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# LETTERS OF CREDIT

The Law and Practice of Compliance

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EBENEZER ADODO

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OXFORD

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UNIVERSITY PRESS

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*For my son, Ehiremen*

## FOREWORD

I am flattered to be asked to write a foreword to this major work by Dr Ebenezer Adodo. I am far from well qualified to do so. It is true that when I was at the Bar I was involved in a number of cases involving the law relating to letters of credit and, indeed, involving the construction of commercial contracts. It is also true that I have had some familiarity with these problems as a judge, both at first instance and on appeal. I have not, however, had any personal experience of the practical problems which face commercial men (and women).

It has not of course been possible for me, before writing this foreword, to read every word of what, is on any view, a very substantial book, covering all or almost all of the issues that could arise in connection with the law and practice of letters of credit. In particular, it refers to many decided cases in the USA and elsewhere which I have never read. However, I will know where to find the relevant cases in the future and I have no doubt that the book will play a valuable role in a number of important respects. For example, it distinguishes between the many different descriptions of credit. It defines unconfirmed and confirmed credit, sight payment credit, deferred payment credit, acceptance credit, negotiation credit, clean credit, red clause credit, transferable credit, back-to-back credit, standby credit, and no doubt many others.

The book also distinguishes the differing roles of the parties to the credit process and contains an analysis of the rights and obligations of each of the relevant players, setting out in some detail the position of each in the case of fraud or alleged fraud, which is unfortunately not unknown in this area of commercial law. It even discusses the role of the law of negligence in this context and will be an invaluable aid, for example, to the construction of the detailed provisions in UCP 600. Throughout, Dr Adodo stresses the importance of approaching the various problems with commercial good sense—something with which I entirely agree—and focuses upon the practicalities involved.

All in all, I wish the book well and will be very surprised if this first edition is not followed by others.

Anthony Clarke,  
Lord Clarke of Stone-cum-Ebony,  
UK Supreme Court,  
October 2013

## PREFACE

This book deals with the requirements of compliance in letter of credit transactions from the perspective of Anglo-American common law systems. It provides a rigorous analysis of highly complex claims of non-compliance with instructions for the opening of a credit, a wide range of techniques for determining proper or non-conforming performance under an operative credit, effective ways of handling tendered faulty documents, and communicating rejection of the tender to the presenter. Appropriate principles and remedies primarily developed for negotiable instruments, international sale of goods contracts, and tort are identified and adapted to resolve thorny points that hitherto tend to prove insurmountable in letter of credit cases. An in-depth examination is made of an eclectic variety of choice of law issues arising when a presentee bank dishonours a set of documents regarded by the presenting beneficiary or nominated bank as constituting a complying presentation.

The topics treated lie at the heart of the practical workings of modern letters of credit; they comprise the most perplexing and litigation prone in credit operations. The book aims to represent an authoritative exposition of the mechanics of the law on the problem of compliance in this branch of the business world and is the first work of this magnitude to address itself exclusively to the matter through the eye of current international banking practice. The text offers a meticulous and penetrating discussion of clauses in the latest edition of the ICC's Uniform Customs and Practice for Documentary Credits, 2007 Revision (UCP 600) and an extensive critique of a large amount of US and English cases pertaining to the regularity of presentation documents under credits. Due consideration is accorded to earlier versions of the codified rules of practice reaching back to the maiden edition of 1933 (ICC Brochure No. 82).

The book also gives clear explanation of the key roles of the parties involved in letters of credit issued, confirmed, or advised to the beneficiary in the jurisdiction covered in order to aid understanding of the legal problems and principles examined. In the various contexts where the reader is likely to consider the law to be in disarray, significantly complicated and controversial, or at variance with the reasonable expectations of banking practice, the book advances a pragmatic commercial solution and provides guidance on the way a court or an arbitrator applying objectively ascertainable precepts underlying the UCP would justifiably dispose of the potential difficulty. It is hoped that the suggested position will enable prospective litigants with claims involving the problems treated in the work to decide whether to press for an out-of-court settlement file or defend a lawsuit.

The work adopts a user-friendly style to enhance its utility among its primary audience, including bankers, traders and their legal advisers, business policy makers such as the ICC's Banking Commission members around the world, and academics and commercial law students in higher education institutions. Throughout, special care has been exercised to meet, on the one hand, what the student would view as calling for detailed illumination in letter of credit transactions and, on the other hand, the unique needs of the busy practitioner.

The problems of compliance in letter of credit transactions with which the book is concerned are contractual in nature. The road to their solution demands application of the prevailing approach to the construction of commercial contracts. A common thread running through

this book is the treatment of the approach as entailing the ascertainment of the meaning which the contract arising out of the particular credit or the arrangements underlying the credit at issue would convey to a reasonable business person in the position of the parties at the time of conclusion of their bargain. In conducting the research on the various portions of the book, any factual material that would be relevant to the manner in which the reasonable business person would understand the language employed in the clauses of the credit or of the underlying contract, including the incorporated provisions of the UCP 600, receives preponderant weight. In a series of seminal Anglo-American pronouncements followed in the text, a great number of judges have gone to a lot of trouble to explain the importance to the business community of giving effect to the reasonably ascertainable meaning of contractual documents; in particular because doing so is apt to carry to proper execution the legitimate object of the contracting parties.

Notably, the terms of a credit or the incorporated provisions of the UCP are the product of hopelessly fallible minds; they cannot be more perfect and exact than those who draft them, nor provide for every possible contingency beyond the prescient prediction of the draftsman; moreover, an astute clairvoyant draftsman may not always be sagacious enough to guard against future disputes with adequate clauses. A given requirement or clause may thus, on the surface, often be found imprecise, deficient, or unsuited for the necessities of the credit device. Under the indicated approach embraced and applied all through this book, however, such apparent semantic infirmities are not permitted to interfere with unearthing the business meaning and effect which the parties as honest reasonable traders and bankers in the letter of credit world intended the stipulation to have. The law is stated in the light of decided cases and codified rules of banking practice pertaining to letters of credit on 2 January 2014.

Ebenezer Adodo  
Guildford, Surrey  
January 2014

## ACKNOWLEDGEMENTS

A number of individuals, organizations, institutions, and colleagues provided invaluable assistance during the preparation of this work. I must express my gratitude to them for their help. Lord Clarke has been relentless in advancing the idea embraced in the ensuing discussions that considerations of reasonable business sense govern the interpretation of clauses in commercial contracts, including contractual provisions arising from letters of credit, performance bonds, and other specialized bank devices oiling the wheels of international trade. I am thus deeply indebted to the judge for giving the forward.

Significant portions of this book were a long time in gestation. They originate substantially from the doctoral thesis I submitted to the Faculty of Law of the National University of Singapore in May 2011. I am grateful to the university and the Government of Singapore for the full scholarships and fellowship they granted me to undertake the research; to Emeritus Professor Peter Ellinger and Professor Tan Yock Lin for the painstaking supervision, inspiration, and mentorship I received under them; and to Professor Ademola Popoola for guiding my first foray into this stimulating slice of commercial law some two decades ago at the Obafemi Awolowo University, Ile-Ife. My external examiners, Professors Yeo Tiong Min of Singapore Management University School of Law, Paul Todd of Southampton Law School, and Eva Lominca of King's College London, deserve special thanks for their exceptionally prompt and immensely enlightening reports. Dean Simon Chesterman, Professors Stephen Girvin, Alan Tan, Adekunle Adeyeye, and Associate Professors Gary Bell and Dora Neo supported me every step of the way. I greatly benefited from the kindness, friendship, and resourcefulness of the administrative staff members of the NUS Law community. The vast array of collections at the CJ Koh Law Library eliminated the necessity of my having to scout around libraries located thousands of miles away in other common law jurisdictions for evergreen, but long out of print materials.

My colleagues at the University of Surrey were generous with their time and discussed many principles underlying the European Union Court of Justice's decisions on articles 3 and 4 of the Rome I Regulation. Unstinting words of encouragement and advice from Robert Jago, Professors David Allen, Indira Carr, and Ademun-Odeke provided a much needed uplift.

I had the exquisite pleasure of working on this project with my publisher, Oxford University Press. It was made possible mostly by the press's excellent commissioning team comprising Rachel Mullaly, along with Eleanor Reedy, Rachel Alban, Lucinda Yeates, and Faye Judges who came aboard at various stages, and the production unit. Only unlimited patience must have enabled them to put up with my perpetual request for revision of the timeframe for handing in the various chapters. Mullaly's enthusiasm remained undiminished from the time of my submission of the proposal for the work to delivery of the final manuscript. She doubtless belongs among the best commissioning editors any aspiring textbook author could hope to find in the publishing industry today. Without her distinguished professionalism and early confidence in me, this project would have died in infancy.

I was fortunate enough to have a very supportive son and a devoted wife, Geok Kheng. She and our house helper, Annie Cabida, ably stood in for me while I was away battling to avoid

yet another excuse for deviating from the delivery schedule I had put together with Eleanor and Lucinda of OUP. However, I agreed with her constant insistence that one should aim to keep a balance between scholarly pursuits and family commitments. A strong desire to achieve a laudable goal and, on the other hand, actual attainment of the goal, unfortunately carry different requirements; the former is easy to fulfil, but the latter often becomes increasingly elusive as one moves up the career ladder.

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| Henry Prince v Oriental Bank Corp (1878) 3 App Cas 325 . . . . .                                                                  | 11.40                    |
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| Hillas & Co Ltd v Arcos Ltd (1932) 147 LT 503 . . . . .                                                                           | 2.26, 2.24, 8.54, 10.100 |
| Hing Yip Fat Co Ltd v Daiwa Bank Ltd [1991] 2 HKLR 35 . . . . .                                                                   | 6.24, 6.37               |
| Hirji Mulji v Cheong Yue Steamship Co Ltd [1926] AC 497 . . . . .                                                                 | 8.03                     |
| Hodgson v Davies (1810) 2 Camp 530, 170 ER 1241 . . . . .                                                                         | 8.60                     |
| Holland Colombo Trading Society Ltd [1954] 2 Lloyd's Rep 45 . . . . .                                                             | 7.49, 7.53               |
| Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2004] 1 AC 715 . . . . .                                               | 7.100, 7.102             |
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| Industrie Chimiche Italia Centrale SPA v Nea Ninemia Shipping Co SA [1983] 1 Lloyd's<br>Rep 310 . . . . .                         | 3.56                     |
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