot

²²⁶ See article 5 of the model law on e-commerce

give a document legal validity or admissibility, the working group in fact consider writing requirement to be in the lower rank of hierarchy²²⁷ in the contractual requirements, as it does not really give a record or a traditional document, much of evidential weight as other requirements such as consensus, which can only be fulfilled by a signature as will be discussed below.

Despite such good initiatives by the working group, with the aim to enhance acceptability of model laws,²²⁸ left the exclusions to this Article for the states, giving them leverage to include and exclude as they deem fit, according to their individual country by country basis trade practices and needs. Well, as a comment to this the researcher would want to argue that this approach is inconsistent to the mandates of the MLEC, which is to create the uniformity, and harmony in the electronic trading. Even in the region if a provision such as the above could have been left for the individual members surely there will chaos.

All the above have been wholly adopted by SADC and ECTA, the disparities lies in the scope of applicability, for instance the exclusions under the SADC model laws are alienation of immovable property, long term lease contracts, execution of wills, codicil, bills of exchange and others that may be prescribed by the minister, while the ECTA's exclusions are execution of a will, declaration of power of attorney, immovable property contract of sale or conveyance. This is not surprising as every jurisdiction would want to cover what they deem necessary influenced by their practical experiences and the difficulties they encounter when dealing with digital documents, but also it raises questions of inconsistencies in application as highlighted above, and does not eliminate the problems of *lex-mercatoria*.²²⁹ If for example the electronic bills of exchange (BOE) are allowed in Botswana and not allowed in the SADC model as is the case, which rules would apply to international trade disputes where an electronic BOE is in dispute between Botswana and any other country that adopted SADC model approach? This clause could also be said to be prohibitive, and contrary to the objectives of the MLEC as it closes room for digital transformation of BOE considering that, it is one of the commonly used payment instrument in international trade. The clause tends not to encourage digital commercial transactions but rather the contrary. The jurisdictions such as Botswana where the paper cheque handling for instance are in the processes of elimination from the market, shows that, they wish

²²⁷ Ibid

²²⁸ Paragraph 52 guide to the model law on e-commerce

²²⁹ See Chapter 2 of the research, Evolution and Legal Nature of Letter of credit.

to step fully in to the digital world trade, even the drafting of their laws attest to this, which shows that they were enacted with future technological developments and international commercial practices in mind not only considering domestic application of the laws and present needs.

Non –Discrimination Based On Signature

Non-discrimination principle has also been extended to the signature requirement under article 7 of the MLEC and it has been one of the contentious issues in electronic trade for a very long time. The Article recognizes the functions of a signature on the paper based model, extending them to the electronic signature modes, thus the e-signature shall be able to fulfill these functions in order to be accepted as a legally binding signature.²³⁰ Some of the apparent functions include; identifying the signatory, to provide certainty as to the personal involvement of such signatory in the signing act, to associate the signatory with the contents of such document and most importantly to certify the intention to be bound by the contents of the document signed.²³¹ The UNICITRAL working group having realized the some lacunas under Article 7 of the MLEC came up with the Model law on electronic signatures (MLEs), which provide clear and comprehensive provisions on the use of electronic signatures and their scope of application.

The MLEs started with the sphere of application of the law then the definition of an electronic signature, in order to lay down a foundation as to the scope within which the MLEs will operate. In this way it could be said that it is a way to promote legal recognition and acceptance, and confidence on the digital contracts.

MLEs however, only recognizes the electronic signatures used for commercial activities, the question that remains becomes how about electronic signature for the non -commercial transactions, this is one of the gaps left unfilled by the UNICITRAL. In addition, MLES gives the rule of law precedence where the law of state intends to protect the customers, which is a good approach. The people can only trust the electronic transactions if they know that their rights are protected. As to the definition of an electronic signature it is fairly broad, open for future use of technology not prescriptive.

²³⁰ See Article 7 of Model law on e-commerce

²³¹ See note 225

The MLES further provide a definition of who is a signatory, stating that a signatory is a person who personally signs and also a person who signs on behalf of the person it represents, but does not state whether such person should have the authority to sign or not, this too leaves a huge room of abuse of the electronic signatures, there is no protection mechanism attached to the use of electronic signature in this clause, any way as has been stated above it must be where national regulation kicks in.

Article 3, of MLEs promotes the non-discrimination principle but in this case, in relation to the electronic records, providing that nothing in the rules shall be applied to exclude, restrict or deprive legal effect any method of creating an electronic signature that satisfies the specified requirements in article 6 to be discussed below, in other words the electronic signatures should not be discriminated against solely because they are digital, should a digital signature be able to fulfill the specified criteria in Article 6 it should be recognized as a legally binding signature. These definitions have been adopted by the SADC Model and Botswana ECTA.

However, while in terms of the SADC model law, the contracting parties may use any method of electronic signature as they deem fit, provided they agree to use such a method, also the member state has a discretion to prescribe which signature should be recognized, through laying down of certain standards and licensing procedures that would regulate electronic signature creation and recognition, without excluding recognition of foreign secure electronic signatures. In terms of ECTA, concerning the same provision the minister may prescribe methods of accrediting products or services used to authenticate and recognize secure electronic signatures, however, they have recognized that every method used to authenticate shall be adherent to the international standards. ECTA also adopted a rebuttable presumption from the MLES that; where a secure electronic signature is or have been used, it shall be regarded as valid unless contrary proven. This simply means MLEs provisions here are broader than those of SADC model and the ECTA, however of importance is that; they all do not discriminate against foreign electronic signatures but allow them as is ostensive in all the laws, this surely is one way to promote regional and global electronic trading.

Article 6 is one of the meats of MLEs, which also could be referred to as the reliability criteria. It calls for legal recognition of an electronic signature provided electronic signature used is reliable as was appropriate for the purpose for which the data message was generated or communicated,

in the light of all circumstances, including any relevant agreement. This closes the gaps identified above under Article 7 of the MLEC. Paragraph three (3) of this article goes on to provide a criteria for reliability, by stating that signature creation is considered reliable if the signature creation data are within the context of which they are used, linked to the signatory and not to the other person, in other words it should have been used where is intended to be used by the signatory and him alone. The signature creation data should at the time of signing be under the control of the signatory, any alteration to the signature after signing should be detectable and the model laws emphasized that, it is not conclusive in this, thus, it does not limit the ability to establish reliability through other means.

The provisions above including the definition of electronic signatures, the non-discrimination principle, and the integrity criteria have been adopted in to the SADC model and the Botswana ECTA, under the heading secured signature.

The MLEC, SADC model and the ECTA all recognize the principle of party autonomy which gives the contracting parties a right to use any method of signing as they deem appropriate provided they have agreed to use it, however this will be determined by the scope of electronic signature as provided in the law applicable at that time. This provision is relevant as it instills confidence on the customers who uses the electronic trade; it gives them flexibility to establish their own rules in using electronic signatures through bilateral arrangements.

MLES further provides a protection mechanism, which sets out the obligations of the signing parties as a way to alleviate the chances of fraud and any abuse of electronic signatures by third parties in Article 8 to 11. These Articles basically seek to create an enforcement mechanism that may be used against the electronic signature which may fall outside the scope of the criteria set under the Model Law. This is not always common for the model laws, this clause is prescriptive, and also it limits the party autonomy principle above. In most cases the rights and obligations of the parties to a contract are left for bilateral arrangements such as a contract.

In addition, MLEs left the above clause incomplete in that, it does not prescribe the penalties that may be imposed on those who fail to abide by these rules, but rather they chose to leave it at that ‘the offenders will face legal consequences’. The only answer could be that the vacuum is left for the national laws to fill, which we all know would bring inconsistencies in application, from one jurisdiction to another.

However, these clauses too have been blindly adopted in to the SADC model under section 8 and ECTA section 28 to 31, under what they termed a secured electronic signature and recognition. The laws, unfortunately did not do anything about the arguments above, the laws also simply stated that failure to abide by the stated rules, the offender will face legal consequences though such consequences are not stated in the laws.

Secured electronic signature has been defined as a signature which is created and can be verified through the application of security procedure or combination of security procedures, that ensures that an electronic signature is unique to the signer for the purpose for which it is used, and can objectively be used to identify the owner, and all the other requirements mentioned could be met. The question that could be asked is what is the difference between an electronic signature and a secured electronic signature and which one of these is legally enforceable, as using them both in this manner tend to cause a *Confusion*.

Functional Equivalence Principle

Functional equivalence principle is another keystone embedded in the model laws which also seeks to neutralize the discriminative treatment against the digital records, based on the contract requirements functions of writing, originality and signature. This concept mainly argues that if it is proven that the electronic written records and electronic signature are capable of fulfilling the same functions as the manually written they should be given the same treatment. This principle also emphasizes an extension of non -discrimination principle above but here not based in the form but in the objective and the functions of a document.

Both the SADC model and the ECTA adopted both the functional equivalence approach and non-discrimination principle discussed above. This qualifies the above view that no e-commerce law could be established without being founded on these principles; they contribute largely to the completeness sufficiency of a law to regulate e-commerce.

Admissibility and Evidential Weight of Electronic Communications

Enablement of electronic records or communications would not be complete without having regard to the arguments raised by the courts against the electronic records. Most jurisdictions used to apply '*best evidence rule* 'which had an effect of denying the electronic records a legal

recognition, enforceability and admissibility as evidence in courts. This clause therefore serves to do away with such discrimination and finally clear the air on this aspect. The principle advocates for legal admissibility and acceptance of electronic records, that they should be given their due evidential weight.

It is in Article 9 of MLEC where this principle has been implanted, which provides that “*in legal proceedings no application of any a rule shall have an effect of denying data message admissibility as evidence in courts solely because it is in an electronic form.*”²³²

This provision too takes strength from the non-discrimination principle above. The article further provides criteria²³³ for assessing evidential weight of an electronic communication which includes; having regard to i) the reliability of the manner in which the data message was generated, stored, generated, stored or communicated. ii) The reliability of the manner in which integrity of the information was maintained. iii) The manner in which the originator was identified and iv) to any other relevant factor. This criteria is not in all comprehensive enough but it is broad enough to allow the individual states to tighten the clause in order to suit their individual national needs, which also could raise some inconsistencies in terms of application. Both SADC model law and Botswana ECTA have adopted these clauses.

Based on the comparative study above, it could be concluded that the Botswana ECTA, is fairly drafted, well sufficient and complete to regulate the e-trading sphere, as all the essential aspects have been taken in to account in drafting the Law. The laws definitely will be able to regulate the use of all electronic payments modes and e-LC included, as they have not been explicitly or by implication excluded as is the case with the SADC model. The Botswana ECTA, supported by other laws not discussed herein, such as Evidence and Records Act, Data protection and the others (currently under review) highly seeks to promote electronic trade hence will be complete and sufficient to successfully regulate the electronic trading practices.

²³² See Article 9 of the model law in e-commerce.

²³³ Ibid (Article 6-9)

5.4.CONCLUSION

Despite the critical arguments raised within this study, the objective of the research was to bring out the lacunas in the laws, which could surely be adequately filled through national legislation, not to taint any bad picture on the drafting of any law. The truth of the matter is that no model is ideal for this area; there will always be questions as the new developments in technology evolve, this is why it is imperative to rely on the best international practices.

The UNCITRAL model laws, enabling e-commerce, were in no doubt a good initiative and have achieved their purpose worldwide, this is evidenced by their rate of adoption in domestic laws and regional model laws as shown above.

When drafting the model law on e-commerce, SADC community borne in mind the international best practices in e-commerce which taught them that e-commerce can only flourish in the region if there is “an accessible, predictable, safe and transparent trading environment, operating across territorial borders and jurisdictions.”²³⁴ They understood and adopted the approach that; the laws should encourage rather than to deter the use of e-commerce and that, the laws should be technologically neutral to cater for the existing and the yet to come technological developments. Therefore in their model law, they addressed all the legal qualms of e-commerce such as evidentiary weight, obligations of the internet suppliers and of most importance, protection of e-commerce consumer rights. The rules for electronic transactions have clearly been defined and the definitions are neutral thanks to the non-discrimination principle and the doctrine of functional equivalence as have been adopted. The SADC model law sort therefore to enhance regional integration and it is said to have adopted best practices and collective efforts of member states addressing all the legal aspects of e-transactions and e-commerce. Though this model is only a guide not legally binding it seems to have been accepted by the community, those that are working on their drafts such as Malawi and Botswana have substantially adopted this model in to their domestic legal regimes.

However, it is worth to mention that in SADC , the main trend setters in region is South Africa They have battled a lot on this field trying to address e-commerce legal concerns and eventually after such a long struggle finally became successful. The laws of South Africa unlike many other in the region were harmonized some time ago and their Electronic Communications and

²³⁴ See the SADC model law on electronic communications and transactions ; The preamble

Transaction Act became effective in 2002, which makes it the eldest in the region. The legal regimes went through some serious legal scrutiny before both international and national courts of law which led to a lot of reviews in order to address the raised legal concerns, at the end they became a success. The South African e-commerce legislation, looking at their successes in the field could be classified as the best and therefore followed in the region, which is why even the SADC model law substantially resembles it.

Chapter 6

6.0.CONCLUSIONS AND RECOMMENDATIONS

6.1.RECAP OF THE RESEARCH PROBLEM

As emphasised in the introductory chapter, this study sort to analyse the legal implications of electronic letters of credit on cross-border trade. It purports to make an inquiry on the sufficiency and the completeness of the existing legal regimes governing electronic letters of credit to address the legal qualms raised by the advancement of technology on trading practices. Four objectives were set to guide this study, directed by the hypothesis that though the trading practices have been infiltrated by the Information Communication Technology developments, the challenges of uncertainties in regulation remain a downside risk.

6.2.SUMMARY OF FINDINGS

Chapter 2 looked at the genesis of letters of credit, and the legal nature, where different types of letters of credits, the documentation relative to the L.C, and the two legal principles of autonomy and the doctrine of strict compliance were explored. The findings revealed that a letter of credit has proven effective and reliable in practice, and has become the life blood of international trade. Due to the principles above the letters of credit balances the interests of all the parties involved and it reduces the payment risks as well as non-performance risks. Research has proven that, the L.C is the most trusted payment mode in international trade finance though it is expensive.

Chapter 3 looked at the legal recognition and acceptance of electronic letters of credit from the contemporary world. The findings revealed that, the electronic letters of credit are legally recognised and accepted as payment mechanisms and are governed by the UCP and its supplement (e-UCP). However, there are inhibiting factors emanating from common law requirements of contract formation, which tend to discriminate between the digital documents and the paper based documents. These have been inhibiting acceptance and legal recognition of digital documents and electronic payments as valid and legally enforceable, mostly based on their form. These are for instance the requirements that: a contract is valid and enforceable only if written and manually and that, it is acceptable as evidence in court if it is able to be presented in a paper based form. However, the findings revealed that the initiatives have been taken by the trading communities, including the UNCITRAL working group on trade, the International Chamber of Commerce and others which strive to eliminate all discriminations between the

paper-based documents and the electronic documents through the principles of functional equivalence and non-discrimination. Therefore these initiatives, which are the e-commerce laws from an international sphere were analysed to assess the extent to which they enable operation of electronic communications in general, which includes operation of electronic letters of credit. Further, the findings were that the legal hurdles have well been addressed; therefore, the electronic L.C is legally valid, accepted and recognised as a payment mechanism in international trade.

Chapter 4 sort to make an inquiry on the efficiency of electronic letter of credit as compared to other modes of payment used in international trade finance deals. The advantages and disadvantages of different payment methods in international trade finance were weighed against each other and the findings were that an electronic letter of credit is the best mode of payment. The study also harnessed case law which proved uncertainties in the legal regimes governing electronic communications and inconsistencies in their application by the courts. However it was acknowledged that such could not have any huge impact on the use of electronic letters of credit because the inherent legal issues have been well addressed by the UNCITRAL working group on trade, ICC, and other trade organizations.

Finally, chapter 5 which was the core chapter to this study, made an inquiry as to the completeness and sufficiency of the legal regimes of Botswana, to enable operation of the electronic letters of credit. The study was conducted through a comparative analysis approach, comparing Botswana drafts laws in e-commerce, with the SADC Model law and UNCITRAL models on e-commerce. The findings were that the Botswana e-legislation drafts so far, are complete because all the legal principles enabling electronic transactions have been taken in to account and are in line with the international best practice and international trade laws. The findings revealed also that the laws are more comprehensive and receptive to the current electronic documents as well as the upcoming developments in technology. The language and definitions in the laws are neutral and most importantly, Botswana laws protect the rights of the users of electronic transactions in general making the e-trading safe trading environment therefore the laws in the future will be serving as an example to other neighbouring countries that have not yet promulgated theirs.

6.3.CONCLUSIONS AND RECOMMENDATIONS

The study recommends that the adequate legal regimes that enable and encourage the use of electronic payments method such as electronic letters of credit, be put in place. The laws should be drafted in a comprehensive manner, where the underlying legal aspects are clearly defined, the laws further should be broad enough to cater for future developments in technology and they should not be too prescriptive or restrictive. The rights of the customers must be appreciated and therefore be protected. The cross-border electronic transactions should also be recognised and not discriminated against. Though there is no ideal model for regulation of the electronic communications, regard should be heard to the legal aspects enabling e-commerce, and the international best practice. The SADC states should adopt the e-commerce model laws in to their domestic legislation with carefulness and must take into account the guides to the Model Laws for better understanding. South Africa is an e-commerce regional trend setter in SADC a lot of good lessons could be drawn from their practices and their legal regimes. The laws should aim to promote and not deter the use of electronic communications, the paper biased language in the laws should be neutralised.