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COMMENTS

BANK OF COCHIN LTD. V. MANUFACTURERS HANOVER TRUST: "QUASI-STRICT" COMPLIANCE OF DOCUMENTS, ISSUER'S "SUPERVISORY CURE," AND "REASONABLE DELAY" UNDER LETTERS OF CREDIT

I. INTRODUCTION

The Bank of Cochin, Ltd. (Cochin) (issuing bank) sued Manufacturers Hanover Trust Company[1] (MHT) (confirming bank) because MHT honored drafts totalling $796,603.50 under a letter of credit, alleging that the accompanying documents did not conform to the letter of credit which required, *inter alia*, six copies of signed invoices (five were presented) and an advice of insurance referring to covernote 429711 (the advice referred to 4291).[2] Further, the draft named "St. Lucia Enterprises" as the payee and not the beneficiary, St. Lucia Enterprises, Ltd.[3] As is quite often the case, the charge of wrongful honor was made because the beneficiary and the money are gone. The goods were never sent; all of the documents presented to MHT were fraudulent. As the district court said, it "must decide whose shoulders will bear the scam."[4]

The United States District Court for the Southern District of New York on cross motions, granted MHT's motion for summary judgment,[5] *holding*: The missing sixth invoice was a "deviation" not a defect, being a type of "variance" that could not mislead the paying bank to its detriment and thus did not violate the rule that documents must strictly conform to a letter of credit.[6] Further, while the mis-numbering and the inaccurate payee of the draft were defects, not "complying" with the letter of credit's "condi-

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1. 612 F. Supp. 1533 (S.D.N.Y. 1985), *aff'd*, 808 F.2d 209 (2d Cir. 1986).

2. *Cochin*, 612 F. Supp. at 1535. The credit as finally amended required the following: sight drafts; six copies of signed invoices; a set of clean, shipped, on-board bills of lading; a west European origin certificate; an analysis certificate; shipment from a west European port to Bombay; a maritime insurance certificate (covernote 429711); a packing list in triplicate; a set of non-negotiable documents to be sent to the customer; a confirming cable; Lloyd's or the shipping company's certificate that the carrying ship was first class or approved non-Pakistani; the beneficiary's certificate of compliance with the letter of credit terms; shipment by May 31, 1980; and June 15, 1980 expiration. *Id.*; Joint Appendix to Briefs of Parties at A-28 to A-34, Bank of Cochin, Ltd. v. Manufacturers Hanover Trust Co., 808 F.2d 209 (2d Cir. 1986).

3. *Cochin*, 612 F. Supp. at 1535.

4. *Id.* at 1534.

5. *Id.* at 1533.

6. *Id.* at 1541.

tions,"[7] Cochin was estopped from "claiming wrongful honor because of its failure to comply with the explicit notice and affirmative obligation provisions of the U.C.P. and its implicit duty to promptly cure discoverable defects in MHT's confirming advices to St. Lucia."[8] That MHT was not harmed by Cochin's failure was seen to be immaterial because Cochin ignored financial custom and expectations, and its acts were "at odds with the basic letter of credit tenet that banks deal in documents, not in goods . . . [and its acts] [d]efeat the letter of credit's function of being a swift, fluid and reliable financing device."[9] The United States Court of Appeals for the Second Circuit on review of the Bank of Cochin's appeal affirmed the district court's judgment, holding: Cochin was estopped from asserting the documentary defects because it delayed in specifying the defects. Further, "Cochin's two-week delay in notifying MHT of its intent to return the documents preclude[d the] suit." *Bank of Cochin, Ltd. v. Manufacturers Hanover Trust Co.*, 808 F.2d 209, 213 (2d Cir. 1986).

While this Comment addresses issues concerning how best to satisfy the commercial needs of the parties under letter of credit arrangements, it is important to keep in mind the threat to the letter of credit devise posed by sophisticated fraud by beneficiaries like St. Lucia. Strict compliance and independence will not protect the buyer who finds himself dealing with a con man. The mechanistic approach to a bank's duty under letters of credit is viable only if the documents represent goods. Where no one can be sure of documents, they cannot serve as the basis for commercial transactions. The parties will find themselves back with the necessity of face-to-face dealing.[10]

This Comment outlines the basis of the concept of requiring strict compliance of documents presented under a letter of credit coupled with the practical necessity of complete independence of letter of credit liability and duty from commercial forces. The Comment goes on to identify the complimentary body of law protecting the parties associated with a letter of credit, then analyzes the district court and Second Circuit *Cochin* decisions, concluding that their analysis is unnecessary, misguided, and potentially dam-

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7. *Id.* at 1540, 1541.

8. *Id.* at 1542.

9. *Id.* at 1543.

10. *See infra* Part II B. The increasing sophistication of electronic money and information transfer systems may provide an answer to the paper problem.

aging to the commercial viability of the letter of credit device.

II. Historical Basis of Strict Compliance

A. *Dawson Partners*

In 1927 Lord, then Viscount, Sumner said: "There is no room for documents which are almost the same, or which will do just as well."[11] The next sentences are equally important:

> Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk. The documents tendered were not exactly the documents which the defendants had promised to take up, and *prima facie* they were right in refusing to take them.[12]

Dawson Partners had bought 3000 kilos of vanilla beans for £8,300. The contract with the seller required that it establish a letter of credit in favor of the seller as beneficiary. The credit, as amended, required that drafts be accompanied by, *inter alia*, a quality certificate issued by "experts who are sworn brokers."[13] The requirement, transmitted by the issuing bank to the beneficiary, was translated from code as an "expert who is a sworn broker."[14] The beneficiary in the course of his fraud, presented one broker's certificate, not the two required by the credit. The issuing bank negotiated and paid the draft as presented with the non-conforming document. Dawson Partners refused to accept the documents. The issuing bank sued.[15] After dealing with an agency question the House of Lords dismissed the issuing bank's appeal. Lord Atkinson characterized the bank's argument in his opinion as follows:

> It is suggested . . . that this conduct of [Dawson Partners] was rather grasping, inconsiderate and ungenerous. I express no

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11. Equitable Trust Co. v. Dawson Partners, Ltd., 27 Lloyd's List L.R. 49, 52 (H.L. 1927).

12. *Id.*

13. *Id.* at 49.

14. *Id.*

15. *Id.*

> opinion on that point; it may be so, but I do venture to express a confident opinion that [its] action was legally justifiable, and that is the business of Courts of law . . . to enforce legal rights . . . [The bank's argument that Dawson partners should have consented to one instead of two experts is unavailing, it] never consented . . . [it was] not under any obligation to do so.[16]

Both members of the House of Lords, while discussing the commercial transaction, motivation, and the business basis for the credit term, refused to go behind the clear requirement of the letter of credit. Dawson Partners, however picayune, intransigent, and ungentlemanly, engaged the bank to obtain the certificate of two experts. Absent legal excuse, an issuing bank must fulfill its ministerial function or suffer the legal consequences.

B. Commercial Context

Dawson Partners while taking a highly mechanistic, formalistic approach was not acting in a vacuum. To the contrary, its insistence on extreme independence of the bank's duty from the commercial setting facilitated "the letter of credit's function of being a swift, fluid and reliable financing device."[17]

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16. *Id.* at 55.

17. *Cochin*, 612 F. Supp. at 1543. Some commentators and courts, including, apparently, the *Cochin* district court, see different relationships needing different rules for compliance and independence. They would look at the rights and liabilities between a customer and issuing bank differently than they would view the relation between an issuing bank and a confirming bank, and again differently, where the dispute arises without the presence of a confirming bank, between an issuing bank and a beneficiary. *See infra* note 43 and sources cited therein. This Comment rejects a situational approach to letter of credit law and instead recommends use of the view set forth in *Dawson Partners*, 27 Lloyd's List L.R. 49 (H.L. 1927) and amplified by the commentators following. Harfield finds the rule of strict conformity to be inevitable from the point of view of the customer, issuing bank, confirming bank, and the beneficiary. Harfield, *Who Does What to Whom: The Letter-of-Credit Mechanism*, 17 U.C.C. L.J. 291, 295-96 (1985)("[T]he cardinal rules, when analyzed, [are] based upon plain common sense."); L. SARNA, LETTERS OF CREDIT, THE LAW AND CURRENT PRACTICE 79 (2d ed. 1986)[hereinafter L. SARNA]("The banker is neither a lawyer nor a merchant and cannot be expected to make commercial judgments on the effect of documents submitted on the basis of information or knowledge extraneous to the documents." The book deals with letters of credit in an international context but is written by a Canadian author and highlights Canadian statutes and cases.); Note, *Confirming Bank Liability in Letter of Credit Transactions: Whose Bank is it Anyway?*, 51 FORDHAM L. REV. 1219, 1223 (1983)("Letters of credit derive their primary utility from the principle that an issuer's duty to pay the beneficiary is entirely independent of the other two contracts comprising the letter of credit transaction."). Discussion of a case or concept in this Comment may, in context, refer to only one of the relationships within the overall letter of credit transaction. The rule derived should be applied to all of the other relationships.

There are two independent "financing" functions fulfilled by the letter of credit. Neither can take place without certainty of process and result. Both are symbiotic, gaining vitality from each other.

1. The Payment Device

The letter of credit replaces the necessity of face-to-face exchange of goods and money, by exchanging documents of title for money through the neutral offices of a bank or banks. The buyer in a long distance purchase needs to be assured that he will get the goods. Absent receipt he is unwilling to part with payment. The seller conversely, will not give up the goods without assurance that the money is forthcoming. The bank steps into a unique position. It takes the "token" representing the goods and gives the payment, in effect, simultaneously.[18]

2. The Credit Device

Once people are willing to accept paper to represent goods, it is a short step to purchase of paper as having intrinsic value. "Negotiable Paper" is the "collateral" for the loan of money. The creditor is assured that the goods are available to satisfy the debt should the debtor default on his payment obligation. This credit function can occur at both ends of the long distance commercial transaction. The seller may "discount" the letter of credit obligation to a creditor to finance the manufacture of goods. The buyer may sell the goods "afloat," the proceeds going to pay off a line of credit used for the original purchase.[19] In short, letters of credit, where independent and subject to strict compliance analysis, assure "inexpensive" payment and financing for any type of transaction envisioned by the parties.[20]

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18. *See* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 708-10 (2d ed. 1980)[hereinafter J. WHITE](examples of the utility of the letter of credit as a payment device. Chapter 18 gives an overview of United States letter of credit law.)

19. *See* J. WHITE, *supra* note 18 (examples of the credit function).

20. Harfield, *The Increasing Domestic Use of the Letter of Credit*, 4 U.C.C. L.J. 251, 257 (1982).

C. *Historical Solution*

Both the payment and credit functions, as noted, are dependant on certainty.[21] Certainty is a result only when the rules are few, simple, and independent of all other rules and relationships.[22] Only where the bank is barred from considering any factor other than paper presented, and then, only where it may, by rote, compare the paper to the terms of the credit for conformance can certainty of process and thus of result be ensured.

The buyer wants the goods. In addition, he wants goods that meet the description and quality he contracted for. To this end, he requires that certain documents be presented with the draft.[23] Where the buyer cannot resell a product made in part from material, for example, from Cuba,[24] he requires a shipment from another country. Within the unique context of the letter of credit he uses a certificate of origin requiring origin in another country. One might think that the law's condonation of such provincialism should not be countenanced. What if only material of a certain grade, type, or quality will do for the intended application or sale? Further, what if the only country that can supply the grade needed is the same country named in the certificate? The letter of credit's independence and the strict compliance standard of document presentation obviate the questions. "The right to enforce express terms, *without reference to equities*, has long been recognized in letter-of-credit law, and is essential to proper functioning of the letter-of-credit devise."[25] Only the buyer may know why he requires the certificate. Where the bank and then a court second guesses the buyer, certainty is destroyed. The buyer cannot get what he wants by using the letter of credit.[26] He wants no inquiry into *why*, and he wants administrative simplicity to reduce his cost

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21. B. KOZOLCHYK, COMMERCIAL LETTERS OF CREDIT IN THE AMERICAS 416 (1966)[hereinafter B. KOZOLCHYK].

22. Rubenstein, *The Issuer's Rights and Obligations Under a Letter of Credit*, 17 U.C.C. L.J. 129, 143-44 (1984)[hereinafter Rubenstein].

23. Rubenstein, *supra* note 22, at 130.

24. The United States will not accept goods originating in Cuba.

25. Harfield, *Code, Customs and Conscience in Letter-of-Credit Law*, 4 U.C.C. L.J. 7, 14 (1971)[hereinafter *Code, Customs*] (emphasis added). The author preceded the quoted sentence with more colorful language: "A court of equity may properly be mindful of the question: . . . 'whoso hath this world's good, and see his brother have need, and shutteth up his bowels of compassion from him, how dwelleth the love of God in him?' [1 *John* 3:17]. Commercial cases require quite different considerations; it is not appropriate for a court of law to open its bowels of compassion in the marketplace." *Id.* at 13-14.

26. *Cf.* L. SARNA, *supra* note 17, at 73-80 (discussion of strict compliance).

of obtaining goods.[27] When courts search behind the document, forcing the buyer to commercially justify the "condition" as "material" or "essential," there is no utility left.[28]

This dilemma is not confined to the buyer. Where the bank can dishonor because the certificate of inspection, while facially complying, is predicated on an inadequate sample—in the buyer's or bank's opinion—the seller's faith in the letter of credit device is reduced. Where the seller seeks to discount the letter of credit to pay for materials, the creditor calculates the discount based on the certainty of the collateral, the bank's obligation to pay on proper presentment, and the time-value of the extension of credit until collection under the terms of the credit. Thus, the cost of credit is directly tied to the certainty of collection on time. Where certainty is lessened and time is lengthened, the risk and thus the discount increases. The next time the seller seeks to peddle his "paper" letter of credit, if he himself has not abandoned its promise, the creditor, if he will discount at all, will charge more dearly. The buyer pays more because of the increased credit cost and gets less. No one is served.[29]

Independence and strict compliance as embodied in the letter of credit are one of law's few working examples of viable "bright line" rules.[30] In the typical letter of credit transaction the results of the bright line strict compliance rule are neither over- nor under-inclusive. All of the involved parties get certainty and eco-

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27. Justice, *Letters of Credit: Expectations and Frustrations, Part I*, 94 BANKING L.J. 424, 427-30 (1977)[hereinafter Justice I]; Justice, *Letters of Credit: Expectations and Frustrations, Part II*, 94 BANKING L.J. 493, 505-07 (1977)[hereinafter Justice II].

28. L. SARNA, *supra* note 17, at 76 ("Once the credit is in place, the issuer cannot substitute its own judgment as to what the documentary requirements or content of the credit should be." The same must hold true of a court.). *Cf.* Megrah, *Risk Aspects of the Irrevocable Documentary Credit*, 24 ARIZ. L. REV. 255, 258, 265-66 (1982). Megrah does not subscribe to this Comment's view of the absolute sanctity of strict compliance, but does recognize that interpretation of what is a "trifling" discrepancy creates difficulty for all concerned and great insecurity for the customer.

29. Justice I, *supra* note 27, at 429-30; Justice II, *supra* note 27, at 505-07.

30. In speaking of independence and strict compliance, Harfield characterizes them as doctrinal versus dogmatic and considers their maintenance as rules essential:

> In a number of cases, courts have refused, explicitly or implicitly on equitable grounds, to apply the rule . . . . Such decisions are generally found at the trial level, and the vast majority are reversed or repudiated on appeal. They remain, nevertheless, exceptions that endanger and may well erode the rule unless the reason for the rule is understood . . . . [T]he rule of strict construction is pragmatic rather than formal and is, when understood, a rule of equity as well as of law.

Harfield, *Identity Crises in Letter of Credit Law*, 24 ARIZ. L. REV. 239, 240 (1982).

nomic and administrative efficiency. Where the bright line bumps against justice, established corollary bodies of law tailor the results to gain fairness.

D. Legal "Equity"

It is normally not necessary to go behind the terms of the letter of credit, looking to the expectations of the parties, to do justice, in the individual case. The historical legal concepts of contract construction, consent, estoppel, waiver, and developed letter of credit and banking law and practice serve to tailor the parties' duties and liabilities to reach the "right" result.

1. Duty of Clarity

Where the customer or issuing bank has not stated what it wants so that the beneficiary or presenting bank (or in more realistic terms, the court hearing the suit) can determine what should be complied with, many courts and commentators have said that there is no duty of strict compliance, it being a logical impossibility.[31] Some of these courts see this as a corollary to the rule of strict compliance.

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31. Jean Stoufflet cites to both Lebanese and Commercial Court of Brussels' decisions for the proposition that the customer must explicitly request a document for there to be occasion to strictly construe what is submitted by the beneficiary. Stoufflet, *Payment and Transfer in Documentary Letters of Credit: Interaction Between the French General Law of Obligations and the Uniform Customs and Practice*, 24 ARIZ. L. REV. 267, 269-76 (1982); L. SARNA, *supra* note 16, at 78 ("If the instructions given by the customer to the issuer as to the documents to be tendered are ambiguous or capable of covering more than one kind of document, the issuer is not in breach of his duty if he acts upon a reasonable meaning of the ambiguous expression or accepts any kind of document which fairly falls within the wide description used."). The Uniform Customs and Practices for Documentary Credits recognizes the problem of ambiguity in the terms of a credit by creating interstitial definitions of common documents and of terms found in documents and credits in Articles 14-33 (1974 revision)(Articles 22-42 in the 1983 Revision). International Chamber of Commerce Publication No. 290 (1974), No. 400 (1983)[hereinafter U.C.P., U.C.P. 1974, or U.C.P. 1983, as appropriate]. The U.C.P., like the U.C.C., acts only in the absence of specific agreement by the parties to the letter of credit. It differs from the U.C.C. in most jurisdictions in the United States in that where adopted by the parties, it governs where it conflicts with a U.C.C. provision. *See, e.g.*, United States Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 360 N.E.2d 943, 392 N.Y.S.2d 265 (1976). Lord Shaw, in quoting Channel, J., stated, "where a person makes a communication [ambiguously] he cannot . . . complain if the recipient . . . puts upon it a meaning not intended . . . provided [the meaning is reasonable]." Equitable Trust Co. v. Dawson Partners, Ltd. 27 Lloyd's List L.R. 48, 58 (H.L. 1927 (Lord Shaw) (quoting Miles v. Haalehurst, 12 Com. Cas. 83, 87 (Channel, J.)).

2. Contract Analogue

An unclear credit term is ambiguous, and thus susceptible to legal interpretation, and if necessary, extrinsic evidence to determine intent. Properly articulated and applied, this process could be termed "substantial compliance." Here, commercial meaning, practice, and custom are relevant.[32] Where the customer has not clearly phrased the credit, the issuing or confirming bank involved in examination must use common sense applicable to commercial transaction. A reviewing court will apply the same common sense in hindsight, as informed by evidence of commercial practice and custom.[33]

3. Waiver and Estoppel

Where documents do not conform and the terms are clear, but the issuing bank or the customer acts or speaks so as to allow the objective conclusion that it considers the deviation immaterial, waiver and estoppel rules operate to "modify" the credit.[34]

4. Consent: In Practice and In Statute

The "problems" generated by strict compliance evidence themselves in the marginal case. For example, the customer in his capacity as buyer, because of a downturn in the market cannot use any of the goods, whether they conform or not, the beneficiary never intended to be a seller, shipping nothing, rags instead of boxing gloves,[35] or sticks instead of Java vanilla beans.[36]

In daily practice, banks talk to their customers and beneficiaries. Where there are five copies of a document, instead of six as required, the bank will ask for the sixth or ask the customer if he

32. H.C. GUTTERIDGE & M. MEGRAH, THE LAW OF BANKERS' COMMERCIAL CREDITS 90 (1979)[hereinafter H.C. GUTTERIDGE].

33. *See supra* note 31.

34. U.C.P. art. 8 (1974), and U.C.P. art. 16 (1983) operate this way. An issuing bank must advise of its objection to the documents to preserve its rejection. Its silence or slowness estops or waives non-conformity because the confirming bank and beneficiary are presumed to be acting in good faith reliance on the conformity of the documents. The cure mechanism cannot work if the defect is not communicated. *See infra* note 71.

35. United States Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 360 N.E.2d 943, 392 N.Y.C.2d 265 (1976).

36. *Dawson Partners*, 27 Lloyd's List L.R. at 49.

minds only getting five.[37]

The U.C.C. has formalized the bank's custom of gaining consent in sections 2-323 and 5-113. While there is considerable controversy as to whether the granting of an indemnity to the issuing bank by the presenting bank for non-conforming documents works, as currently outlined in case law and Article 5, the mechanism, subject to revision by adjudication and statutory reform, is viable.[38]

5. Negotiable Paper

Articles 3, 4, and 7 of the U.C.C., while superceded when Article 5 treats an issue, are applicable where appropriate.[39] The draft with supporting documents can be negotiable and subject to Article 3. Banks' dealings with each other and their customers (the letter of credit's customer and beneficiary) are governed by Article 4. Articles 7 and 9 can also apply to specific issues arising under a letter of credit.

Understanding Harfield's observation[40] on the rules of strict compliance and independence as functional equity devices is crucial to proper adjudication of letter of credit disputes. He echoes Lord Sumner's practical approach:[41] a bank that knows nothing of

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37. L. SARNA, *supra* note 17, at 72. Communication among banks, customers, and beneficiaries is the rule rather than the exception. Banking officials take the view that they work *for* their client. While the bank may have the privilege to act unilaterally, it does not, in practice, use it. Telephone interview with Fernando Garcia, Chief of Operations, International Department, Republic National Bank, Miami, Florida (Nov. 11, 1986).

38. H.C. GUTTERIDGE, *supra* note 32, at 151-57 (The most controversial aspects of the giving of indemnity are the issues as to whether acceptance is mandatory and whether the customer is bound and protected. Other sources on these issues are reported in the notes to the cited text).

39. Article 5 of the U.C.C. states,

> § 5-111. Warranties on Transfer and Presentment
>
> (1) Unless otherwise agreed the beneficiary by transferring or presenting a documentary draft or demand for payment warrants to all interested parties that the necessary conditions of the credit have been complied with. This is in addition to any warranties arising under Articles 3, 4, 7 and 8.
>
> (2) Unless otherwise agreed, a negotiating, advising, confirming, collecting or issuing bank presenting or transferring a draft or demand for payment under a credit warrants only the matters warranted by a collecting bank under Article 4 and any such bank transferring a document warrants only the matters warranted by an intermediary under Articles 7 and 8.

U.C.C. § 5-111 (1978).

40. *Supra* note 30.

41. *Supra* note 11 and accompanying text.

the transaction cannot judge the equity of a credit's terms. This separation of function precludes second guessing and is grounded in common sense. Banks understand banking, not the myriad of commercial relations that are facilitated by the letter of credit. Given a *duty* to judge what is good enough for the fee they charge, banks would protest.

Where the term is unclear, the rule, in common sense, changes. Now the customer, by ambiguity, has prevented the bank and the beneficiary from strictly complying with the terms of the letter of credit. The bank, barring the use of a coin toss, cannot remain independent from commercial reality. It must still act reasonably, within the commercial context, but it must be judged by a less strict standard. Contract principles and interstitial agreements and statutes, act at this level, only where the term of the credit is not susceptible to strict compliance, to guide the bank in its duty to act reasonably.

Compression of this two-step process is actually inequitable because it does not give the parties what they want—certainty by which they can order their relationships. *Ad hoc* justice can be necessary, but should never be a first choice. Where a court picks and chooses which terms are essential and material and worthy of strict compliance, as a first and only step it engages in adjudication without a rule, *ad hoc*. Accordingly the parties expectations, under this analysis, are only met where they match those of the court, in hindsight.

III. COCHIN ANALYSIS

A. *"Quasi-Strict" Compliance*

The district court begins its analysis by surveying New York law regarding a confirming bank's duty to require strict or only substantial compliance of documents under a letter of credit to prevail in a suit alleging wrongful honor instituted by an issuing bank.[42] The district court abstained from determining whether substantial compliance should be sufficient in a suit between an issuing bank and its customer. It apparently viewed the two relationships as potentially requiring separate rules.[43] This approach is

42. Bank of Cochin, Ltd. v. Manuf. Hanover Trust Co., 612 F. Supp. 1533, 1537-40 (S.D.N.Y. 1985), *aff'd*, 808 F.2d 209 (2d Cir. 1986).

43. Boris Kozolchyk, to an extent, agrees that there are two relationships requiring dif-

sound, if the district court's premise that there is a policy basis for separate treatment is accepted, as a court should not decide legal matters not implicated by the facts. Unfortunately, it *is* unsound because there is no practical or legal difference between the customer-issuing bank and issuing bank-confirming bank relationships regarding the issue of the necessity of strict compliance and independence of the bank's duty from the underlying transactions.[44]

As previously noted, the concept of strict compliance is one of law's few examples of a workable "bright-line" rule. The district court's bifurcation is based on what it sees as a need to give the issuing bank breathing room when its customer attempts to "avoid payment by objecting to inconsequential defects."[45] The choice of adjective is enlightening and will be highlighted again when the district court refers to terms *and* conditions[46] of a letter of credit, material discrepancy,[47] variances,[48] and deviations.[49]

The viability of strict compliance aside, there is no difference between a customer who seeks "inconsequential defects" and an issuing bank that asserts those same defects in its effort to find the confirming bank's honor to be wrongful. The district court reasoned that the facts of the case did not warrant a looser standard as MHT did not have to worry about Cochin's refusal to reimburse because the funds were already available in Cochin's account at

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ferent treatment by a court. B. KOZOLCHYK, *supra* note 21, at §§ 13.02, 19.01. He views the customer as being able to comb the presented documents for slight deviations to assert in court in a manner reminiscent of the expert defense attorney examining a pleading under the forms of action. He is wrong for several reasons. In a stable market the customer, on consultation, will waive the non-conformity if the deviation is minor and not adverse to his needs. In a falling market or where the goods, money, and beneficiary have disappeared, there is no greater equity found in favoring the issuing or confirming bank that agreed to the term, did not conform to the credit, as it had agreed to, and now wishes to wriggle out claiming that it "substantially complied." The bank should have given itself the breathing room it now wants when it undertook the credit. Culpability has no place in letter of credit law. A sense of fairness cries out when the customer "stiffs" a bank that acted in good faith in a falling market. The same sense of fairness is shaken when the beneficiary is gone with the goods and cash because the bank did not do what it said it would do. A rule, to be viable, must work in *each* marginal case. Because of the strong commercial basis for certainty, equity in its traditional usage cannot be used to favor the more innocent party. Requiring strict compliance by all parties, leavened with "legal equity," Part II(D), gives equity and retains certainty, stability, administrative and economic efficiency. *See Code, Customs, supra* note 25, at 13, 14, and *supra* note 17.

44. *See supra* notes 17, 43.

45. *Cochin*, 612 F. Supp. at 1539.

46. *Id.* at 1535.

47. *Id.* at 1540.

48. *Id.* at 1539, 1541.

49. *Id.* at 1541.

MHT.[50] A rule of law should not be based on the happenstance that the funds at stake are in the hands of the defendant. Issuing banks do not keep accounts with all potential confirming banks. Not all customers have the necessary funds on deposit with the issuing bank. The district court's logic would require the use of the substantial compliance standard in an action by a customer who had convinced the issuing bank to extend the letter of credit based on its promise to reimburse, often the case when there is an ongoing relationship, but indicates a strict compliance standard where the issuing bank has the customer's funds in an account. If either the customer or the issuing bank sues to recover funds based on wrongful honor, the rule is strict compliance. If either a confirming bank or the issuing bank sues its customer, to force reimbursement, the rule degenerates to a substantial compliance standard. The rule left open in the district court's opinion turns on who is suing whom. Thus, the only rationale given for a substantial compliance standard is unworkable.[51]

After settling on what it calls a strict compliance standard for MHT's action under the credit, the district court proceeded to apply what might be termed a "quasi-strict compliance" standard to the terms of the credit.[52] It only found those credit requirements that it deemed consequential and material to be defects requiring strict compliance.

The court determined that submission of an insurance covernote bearing the number 4291 instead of the correct number 429711 while possibly "immaterial on its face," under precedent was non-conforming.[53] The absence of "Ltd." from the payee's

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50. *Id.* at 1539.

51. It should be noted the district court did *not* adopt a situational strict/substantial compliance standard. It did imply that it might in the future. The Second Circuit based its affirmance on other grounds and refrained from discussing the advisability of adopting substantial compliance or situational standards. *Cochin*, 808 F.2d at 211. This avoidance, while proper, leaves the district court free, and apparently inclined, to adopt a situational standard in an appropriate case.

52. *Id.* at 1540-41.

53. *Id.* at 1540. The district court cites Beyene v. Irving Trust Co., 762 F.2d 4 (2d Cir. 1985) as authority for the proposition that "immaterial" or "inconsequential" mistakes in a document may be considered as complying with a credit's terms. The *Beyene* court did *not* hold that minor mistakes may be found to comply. It, as an aside, said that in "a case where [a] name intended [on a bill of lading] is unmistakably clear despite what is obviously a typographical error," *Id.* at 6, there might be grounds for a different result. It did hold that a bank's duty to honor a draft does not arise "unless the terms of the letter have been complied with strictly." *Id.* Thus, while the *Beyene* dicta is troubling, and given liberal construction is capable of being support for derogation of the strict compliance rule, it is not

name was termed a defect because "it is not clear that the 'intended' party was paid. The difference in names could also possibly be an indicia of unreliability or forgery."[54]

The expressly stated terms of the letter of credit are unavailing to the customer unless the court can agree that the customer had a valid reason for requesting the conformity: the insurance coverage depends on the correct number, or, the intended payee may be not be paid if "Ltd." is deleted from the draft. This method of going behind the required documents is forcefully highlighted by the district court's rejection of a term requiring six copies of the commercial invoice.[55] The five copies sent were similar, in the court's view, to spelling "Smith" as "Smithh."[56] The court does not compare apples to oranges, both fruits; but instead compares apples and computers.[57] Thus, Smithh equals Smith as 5 equals 6. Everyone knows who, in context, "Smithh" is, as everyone knows that "5 equals 6." Such reasoning does nothing to preserve the certainty and stability needed in letter of credit law. By this logic, the required number of copies of a document is the same as the spelling of a common name. It is then permissible to conclude that the "deviations" —Smithh/Smith and 5/6—were similar, "not affecting strict compliance [as] [t]hese types of variances may be allowable 'if there is no possibility that the documents could mislead the paying bank to its detriment.' "[58] Cochin is *not*

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a basis for the great expansionary construction applied by the *Cochin* district court.

54. *Cochin*, 612 F. Supp. at 1541. It should be kept in mind that this case is decided on motions for summary judgment. The court's inquiry into the customer's intent in choice of names is troubling.

55. The Second Circuit accepts the district court's misanalysis without comment. *Cochin*, 808 F.2d at 211, n. 1 and accompanying text.

56. *Id.*

57. Apple Computer has had some trouble in the past coping with grey-market knockoffs of its products. The copies were marketed under the names of various fruits.

58. *Cochin*, 612 F. Supp. at 1541. The district court is quoting from a footnote in Beyene v. Irving Trust Co., 596 F. Supp. 438, 442 n.8 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 4 (2d Cir. 1985) which quotes from Flagship Cruises, Ltd. v. New England Merchants National Bank, 569 F.2d 699 (1st Cir. 1978). The district court deletes emphasis from the word "no" found in both *Flagship* and *Beyene* and ignores the *Beyene* court's placement of the burden of proof on the party—here MHT—claiming that the error did not mislead the issuing bank. The analysis and wisdom of the *Flagship* decision aside, it is inappropriate authority. The *Beyene* court cited it as an *incorrect* standard: "Even if a compliance rule of arguably greater liberality applied . . ." going on to quote and dismiss the *Flagship* rationale. *Beyene*, 596 F. Supp. at 442 n.8. The Second Circuit in affirming the district court *Beyene* decision flatly stated that the duty to pay the amount of the credit "does not arise unless the terms of the letter have been complied with strictly." *Beyene*, 762 F.2d at 6. Even were the *Flagship* rationale an appropriate rule, MHT should *not* prevail. The missing commercial invoice copy is not something that misleads like a misspelling. Were it capable of mis-

misled. The issuing bank, and the customer *are* deprived of what they engaged the confirming bank to procure, the documents requested, as strictly construed, or a remedy for the confirming bank's wrongful honor.[59]

Absent strict compliance, a customer, through the issuing bank, has no certain way of obtaining the documents it wants. The district court is not willing to accept what the customer wants. There is no strict compliance standard unless Cochin is mislead by the absence of the invoice—unless the district court agrees that Cochin had a good reason for demanding the invoice. In hindsight, the district court must concur that the want is a material, essential need, deserving of application of the strict compliance standard.[60]

Multiple layers of unreality are at work. Just as the customer may not have had a reason, or a "good" reason, for requiring six copies of the commercial invoice, the confirming bank or the beneficiary probably did not decide that five copies were sufficient. Five copies, without thought, were probably sent.[61] Such defects are not important unless a deal goes bad. At that point there is a scramble to avoid the consequences. When a court acts to assign the consequences to the party who in a normal commercial context was less culpable, by examining the commercial validity of requiring a certain reference number, an exact name, or an exact number of copies, it masks what is occurring. Thus, the district court claims to be analyzing under a strict compliance standard, but abandons reference to the ministerial role of the bank, judging the bank's conduct by whether the *customer*'s and *beneficiary*'s acts were justified in the context of the underlying transaction, under circumstances where the motivations of the parties are completely divorced from

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leading, MHT presented no evidence to show that there was "*no* possibility that the [missing invoice] could mislead [Cochin]." *Flagship*, 569 F.2d at 705.

59.

> The reason underlying the rule that the bank is to act only on the basis of the documents submitted is that the value of a letter of credit lies in the fact that the banks, which handle the letter of credit, act in a purely ministerial capacity and can determine with relative ease whether payment to the beneficiary should be made. If a bank were required to conduct an investigation of the circumstances underlying the transaction before making a decision as to whether to honor the credit, the system would become so expensive and cumbersome that it would be virtually useless.

Rubenstein, *supra* note 22, at 143-44.

60. *See* Rubenstein, *supra* note 22.

61. There were 160 pages of documents submitted to support ten presented drafts. Brief for Appellant at 6, *Cochin*, 808 F.2d 209 (2d Cir. 1986).

the normal motivations fueling a commercial transaction.[62]

A rule of law must work whenever it is applied. The same rule that governs a confirming bank's failure to procure universally recognized commercially necessary documents, must work when the confirming bank fails to obtain documents that in hindsight seem to have no, or a petty purpose. The district court gratuitously said that "If Vishwa or Cochin wanted additional protection, they could have requested it and so informed MHT."[63] Three paragraphs later it denied the request (note that this request is, in the court's view, not a "requirement" under the letter of credit) for six copies of the commercial invoice.[64]

Whether a rule works must be judged by its purpose. The district court states that the purpose of the rule it applies to the case is to ensure "the letter of credit's function of being a swift, fluid and reliable financing device."[65] It is difficult to see the district court's "quasi-strict" compliance rule, as reliable from anyone's point of view. MHT deleted "Ltd." and lost. It deleted one of six copies and won. Cochin relied on the phrase, "St. Lucia Enterprises, Ltd.," and won. It relied on the word six and lost. The "reliability" of the rule led to a "swift" determination of the party's rights five years after presentation of the draft and documents. The course of the dispute might be described as "fluid" if the twists and turns of the district court's analysis were not so abrupt.

The Second Circuit, as previously noted, accepted without comment the district court's determination that there were only two non-conformities in the documents taken in by MHT. This abstention, hopefully, is not a sign of retreat from the strict compliance standard; but rather, an instance where discussion was not

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62.

> It is the complete separation between the underlying commercial transaction and the letter of credit that gives the letter its utility in financing transactions. The parties to the commercial contract bring in a third party—the bank—to finance the transaction for them. The bank's sole function is the financing; it is not concerned with or involved in the commercial transaction. This restriction simplifies the bank's role and enables it to act quickly and surely. Because the bank is not involved in the commercial transaction, however, all its rights and duties are set out in and defined by the letter of credit. The bank is not expected or required to be familiar with or to consider the customs of, or the special meaning or effect given to particular terms in, the trade.

Marino Industries v. Chase Manhattan Bank, N.A., 686 F.2d 112, 115 (2d Cir. 1982).

63. *Cochin*, at 1541.

64. *Id.*

65. *Id.* at 1543.

necessary to the Second Circuit's resolution of the appeal.

This case was heard in the federal courts on a diversity basis, requiring application of New York law.[66] The New York Court of Appeals recently reaffirmed its adherence to the strict compliance standard in *United Commodities-Greece v. Fidelity International Bank*, stating the rule to be "justified in the bank's role in the transaction [as] being ministerial . . . to require it to determine the substantiality of discrepancies would be inconsistent with its function. Strict compliance means that 'the papers, documents and shipping directions must be followed as stated in the letter.' "[67]

B. Duty to "Cure"

The district court next examined the dealings between Cochin and MHT in terms of what it called estoppel.[68] Estoppel, as defined by the district court, applies when an issuing bank is charged with "discoverable district nonconformities that could have been cured by the beneficiary before the expiration of the letter."[69] The estoppel results from "previous assurances to the beneficiary of documentary compliance"[70] or retention of the documents, with silence as to the non-conformity for an unreasonably long period of time after presentation.[71] Estoppel, as traditionally defined, as used by New York courts, and as implied by the district court's definition, requires detrimental reliance by the party asserting its application.[72] The district court's deletion of the reliance element is immaterial because after stating what estoppel is, the court ignored the rule and applied an amalgam of U.C.P. and U.C.C. letter of credit provisions with overtones of sales and negotiable instrument law, leavened with an issuing bank's affirmative duty, apparently derived from a law review comment.[73]

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66. *See infra* note 102. Reference to New York law might lead to the use of Indian law.

67. 64 N.Y.2d 449, 456, 478 N.E.2d 172, 174, 489 N.Y.S.2d 31, 33 (1985) (citations omitted).

68. *Cochin*, 612 F. Supp. at 1541-43. The court defines waiver in the letter of credit context, but the concept is not applicable to, or used with, the facts at issue. The court substitutes a combined U.C.P., U.C.C. waiver analysis, discussed *infra*.

69. *Id.* at 1541.

70. *Id.*

71. *Id.*

72. BLACK'S LAW DICTIONARY 648 (4th ed. 1968); United Commodities-Greece v. Fidelity International Bank, 64 N.Y.2d 449, 457, 478 N.E.2d 172, 175, 489 N.Y.S.2d 31, 34 (1985) ("To take advantage of estoppel, [MHT] would have to prove that it relied to its detriment on a misleading representation of [Cochin].").

73. *Cochin*, 612 F. Supp. at 1541-43.

The court cites U.C.P. 1974, Article 8(c)[74] for the rule that an issuing bank must "immediately notify the beneficiary by 'expeditious means' of any reason for non-compliance and [of] the physical disposition of the disputed documents."[75] As examination of Article 8 set forth in note 74 indicates, the U.C.P. does not require immediate notice; rather, it requires "notice without delay."[76] Further, that notice is only required *after* the "issuing bank [has had] a reasonable time to examine the documents."[77] The International Commerce Commission Banking Commission (I.C.C.), in deciding whether a confirming bank was entitled to interest while the issuing bank delays reimbursement, stated that "each case would need to be considered on its merits to decide whether there had been delay . . . the main problem was deciding what was meant by de-

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74. Article 8 states:

(a) In documentary credit operations all parties concerned deal in documents and not in goods.

(b) Payment, acceptance or negotation against documents which appear on their face to be in accordance with the terms and conditions of a credit by a bank authorized to do so, binds the party giving the authorization to take up the documents and reimburse the bank which has effected the payment, acceptance or negotiation.

(c) If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms and conditions of the credit, that bank must determine, on the basis of the documents alone, whether to claim that payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit.

(d) The issuing bank shall have a reasonable time to examine the documents and to determine as above whether to make such a claim.

(e) If such claim is to be made, notice to that effect, stating the reasons therefor, must without delay, be given by cable or other expeditious means to the bank from which the documents have been received (the remitting bank) and such notice must state that the documents are being held at the disposal of such bank or are being returned thereto.

(f) If the issuing bank fails to hold the documents at the disposal of the remitting bank, or fails to return the documents to such bank, the issuing bank shall be precluded from claiming that the relative payment, acceptance or negotiation was not effected in accordance with terms and conditions of the credit.

(g) If the remitting bank draws the attention of the issuing bank to any irregularities in the documents or advises such bank that it has paid, accepted or negotiated under reserve or against a guarantee in respect of such irregularities, the issuing bank shall not thereby be relieved from any of its obligations under this article. Such guarantee or reserve concerns only the relations between the remitting bank and the beneficiary.

U.C.P. article 8 (1974).

Article 8 was revised and renumbered as 16 in the 1983 version of the U.C.P. The provisions pertinent to the issues discussed have not changed so as to effect the outcome.

75. *Cochin*, 612 F. Supp. at 1541-1542.

76. U.C.P. 8(e).

77. U.C.P. 8(d).

lay." The Commission resolved that delay was to be determined by examination of practice of the bank.[78] The I.C.C., author of the U.C.P., did not equate "without delay" to "immediate"; but rather indicated that delay is to be determined on a factual record.[79]

The district court introduced the idea of cure by reference to a student law review comment.[80] The Comment recommends that the U.C.C. incorporate the U.C.P. 1974, Article 8 notice provision so that non-conforming presentations before expiration of the credit can be cured by correction and re-presentation.[81] The Comment goes on to propose that a customer have a "good faith waiver duty" even when the credit has expired.[82] The district court went one step better.

MHT advised its confirmation of the credit *to St. Lucia*, the beneficiary, including the wrong insurance number and the misstatement of the beneficiary's name. Cochin received a copy.[83] The district court took the Comment's proposal, applicable where an issuing bank receives non-conforming *documents* that are required on *presentation*, and created an affirmative duty that the issuing bank review copies of correspondence from the confirming bank *to the beneficiary* to ensure that the confirming bank has not acted negligently.[84]

There is more than a semantic problem with holding that Cochin has a duty to "cure" MHT's mistake.[85] Instead of a duty to notify the confirming bank, and thus the beneficiary, of non-conformities where the beneficiary can resubmit conforming documents, curing the defect, the district court required that Cochin, effectively, supervise MHT's actions during the term of the credit.

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78. INTERNATIONAL CHAMBER OF COMMERCE, DECISIONS (1975-1979) OF THE ICC BANKING COMMISSION ON QUERIES RELATING TO UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1980) [hereinafter DECISIONS]. While published in 1980, and dealing with the years 1975-79, the decisions refer to the U.C.P. 1974.

79. It should be noted that the U.C.P. is not binding on courts. DECISIONS acknowledges this by stating the caveat "[this book is] intended as [a guideline] for all interested parties in documentary credit operations but has no legally-binding effect on these parties." DECISIONS, *supra* note 78, overleaf. Part of the basis of the district court's opinion is derived from the U.C.P. duty to advise of the reason for rejection of documents. Thus, it would seem that I.C.C. interpretations would be persuasive.

80. Comment, *Letters of Credit: A Solution to the Problem of Documentary Compliance* 50 FORDHAM L. REV. 848, 870-74 (1982).

81. *Id.*

82. *Id.* at 874-75.

83. *Cochin*, 612 F. Supp. at 1535 n.5.

84. *Id.* at 1542.

85. *Id.*

Where Cochin does not meet the tort standard of care under its "affirmative obligation" it "is precluded from claiming wrongful honor."[86]

There is no dispute that MHT erred in its advices to St. Lucia. The district court charged Cochin with notice and created a duty to correct MHT's apparently negligent error. The I.C.C. Banking Commission stated that "Article 12 established a principle according to which the issuing bank was exonerated from all liability for the errors of the advising bank [except] where the issuing bank had been guilty of negligence."[87] A negligence standard dovetails nicely with the basis for estoppel's detrimental reliance element—breach of duty without causation or damage is not actionable. Negligence by a bank respecting its duty to others is treated by the U.C.C. as a failure to exercise "ordinary care."[88] Even if Cochin should have a duty to supervise the performance of MHT's duty under the credit, as a confirming bank, whether Cochin breached that duty is a fact question for a jury, not a question of law susceptible to summary judgment. Breach must be determined on the facts surrounding its examination. The facts did not appear before the district court.[89]

Again, as previously noted, the Second Circuit grounded its decision on other bases and did not comment on the district court's novel creation of an ongoing affirmative duty to supervise a confirming bank's performance of its duties under a letter of credit. Again, this approach allows the district court's analysis to survive as dicta.

C. "Reasonable Delay"

Both the district court and the Second Circuit find that Cochin's claim is barred by several separate versions of waiver, es-

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86. *Id.*

87. DECISIONS, *supra* note 78, at 30. U.C.P. 1974 Article 12 deals with the liability of an issuing bank to its customer for negligence by an advising or a confirming bank. There does not appear to be any policy basis to reject the negligence standard when the issuing bank is the plaintiff suing the confirming bank rather than the defendant being sued by the customer for derivative liability based on the negligence of the confirming bank.

88. U.C.C. art. 4.

89. This suit was decided on cross-motions for summary judgment on a record that included the letter of credit, the documents presented, and various depositions dealing with Cochin's and MHT's actions during the time period surrounding the presentation of the drafts and documents. There is *no* evidence about the circumstances in which Cochin received and processed the advice copies.

toppel, U.C.P. rules, and what is termed "preclusion" analysis.[90] Each court's analysis will be discussed separately.

1. The District Court

The district court found Cochin to be "precluded from claiming wrongful honor because of its failure to comply with the explicit notice and affirmative obligation provisions of the U.C.P."[91] The district court determined that Cochin unreasonably delayed asserting the defects in the documents. As previously noted, the I.C.C. Commission considers "what is delay" to be a fact question. The district court reasoned that since the terms "reasonable time" and "without delay" are not defined, the U.C.P. provision is ambiguous, allowing incorporation of U.C.C. § 5-112 (1)(a). Phrases like "reasonable time" and "without delay" usually are not labelled ambiguous as that term is used in a legal context; but, rather are taken to invite factual interpretation.[92] Traditionally, ambiguity is either latent, where the words are clear but can be rationally interpreted variously in light of extrinsic evidence, or patent, where the words are not capable of understanding.[93] Neither definition fits the U.C.P. language.[94]

The district court has used "ambiguity" to make a value judgment, substituting a concrete rule for examination of facts. The U.C.C. rule allows a bank to delay honor of a draft and documents "until the close of the third banking day following receipt of the documents."[95] The district court applied the provision, reasoning that since Cochin received the documents on a Saturday, June 21 (skipping Sunday the 22nd), Wednesday, the 26th, was the third, and last day that Cochin could convey non-conformities.[96] Cochin advised of the non-conforming insurance covernote on June 27, a day late and $798,000 short.

There are several problems with the court's application of Section 5-112 (1)(a).[97] There is no evidence that Cochin received the

90. *Cochin*, 612 F. Supp. at 1541-43; *Cochin*, 808 F.2d at 211-13.
91. *Cochin*, 612 F. Supp. at 1542.
92. U.C.C. § 1-205 comment 1 (1978).
93. BLACK'S LAW DICTIONARY 105 (4th ed. 1968).
94. *Supra* note 74.
95. U.C.C. § 5-112 (1)(a).
96. *Cochin*, 612 F. Supp. at 1543.
97. The effect of district court's analysis on the parties is obviated by the subsequent agreement of the parties that the incorrect insurance covernote number was actually

documents while open for business on Saturday. Section 4-107 of the U.C.C. provides:

> (1) For the purpose of allowing time to process items, prove balances and make the necessary entries on its books to determine its position for the day, a bank may fix an afternoon hour of 2 p.m. or later as a cut-off hour for the handling of money and items and the making of entries on its books.
> (2) Any item or deposit of money received on any day after a cut-off hour so fixed or after the close of the banking day may be treated as being received as of the opening of the next banking day.[98]

Section 4-104 of the U.C.C. states: "(1) . . . (c) 'Banking day' means that part of any day on which a bank is open to the public for carrying on substantially all of its banking functions."[99]

It is possible with various assumptions, that the three day period could end on June 27. Again, the issue is hardly resolvable on summary judgment.[100] The district court, in evading the U.C.P.'s factual questions as to what constitutes "reasonable time" and "without delay," was confronted with, and ignored, factual questions concerning whether Cochin advised of the absence of "Ltd" from the payee's name on the draft within the adopted U.C.C. time period.[101]

2. The Second Circuit

As already noted, the Second Circuit decided Cochin's appeal without determining whether substantial or strict compliance should have been used as a standard;[102] whether an issuing bank should have a duty to oversee the performance of a confirming

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Cochin's fault. The wrong number was originally mistakenly transmitted to MHT. *Cochin*, 808 F.2d at 211 n.1. The analysis, however, still remains in the opinion available for use in later suits. Again, the Second Circuit did not address the issue, as it was not pertinent to resolution of the revised dispute.

98. U.C.C. § 4-107 (1978).

99. U.C.C. § 4-104 (1978).

100. The record on which the court decided the case does not include information on Cochin's closing time and when the documents were received on Saturday, the 21st.

101. The district court rejects use of Indian law to determine the "ambiguous" phrases, using New York's comparative interest choice of law approach to apply the U.C.C. U.C.C. § 4-102(2) (1978) requires that the liability of a bank for its acts "for purposes of presentment, payment or collection is governed by the law of the place where the bank is located," here India. Renvoi resolution is not dealt with by the court.

102. *See supra* Part III (A).

bank and "cure" its mistakes;[103] and whether the U.C.C. § 5-112 three day rule should be engrafted to interpret U.C.P. Article 8's "reasonable time" and "without delay."[104] The Second Circuit instead focused on U.C.P. Article 8 and ignored the allowance of a "reasonable time to examine the documents" found in subsection (d). The court apparently decided as a matter of law that Cochin's notice of discrepancies and advise of disposition of the documents were unjustifiably delayed. "Cochin's delay in specifying the defects estopped it from asserting that the documents did not comply with the letter of credit, and [it's] two-week delay in notifying MHT of it's intent to return the documents precludes this suit."[105]

The court's phrasing of its holding makes it unclear whether the two standards Cochin is found to have breached are independently sufficient to first "estop" it and then further, "preclude" its suit. Precision aside, the Second Circuit is wrong. Like the district court, the Second Circuit does not seem to be concerned with analyzing the elements of estoppel; indeed, it does not seem to be concerned with New York case law, or with its own prior decisions.

New York requires that a party prove detrimental reliance to assert estoppel.[106] In *Marino Industries Corp. v. Chase Manhattan Bank*,[107] the Second Circuit recognized the factual predicate for the legal estoppel defense. There the Second Circuit remanded for determination of whether a one-and-one-half month delay in returning documents after initial inspection and discovery of defects was an unreasonable time to examine the documentation under the terms of U.C.P. Article 8. The *Marino* court there noted that the bank's prompt return of the documents would have allowed the beneficiary to correct and resubmit within the term of the credit.[108] Implicit in the common law estoppel and U.C.P. "reasonable time" analysis is the requirement that the confirming bank or beneficiary be harmed by the issuing bank's retention of the documents during the term of the credit. The legal bromide—the law does not require a useless act—comes to mind.

MHT was informed of the existence of defects asserted by Cochin immediately upon Cochin's receipt of the documents, but

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103. *See supra* Part III (B).
104. *See supra* Part III (C).
105. *Cochin*, 808 F.2d at 213.
106. *United Commodities*, 64 N.Y.2d 449, 478 N.E.2d 172, 489 N.Y.S.2d 31 (1985).
107. 686 F.2d 112 (2d Cir. 1982).
108. *Marino*, 686 F.2d at 118.

even at that time MHT had paid the absconding beneficiary.[109] MHT was not harmed by Cochin's retention of the documents. The Second Circuit quotes from Harfield to the effect that the issuing bank cannot use the "reasonable time" allowance to "ride the market."[110] Cochin was hardly riding the market. It advised of defects and continued to identify them over the two-week period that the Second Circuit decries. MHT could *not* have cured the situation within the period of the credit.

The Second Circuit fell into the same trap entered by the district court—treating what is reasonable time as a question of law, susceptible to resolution on motions for summary judgment.[111] The Second Circuit concluded its analysis by incorrectly stating that, had Cochin quickly notified MHT of the claimed defects, some or all of the funds might have been recovered. It then held Cochin to be culpable for failing to take advantage of the opportunities available to prevent MHT's *negligence* from resulting in loss.

IV. CONCLUSION

The Second Circuit affirmed with minimal comment, leaving the district court's analysis as precedent. It did not reach the district court's alternative duty of "cure" analysis which thus survives with some validity as dicta. Further, the Second Circuit did not deal with the "quasi-strict" compliance analysis. This leaves the district court's analysis as dicta to be applied to bank-beneficiary suits. The Second Circuit while inappropriately deciding fact questions without the benefit of appropriate evidence, does most of its damage to Cochin individually. It is hoped that when the district court's various hybrid analyses re-emerge in future cases that the Second Circuit will take the time to disavow and reject them.

The Southern District of New York and the Second Circuit are very important courts; the business and banking communities, as well as other courts, closely watch their commercial cases. *Bank of Cochin, Ltd. v. Manufacturers Hanover Trust*, in both the district court and in the Second Circuit, however it is interpreted by

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109. Joint Appendix to Briefs of Parties at A-161, Bank of Cochin Ltd. v. Manufacturers Hanover Trust Co., 808 F.2d 209 (2d Cir. 1986). St. Lucia Enterprise's Citibank account statement indicates that they deposited $798,000.00 on June 17. They withdrew $756,673.50 by check paid on June 23. MHT's telex was dated the same day. *Id.* at A-156.

110. H. HARFIELD, BANK CREDITS AND ACCEPTANCES 232 (5th ed. 1974).

111. *See supra* Part III (C)(1).

other courts, can do little to stabilize letter of credit law for banks and businessmen.

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