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## Application of Compulsory Joinder, Intervention, Impleader, and Attachment to the Letter of Credit Litigation

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# THE APPLICATION OF COMPULSORY JOINDER, INTERVENTION, IMPLEADER AND ATTACHMENT TO LETTER OF CREDIT LITIGATION

## INTRODUCTION

A letter of credit<sup>1</sup> is a device by which a bank or other issuer,<sup>2</sup> at the request of its customer, engages<sup>3</sup> that it will honor drafts or other demands for payment if presented in compliance with specified conditions.<sup>4</sup> The essential function of the letter of credit is to substitute the

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1. For a general definition of a letter of credit, see *Bank of Newport v. First Nat'l Bank & Trust Co.*, 34 U.C.C. Rep. Serv. (Callaghan) 650, 655 (8th Cir. 1982); *East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 601-02 (5th Cir. 1979) (quoting 2 Tex. Bus. & Com. Code Ann. § 5.103(a)(1) (Vernon 1968)); *Consolidated Aluminum Corp. v. Bank of Va.*, 544 F. Supp. 386, 393-95 (D. Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983); *Dynamics Corp. of Am. v. Citizens & S. Nat'l Bank*, 356 F. Supp. 991, 995 (N.D. Ga. 1973); *Ernesto Foglino & Co. v. Webster*, 217 A.D. 282, 293, 216 N.Y.S. 225, 234 (1926), *modified on other grounds*, 244 N.Y. 516, 155 N.E. 878 (1927); H. Harfield, *Bank Credits and Acceptances* 26-27 (5th ed. 1974); 6 *Michie on Banks and Banking* ch. 12, § 28, at 398 (perm. ed. 1975) [hereinafter cited as *Michie*]; J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* § 18-2 (2d ed. 1980).

2. An issuer is defined as "a bank or other person issuing a credit." U.C.C. § 5-103(1)(c) (1977). Accordingly, an issuer need not be a bank but also may be a finance or insurance company, or other similar institution. J. White & R. Summers, *supra* note 1, § 18-1, at 710; see *Barclays Bank D.C.O. v. Mercantile Nat'l Bank*, 481 F.2d 1224, 1226 (5th Cir. 1973) (mortgage broker as issuer), *cert. dismissed*, 414 U.S. 1139 (1974); U.C.C. § 5-102(1)(b), (c) & official comment 1 (1977).

3. The issuer's engagement that it will honor drafts or other demands for payment that comply with the terms of the letter of credit is one of the formal requirements for establishing a valid letter of credit. See U.C.C. § 5-103(1)(a) (1977); *Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1024 (N.D. Ill. 1975). The other formal requirements are that the letter of credit be in writing and signed by the issuer, U.C.C. § 5-104(1) (1977), and that the letter conspicuously state that it is a letter of credit when no demand or draft is required for payment, *id.* § 5-102(1)(c). In addition, the issuer's engagement to honor must be written on the draft itself, see *id.* § 3-410(1), and, to be enforceable, must be communicated to the prescribed third party in such a manner "that the commitment may be legally enforced against the [issuer]." H. Harfield, *supra* note 1, at 10.

4. There is a split of authority as to whether strict or substantial compliance is required. The traditional view requires strict compliance with the terms of the letter of credit. Kozolchyk, *Preface to The Law of Letters of Credit and Standbys in the 80's*, 24 Ariz. L. Rev. 235, 235 (1982) [hereinafter cited as *Kozolchyk I*]; State of N.Y. Law Revision Comm'n, Study of Uniform Commercial Code: Article 5—Documentary Letters of Credit, Legislative Doc. No. 65(F), at 67 (1955), *reprinted in* 3 State of N.Y. Law Revision Comm'n, Report of the Law Revision Comm'n for 1955, at 1635 [hereinafter cited as 1955 Report]; e.g., *Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230, 236 (5th Cir. 1983); *Marino Indus. Corp. v. Chase Manhattan Bank, N.A.*, 34 U.C.C. Rep. Serv. (Callaghan) 637, 640 (2d Cir. 1982); *Insurance Co. of N. Am. v. Heritage Bank, N.A.*, 595 F.2d 171, 175 (3d Cir. 1979) (*per curiam*); *Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 528 F.2d 802,

credit of the issuer for the credit of its customer,<sup>5</sup> often a buyer of goods (customer).<sup>6</sup> As a result, the beneficiary of the credit, typically a seller of goods (beneficiary),<sup>7</sup> is assured of payment upon proper

805-06 (4th Cir. 1975); *AMF Head Sports Wear, Inc. v. Ray Scott's All-American Sports Club, Inc.*, 448 F. Supp. 222, 223 (D. Ariz. 1978); *Dynamics Corp. of Am. v. Citizens & S. Nat'l Bank*, 356 F. Supp. 991, 995 (N.D. Ga. 1973). Some courts, however, have required only substantial compliance, or some variation thereof. *See, e.g.,* *Corporacion de Mercadeo Agricola v. Mellon Bank Int'l*, 608 F.2d 43, 47 n.1 (2d Cir. 1979) (strict compliance limited to "essential requirements of the letter of credit"); *Flagship Cruises v. New Eng. Merchants Nat'l Bank*, 569 F.2d 699, 705 (1st Cir. 1978) (non-compliance "not fatal" absent possibility of misleading paying bank to its detriment); *Banco Espanol de Credito v. State St. Bank & Trust Co.*, 385 F.2d 230, 237 (1st Cir. 1967) (documentary draft is acceptable if it complies "in all significant respects"), *cert. denied*, 390 U.S. 1013 (1968); *Crocker Commercial Servs. v. Countryside Bank*, 538 F. Supp. 1360, 1362-63 (N.D. Ill. 1981) (reasonable compliance standard); *First Arlington Nat'l Bank v. Stathis*, 90 Ill. App. 3d 802, 816, 413 N.E.2d 1288, 1299 (1980) (compliance sufficient when presentment does not "deviate significantly" from the letter's requirements). A third view applies a strict compliance standard when the beneficiary sues the issuer, but a substantial compliance standard when the issuer seeks reimbursement from its customer. *J. White & R. Summers, supra* note 1, § 18-6, at 731-32 (quoting State of N.Y. Law Revision Comm'n, *supra*, at 67-68, *reprinted in* 1955 Report, *supra* note 4, at 1634-35); *see Transamerica Deleval, Inc. v. Citibank, N.A.*, 545 F. Supp. 200, 203-04 (S.D.N.Y. 1982); *Far E. Textile Ltd. v. City Nat'l Bank & Trust Co.*, 430 F. Supp. 193, 196 (S.D. Ohio 1977). *Compare Bank of Italy v. Merchants Nat'l Bank*, 236 N.Y. 106, 108, 140 N.E. 211, 212 (1923) (action by beneficiary against the issuer) *with Bank of Montreal v. Recknagel*, 109 N.Y. 482, 494, 17 N.E. 217, 221-22 (1888) (suit by issuer for reimbursement). *See generally* Note, *Letters of Credit: A Solution to the Problem of Documentary Compliance*, 50 *Fordham L. Rev.* 848, 856 (1982) (advocating strict compliance) [hereinafter cited as *Documentary Compliance*].

5. *Continental Nat'l Bank v. National City Bank*, 69 F.2d 312, 316 (9th Cir.), *cert. denied*, 293 U.S. 557 (1934); *Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92, 98 (M.D.N.C. 1975), *rev'd on other grounds*, 528 F.2d 802 (4th Cir. 1975); *H. Harfield, supra* note 1, at 27, 44; 6 *Michie, supra* note 1, ch. 12, § 30, at 410; *see Insurance Co. of N. Am. v. Heritage Bank, N.A.*, 595 F.2d 171, 173 (3d Cir. 1979) (*per curiam*); *H. Ray Baker, Inc. v. Associated Banking Corp.*, 592 F.2d 550, 552-53 (9th Cir.), *cert. denied*, 444 U.S. 832 (1979); *West Va. Hous. Dev. Fund v. Sroka*, 415 F. Supp. 1107, 1112 (W.D. Pa. 1976); *National Sur. Corp. v. Midland Bank & Trust Co.*, 408 F. Supp. 684, 690 (D.N.J. 1976), *rev'd on other grounds*, 551 F.2d 21 (3d Cir. 1977); *Documentary Compliance, supra* note 4, at 848 (1982).

6. A customer is defined as "a buyer or other person who causes an issuer to issue a credit." U.C.C. § 5-103(1)(g) (1977). Other names for this party include accredited buyer, importer, consignee and account party. *H. Harfield, supra* note 1, at 33. A bank that procures the issuance or confirmation of a letter of credit on behalf of its customer is also considered to be a customer. U.C.C. § 5-103(1)(g) (1977).

7. A beneficiary of a letter of credit is defined as "a person who is entitled under its terms to draw or demand payment," U.C.C. § 5-103(1)(d) (1977), and is usually a seller of goods, *see, e.g., Empire Abrasive Equip. Corp. v. H.H. Watson, Inc.*, 567 F.2d 554, 556 (3d Cir. 1977); *Vazman, S.A. v. Fidelity Int'l Bank*, 418 F. Supp. 1084, 1085 (S.D.N.Y. 1976); *Lantz Int'l Corp. v. Industria Termotecnica Campana, S.p.A.*, 358 F. Supp. 510, 512 (E.D. Pa. 1973).

presentment of the documents required by the terms of the letter of credit.<sup>8</sup> The customer receives evidence of performance of the underlying contract from this documentary presentment.<sup>9</sup> The commercial

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The beneficiary is not a third-party beneficiary of a contract between the issuer and its customer because the beneficiary's claims are not subject to all claims that the issuer, as promisor, might set up against the customer, as promisee. *J. White & R. Summers, supra* note 1, § 18-2, at 714; *see Chase Manhattan Bank v. Equibank*, 550 F.2d 882, 886 (3d Cir. 1977); Restatement of Contracts § 140 (1932); *J. Calamari & J. Perillo, The Law of Contracts* § 17-8, at 623 (2d ed. 1977). *But see West Va. Hous. Dev. Fund v. Sroka*, 415 F. Supp. 1107, 1109-10 (W.D. Pa. 1976) (characterizing letter of credit as third-party beneficiary contract) (quoting *Harvey Estes Constr. Co. v. Dry Dock Sav. Bank*, 381 F. Supp. 271, 274 (W.D. Okla. 1974)); *Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92, 98 (M.D.N.C.) (same), *rev'd on other grounds*, 528 F.2d 802 (4th Cir. 1975). The beneficiary also is not an assignee of the customer's rights because the beneficiary's exclusive right to draw on the letter of credit cannot be met with defenses that the issuer might have against the customer. *J. White & R. Summers, supra* note 1, § 18-2, at 714; *see Restatement of Contracts* § 167 (1932). *See infra* note 109.

8. *See East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 601 (5th Cir. 1979); *Pringle-Associated Mortgage Corp. v. Southern Nat'l Bank*, 571 F.2d 871, 874 (5th Cir. 1978); *Consolidated Aluminum Corp. v. Bank of Va.*, 544 F. Supp. 386, 394, (D. Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983); *Kingdom of Swed. v. New York Trust Co.*, 197 Misc. 431, 441-42, 96 N.Y.S.2d 779, 787-88 (1949); *H. Harfield, supra* note 1, at 18; *J. White & R. Summers, supra* note 1, § 18-1, at 705.

9. *See Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 319 (Me. 1978); *H. Harfield, supra* note 1, at 18. The term document includes "any paper including document of title, security, invoice, certificate, notice of default and the like." U.C.C. § 5-103(1)(b) (1977), and is intended by the drafters to be construed broadly, *see id.* § 5-103 official comment 2. Honoring a documentary draft or demand for payment "is conditioned upon the presentation of a document or documents." *Id.* § 5-103(1)(b). Documents ordinarily required by the terms of a letter of credit are a commercial invoice, a bill of lading and an insurance policy in addition to the beneficiary's draft. *See, e.g., Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 463-64 (2d Cir. 1970); *Continental Nat'l Bank v. National City Bank*, 69 F.2d 312, 314 (9th Cir.), *cert. denied*, 293 U.S. 557 (1934); *National Am. Corp. v. Federal Republic of Nig.*, 448 F. Supp. 622, 627 n.3 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979); *H. Harfield, supra* note 1, at 57. Collectively, these documents evidence the beneficiary's performance of the underlying contract. *H. Harfield, supra* note 1, at 56-57. The commercial invoice is the beneficiary's representation of the merchandise shipped or to be shipped, *see Laudisi v. American Exch. Nat'l Bank*, 239 N.Y. 234, 242, 146 N.E. 347, 349 (1924) (invoices ordinarily contain vendor's version of the transaction), and must match the description of the goods in the letter of credit. International Chamber of Commerce, Uniform Customs and Practice for Documentary Credits (UCP) art. 41(c) (Publ. No. 400) (rev. ed. 1983) (effective Oct. 1, 1984) [hereinafter cited as U.C.P.]; *H. Harfield, supra* note 1, at 56-57. The letter of credit may require no documents other than the beneficiary's draft or demand for payment. *See, e.g., East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 601 (5th Cir. 1979); *Border Nat'l Bank v. American Nat'l Bank*, 282 F. 73, 79 (5th Cir. 1922); *Werner Lehara Int'l, Inc. v. Harris Trust & Sav. Bank*, 484 F. Supp. 65, 68 (W.D. Mich. 1980); *Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1024 (N.D. Ill. 1975); *J. White & R. Summers, supra* note 1, § 18-1, at 710. Nevertheless, the issuer must pay on the beneficiary's complying presentment even if the goods shipped

utility of a letter of credit, however, is not limited to facilitating a mercantile exchange. Rather, the letter of credit can function as a financing mechanism through assignment or negotiation by the beneficiary<sup>10</sup> and as a "guaranty" to ensure performance in non-goods transactions.<sup>11</sup>

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do not conform to the specifications of the underlying contract. *E.g.*, *Asociacion de Azucareros de Guatemala v. United States Nat'l Bank*, 423 F.2d 638, 641 (9th Cir. 1970); *Weyerhaeuser Co. v. First Nat'l Bank*, 27 U.C.C. Rep. Serv. (Callaghan) 777, 780 (S.D. Iowa 1979). In order to guard against this result, the customer may require the beneficiary to present a third party's certificate of quality to the issuer, certifying the quality of the goods shipped. *See* H. Harfield, *supra* note 1, at 67-68; *see, e.g.*, *Banco Espanol de Credito v. State St. Bank & Trust Co.*, 385 F.2d 230, 231 (1st Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968); *North Am. Foreign Trading Corp. v. General Elecs., Ltd.*, 67 A.D.2d 890, 892, 413 N.Y.S.2d 700, 703 (1979).

10. The drafters did not intend to limit the application of Article 5 of the U.C.C. to letter of credit arrangements that facilitate mercantile transactions. *See* U.C.C. § 5-102 official comment 1 (1977). Accordingly, a beneficiary can finance his performance of the underlying contract by assigning the entire letter of credit, by assigning his rights to the letter of credit proceeds, or by engaging in a "back-to-back" letter of credit transaction. J. White & R. Summers, *supra* note 1, § 18-1, at 708; *id.* § 18-9, at 752. One commentator has labelled this financing function secondary, with the payment function considered primary. Harfield, *Secondary Uses of Commercial Credits*, 44 Colum. L. Rev. 899, 908 (1944); *see, e.g.*, *Insurance Co. of N. Am. v. Heritage Bank, N.A.*, 595 F.2d 171, 173 (3d Cir. 1979) (payment function); *Pringle-Associated Mortgage Corp. v. Southern Nat'l Bank*, 571 F.2d 871, 872 (5th Cir. 1978) (security to short-term financiers); *Chase Manhattan Bank v. Equibank*, 550 F.2d 882, 884 (3d Cir. 1977) (long-term financing); *Consolidated Aluminum Corp. v. Bank of Va.*, 544 F. Supp. 386, 393-94 (D. Md. 1982) (payment function), *aff'd*, 704 F.2d 136 (4th Cir. 1983).

Under a back-to-back letter of credit, a bank will take an assignment of one irrevocable letter of credit as security for the issuance of another irrevocable letter of credit. *Decker Steel Co. v. Exchange Nat'l Bank*, 330 F.2d 82, 86-87 (7th Cir. 1964); *see* U.C.C. § 5-116 official comment 1 (1977); J. White & R. Summers, *supra* note 1, § 18-9, at 752. The letter of credit, including the right to draw, is assignable only if it is expressly designated as assignable or transferable. U.C.C. § 5-116(1) (1977); U.C.P., *supra* note 9, art. 54(b). Nevertheless, the assignor-beneficiary remains liable for the nature of performance. U.C.C. § 5-116 official comment 2 (1977). Even in the absence of an express provision, the right to the letter of credit proceeds is always assignable. U.C.C. § 5-116(2) (1977); U.C.P., *supra* note 9, art. 55.

Alternatively, the beneficiary may discount the letter of credit to a local bank. Gillette, *Holders in Due Course in Documentary Letter of Credit Transactions*, 1982 Ann. Rev. Banking L. 21, 33 (transferee is commonly the beneficiary's own bank); H. Harfield, *supra* note 1, at 43 (beneficiary can obtain proceeds earlier through discounting). Unlike straight credits, in which the issuer's engagement runs only to the beneficiary and third parties may elect to purchase the beneficiary's drafts as volunteers, negotiation credits permit discounting. J. White & R. Summers, *supra* note 1, § 18-1, at 710; *see* H. Harfield, *supra* note 1, at 212. *See generally* Ufford, *Transfer and Assignment of Letters of Credit Under the Uniform Commercial Code*, 7 Wayne L. Rev. 263 (1960) (discussing the ability of the beneficiary to negotiate). If the transferee bank becomes a holder in due course, *see* U.C.C. § 3-302 (1977), it also becomes a protected third party under Article 5, *see id.* § 5-114(2)(a).

11. A standby letter of credit is defined as "any letter of credit . . . which represents an obligation to the beneficiary on the part of the issuer . . . to make

Given the tripartite contractual nature of the basic letter of credit arrangement, and the possible addition of other parties when it is

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payment on account of any indebtedness undertaken by the [customer], or . . . to make payment on account of any default by the [customer] in the performance of an obligation." 12 C.F.R. § 7.1160(a) (1983). Similar definitions are stated by the FDIC, *id.* § 337.2(a), and by the Federal Reserve Board, *id.* § 208.8(d)(1). The standby letter of credit is similar to a guaranty or surety in that the issuer is obligated to honor a demand for payment when there has been a failure of performance in the underlying contract. See *Bossier Bank & Trust Co. v. Union Planters Nat'l Bank*, 550 F.2d 1077, 1081 app. A (6th Cir. 1977) (per curiam) (adopting district court's memorandum decision); *Consolidated Aluminum Corp. v. Bank of Va.*, 544 F. Supp. 386, 394 (D. Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983); Harfield, *The Increasing Domestic Use of the Letter of Credit*, 4 U.C.C. L.J. 251, 258 (1972) [hereinafter cited as Harfield I]; McLaughlin, *Standby Letters of Credit and Penalty Clauses: An Unexpected Synergy*, 43 Ohio St. L.J. 1, 6 (1982); Weisz & Blackman, *Standby Letters of Credit After Iran: Remedies of the Account Party*, 1982 U. Ill. L. Rev. 355, 358. Certain form guidelines can be followed to avoid confusion between a standby letter of credit and a guaranty. H. Harfield, *supra* note 1, at 176-77; see 12 C.F.R. § 7.7016 (1983). The two devices are distinguished, however, in that the obligation of a guarantor is secondary, whereas the obligation of an issuer is primary. *E.g.*, *Barclays Bank D.C.O. v. Mercantile Nat'l Bank*, 481 F.2d 1224, 1236 (5th Cir. 1973), *cert. dismissed*, 414 U.S. 1139 (1974); *Consolidated Aluminum Corp. v. Bank of Va.*, 544 F. Supp. 386, 394 n.23 (D. Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983). Moreover, the obligation of the guarantor does not mature until the principal debtor has actually defaulted; the issuer, however, is concerned only with documents and not actual facts. *E.g.*, *Wichita Eagle & Beacon Publishing Co. v. Pacific Nat'l Bank*, 493 F.2d 1285, 1286 (9th Cir. 1974) (per curiam) ("letter of credit" found to be a guaranty because obligor's duty was conditioned upon actual default); J. White & R. Summers, *supra* note 1, § 18-2, at 713 (actual facts are irrelevant to issuer's obligation). This is significant because the issuance of a guaranty is beyond the power of a national bank. See *Kimien v. Atlas Exch. Nat'l Bank*, 92 F.2d 615, 617-18 (7th Cir. 1937), *cert. denied*, 303 U.S. 650 (1938); Lord, *The No-Guaranty Rule and the Standby Letter of Credit Controversy*, 96 Banking L.J. 46, 62 (1979); see also 12 U.S.C. § 24 (1982) (powers of a national bank). The potential uses of the standby letter of credit are numerous. See Kozolchyk, *The Emerging Law of Standby Letters of Credit and Bank Guarantees*, 24 Ariz. L. Rev. 319, 320 (1982) ("can encompass virtually every obligation known to man") [hereinafter cited as Kozolchyk II]; see, *e.g.*, *Pringle-Associated Mortgage Corp. v. Southern Nat'l Bank*, 571 F.2d 871, 872-73 (5th Cir. 1978) (to secure interim lenders); *National Sur. Corp. v. Midland Bank*, 551 F.2d 21, 23 (3d Cir. 1977) (security for litigation bond); *Chase Manhattan Bank v. Equibank*, 550 F.2d 882, 884 (3d Cir. 1977) (to secure permanent financing); *Beathard v. Chicago Football Club, Inc.*, 419 F. Supp. 1133, 1135 (N.D. Ill. 1976) (guaranty of salary payments); *West Va. Hous. Dev. Fund v. Sroka*, 415 F. Supp. 1107, 1115 (W.D. Pa. 1976) (substitute for working capital deposit); Thorup, *Injunctions Against Payment of Standby Letters of Credit: How Can Banks Best Protect Themselves*, 101 Banking L.J. 6, 8 (1984) (guaranty performance of debt securities); Harfield I, *supra*, at 253 (support issuance of commercial paper by corporate borrowers). As a matter of convenience, this Note is phrased in terms of the commercial letter of credit, but the discussion is applicable to all types of the letter.

confirmed,<sup>12</sup> negotiated,<sup>13</sup> assigned or transferred,<sup>14</sup> the ways in which a valid, irrevocable letter of credit can break down are numerous.<sup>15</sup> When a party to the letter of credit arrangement does not perform

12. A confirming bank is defined as "a bank which engages either that it will itself honor a credit already issued by another bank or that such a credit will be honored by the issuer or a third bank." U.C.C. § 5-103(1)(f) (1977); *see, e.g.*, *Venzelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 465 (2d Cir. 1970); *Voest-Alpine Int'l Corp. v. Chase Manhattan Bank, N.A.*, 545 F. Supp. 301, 303 (S.D.N.Y. 1982), *modified on other grounds*, 707 F.2d 680 (2d Cir. 1983); *Lustrelon, Inc. v. Prutscher*, 178 N.J. Super. 128, 139, 428 A.2d 518, 524 (App. Div. 1981). A beneficiary, because it is not familiar with the issuer, may seek confirmation of the letter of credit from a local bank. *See* R. Braucher & R. Riegert, *Introduction to Commercial Transactions* 367 (1977); H. Harfield, *supra* note 1, at 37; J. White & R. Summers, *supra* note 1, § 18-1, at 710 n.21.

13. The beneficiary may discount its draft to a local bank. *See* H. Harfield, *supra* note 1, at 35-36. As a result, the issuer becomes liable to the negotiating bank in the same way the issuer was liable to the beneficiary. *Id.* at 36; *see* U.C.P., *supra* note 9, art. 11(d); *see, e.g.*, *Flagship Cruises, Ltd. v. New Eng. Merchants Nat'l Bank*, 569 F.2d 699, 704 (1st Cir. 1978); *Irving Trust Co. v. Bank of India*, 561 F. Supp. 246, 247 (S.D.N.Y. 1983). The letter of credit itself, however, is not a negotiable instrument. J. White & R. Summers, *supra* note 1, § 18-9, at 747, because it does not meet the requirement in Article 3 of the U.C.C. that a negotiable instrument must "contain an unconditional promise or order to pay a sum certain in money." U.C.C. § 3-104(1)(b) (1977); *accord* *Shaffer v. Brooklyn Park Garden Apts.*, 311 Minn. 452, 457-58, 250 N.W.2d 172, 176-77 (1977) (conditions precedent to payment and issuer's duty to reject non-complying documents take the letter of credit out of the purview of Minnesota's version of U.C.C. § 3-104(1)). *Contra* Kozolchyk, *Letters of Credit*, in 9 *International Encyclopedia of Comparative Law* ch. 5, at 140 (1979) (conditions of the letter of credit are mere formalities and tantamount to a signature under an ordinary bank check) [hereinafter cited as Kozolchyk III]. The draft presented under the letter of credit, however, may be a negotiable instrument. *See generally* Farnsworth, *Documentary Drafts under the Uniform Commercial Code*, 22 *Bus. Law.* 479 (1967) (discussing the characteristics of the beneficiary's draft).

14. The beneficiary's rights to draw on the letter of credit are not assignable or transferable unless the letter expressly so provides. U.C.C. § 5-116(1) (1977); U.C.P., *supra* note 9, art. 54(b); *accord* *Pastor v. National Republic Bank*, 76 Ill. 2d 139, 148, 390 N.E.2d 894, 897 (1979); *Shaffer v. Brooklyn Park Garden Apts.*, 311 Minn. 452, 458-59, 250 N.W.2d 172, 177 (1977). This rule protects the customer's interest in the proper presentation of documents in that it is empowered to prevent someone other than the party it has contracted with from making the presentment. H. Harfield, *supra* note 1, at 180-81; Weisz & Blackman, *supra* note 11, at 366; State of N.Y. Law Revision Comm'n, *supra* note 4, at 123-24, *reprinted in* 1955 Report, *supra* note 4, at 1691-92. The letter of credit proceeds, however, are assignable even if the letter itself is expressly non-transferable. *E.g.*, *Watson v. Commissioner*, 613 F.2d 594, 598 (5th Cir. 1980); *Bank of Newport v. First Nat'l Bank & Trust Co.*, 32 U.C.C. Rep. Serv. (Callaghan) 1572, 1578 (D.N.D. 1981), *aff'd*, 34 U.C.C. Rep. Serv. (Callaghan) 650 (8th Cir. 1982); *Pastor v. National Republic Bank*, 76 Ill. 2d 139, 148-49, 390 N.E.2d 894, 898 (1979); *Shaffer v. Brooklyn Park Garden Apts.*, 311 Minn. 452, 458-59, 250 N.W.2d 172, 177 (1977); U.C.C. § 5-116(2) (1977); U.C.P., *supra* note 9, art. 55.

15. Litigation is frequent in the area of documentary compliance. State of N.Y. Law Revision Comm'n, *supra* note 4, at 64 & n.167, *reprinted in* 1955 Report, *supra* note 4, at 1632 & n.167; *see* J. White & R. Summers, *supra* note 1, § 18-6, at 729; Comment, *Letters of Credit Under the Proposed Uniform Commercial Code*:

properly, the economic interests of the other parties may be affected.<sup>16</sup> If such disputes result in litigation, multiple parties may be involved.

*An Opportunity Missed*, 62 Yale L.J. 227, 247 (1953); *see, e.g.*, Insurance Co. of N. Am. v. Heritage Bank, N.A., 595 F.2d 171, 172 (3d Cir. 1979) (per curiam); Flagship Cruises, Ltd. v. New Eng. Merchants Nat'l Bank, 569 F.2d 699, 701-02 (1st Cir. 1978); Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank, 528 F.2d 802, 804 (4th Cir. 1975). Two major types of improper performance are payment by the issuer in the absence of strict compliance of the beneficiary's presentment with the letter's terms and refusal by the issuer to honor notwithstanding strict compliance. H. Harfield, *supra* note 1, at 102. Wrongful dishonor occurs when "a draft or demand for payment which complies with the terms of the relevant credit" is not honored by the issuer. U.C.C. § 5-114(1) (1977). The beneficiary's remedies are explicitly stated in the U.C.C. *Id.* § 5-115. The customer's remedies for wrongful honor, however, are not stated in the U.C.C., perhaps because "lawyers for issuers greatly influenced the drafting of Article Five." J. White & R. Summers, *supra* note 1, § 18-7, at 741 (footnote omitted); *accord* Note, *Judicial Development of Letters of Credit Law: A Reappraisal*, 66 Cornell L. Rev. 144, 161 n.83 (1980) [hereinafter cited as *Judicial Development*]. The issuer, however, may be required to honor the beneficiary's non-complying presentment if the custom of the trade so dictates, Dixon, Irmaos & Cia, Ltda. v. Chase Nat'l Bank, 144 F.2d 759, 762 (2d Cir. 1944) (trade custom to treat indemnity from a responsible bank as a sufficient substitute for compliance), *cert. denied*, 324 U.S. 850 (1945), if the issuer waived the requirement or is estopped from asserting it, *see, e.g.*, Barclays Bank D.C.O. v. Mercantile Nat'l Bank, 481 F.2d 1224, 1236 (5th Cir. 1973), *cert. dismissed*, 414 U.S. 1139 (1974); International Leather Distribs., Inc. v. Chase Manhattan Bank, N.A., 464 F. Supp. 1197, 1201-03 (S.D.N.Y.), *aff'd mem.*, 607 F.2d 996 (2d Cir. 1979); United States Indus. v. Second New Haven Bank, 462 F. Supp. 662, 666 (D. Conn. 1978), or if the issuer failed to give notice of the non-compliance and thereby denied the beneficiary of its right to cure, *see, e.g.*, Corporacion de Mercadeo Agricola v. Mellon Bank Int'l, 608 F.2d 43, 48-49 (2d Cir. 1979); Bank of Canton, Ltd. v. Republic Nat'l Bank, 509 F. Supp. 1310, 1317 (S.D.N.Y.), *aff'd per curiam*, 636 F.2d 30 (2d Cir. 1980); Data Gen. Corp. v. Citizens Nat'l Bank, 502 F. Supp. 776, 786 (D. Conn. 1980); U.C.P., *supra* note 9, art. 16(d); *see also* Harfield I, *supra* note 11, at 257 ("any [party to a letter of credit transaction] can go a long way toward messing it up"). For an inventory of ways in which a valid irrevocable letter of credit may break down, *see* H. Harfield, *supra* note 1, at 102-15; J. White & R. Summers, *supra* note 1, §§ 18-5 to -8, at 727-46.

16. Generally, the letter of credit is the third agreement in a commercial arrangement initially comprised of two independent contracts. East Girard Sav. Ass'n v. Citizens Nat'l Bank, 593 F.2d 598, 601 (5th Cir. 1979); Baker v. National Blvd. Bank, 399 F. Supp. 1021, 1024 (N.D. Ill. 1975); Justice, *Letters of Credit: Expectations and Frustrations* (pt. 1), 94 Banking L.J. 424, 425 (1977) [hereinafter cited as Justice I]; Verkuil, *Bank Solvency and Guaranty Letters of Credit*, 25 Stan. L. Rev. 716, 719 (1973); *see, e.g.*, Barclays Bank D.C.O. v. Mercantile Nat'l Bank, 481 F.2d 1224, 1239 n.21 (5th Cir. 1973) (quoting Comment, *Commercial Letters of Credit: Development and Expanded Use in Modern Commercial Transactions*, 4 Cum.-Sam. L. Rev. 134, 142 n.39 (1973)), *cert. dismissed* 414 U.S. 1139 (1974); First Nat'l Bank v. Wynne, 149 Ga. App. 811, 814, 256 S.E.2d 383, 385 (1979). While the letter of credit traditionally is viewed as a mere conduit of payment, *see* I A. Lowenfeld, *International Private Trade* § 5-1, at 125 (2d ed. 1981), courts recently have applied contract principles to the letter of credit. *E.g.*, Bank of N.C., N.A. v. Rock Island Bank, 570 F.2d 202, 207 (7th Cir. 1978); Venizelos, S.A. v. Chase Manhattan Bank, 425 F.2d 461, 465-66 (2d Cir. 1970); Data Gen. Corp. v. Citizens Nat'l Bank, 502 F. Supp. 776, 784 (D. Conn. 1980); West Va. Hous. Dev. Fund v. Sroka, 415 F. Supp.



The prospect of multiple-party litigation in letter of credit transactions may implicate several aspects of procedural law. Four procedural devices that may affect letter of credit transactions are compulsory joinder, intervention, impleader and attachment. For instance, in an action between two parties to the letter of credit arrangement, a third party may be deemed necessary or indispensable under Rule 19 of the Federal Rules of Civil Procedure (Federal Rules).<sup>17</sup> In addition, a party to the letter of credit arrangement that is not a party-litigant may attempt to intervene in the action in order to protect its interests.<sup>18</sup> Alternatively, a party-defendant in a letter of credit action may wish to implead a third party to the transaction that may be secondarily liable to the plaintiff.<sup>19</sup> Finally, when the beneficiary breaches the

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1107, 1112 (W.D. Pa. 1976); *Harvey Estes Constr. Co. v. Dry Dock Sav. Bank*, 381 F. Supp. 271, 274 (W.D. Okla. 1974). In any event, the letter of credit serves a ministerial function to facilitate trade because the issuer does not have discretion in deciding whether to honor the beneficiary's draft. *Insurance Co. of N. Am. v. Heritage Bank, N.A.*, 595 F.2d 171, 173 (3d Cir. 1979); *Data Gen. Corp. v. Citizens Nat'l Bank*, 502 F. Supp. 776, 780 (D. Conn. 1980); see *Chase Manhattan Bank v. Equibank*, 550 F.2d 882, 885 (3d Cir. 1977); *Far E. Textile, Ltd. v. City Nat'l Bank & Trust Co.*, 430 F. Supp. 193, 196 (S.D. Ohio 1977); Joseph, *Letters of Credit: The Developing Concepts and Financing Functions*, 94 *Banking L.J.* 816, 850-51 (1977).

17. Fed. R. Civ. P. 19; e.g., *Continental Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408, 410 (S.D.N.Y. 1982); *National Am. Corp. v. Federal Republic of Nig.*, 420 F. Supp. 954, 957 (S.D.N.Y. 1976); *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 315 (Me. 1978); *Edgewater Constr. Co. v. Percy Wilson Mortgage & Fin. Corp.*, 44 Ill. App. 3d 220, 226, 357 N.E.2d 1307, 1312-13 (1976); see *Faravelli v. Bankers Trust Co.*, 85 A.D.2d 335, 337, 447 N.Y.S.2d 962, 964, *aff'd*, 59 N.Y.2d 615, 449 N.E.2d 1272, 463 N.Y.S.2d 194 (1983); *J. White & R. Summers*, *supra* note 1, § 18-7, at 745; *State of N.Y. Law Revision Comm'n*, *supra* note 4, at 99-102, *reprinted in* 1955 Report, *supra* note 4, at 1667-70; *Weisz & Blackman*, *supra* note 11, at 364 n.35. Two courts have recognized the compulsory joinder issue, but failed to decide it. See *Canadian Transp. Co. v. Irving Trust Co.*, 548 F.2d 53, 55 (2d Cir. 1977) (too many uncertainties to warrant a decision on the merits); *Continental Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408, 410 (S.D.N.Y. 1982) (case dismissed in favor of foreign litigation presenting same claims and issues).

18. See Fed. R. Civ. P. 24; see, e.g., *National Am. Corp. v. Federal Republic of Nig.*, 425 F. Supp. 1365, 1368 (S.D.N.Y. 1977); *Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1022 (N.D. Ill. 1975); *Lantz Int'l Corp. v. Industria Termotecnica Campana, S.p.A.*, 358 F. Supp. 510, 512 n.2 (E.D. Pa. 1973); *Dynamics Corp. of Am. v. Citizens & S. Nat'l Bank*, 356 F. Supp. 991, 996 (N.D. Ga. 1973); *Pastor v. National Republic Bank*, 56 Ill. App. 3d 421, 423, 371 N.E.2d 1127, 1128 (1977); *aff'd*, 76 Ill. 2d 139, 390 N.E.2d 894 (1979); see also *Vazman, S.A. v. Fidelity Int'l Bank*, 418 F. Supp. 1084, 1085 (S.D.N.Y. 1976) (shipowners sought to intervene in beneficiary's suit to recover demurrage from the issuer).

19. See Fed. R. Civ. P. 14; see, e.g., *Toyota Indus. Trucks U.S.A., Inc. v. Citizens Nat'l Bank*, 611 F.2d 465, 469 (3d Cir. 1979); *Equilease Corp. v. Jefferson Bank*, 88 F.R.D. 208, 209 (E.D. Pa. 1980); *Telenet Co. v. Com/Link Int'l Corp.*, No. 78-3329, slip op. at 1 (S.D.N.Y. Feb. 7, 1979); *Bank of the Southeast v. Jackson*, 413 So. 2d 1091, 1092 (Ala. 1982); *Faravelli v. Bankers Trust Co.*, 85 A.D.2d 335, 336-37, 447 N.Y.S.2d 962, 964 (1982), *aff'd*, 59 N.Y.2d 615, 449 N.E.2d 1272, 463

underlying contract, the customer may attempt to attach the proceeds of the letter of credit while they are in the possession of the issuer, thereby attempting to obtain quasi-in-rem jurisdiction over, and prevent payment to, the beneficiary.<sup>20</sup>

While the application of procedural law relating to multiple-party litigation appears well-suited to letter of credit disputes,<sup>21</sup> substantive

N.Y.S.2d 194 (1983); *Mid-States Mortgage Corp. v. National Bank of Southfield*, 77 Mich. App. 651, 652, 259 N.W.2d 175, 176 (1977); *cf. Atlas Assurance Co. v. Harper, Robinson Shipping Co.*, 508 F.2d 1381, 1384 (9th Cir. 1975) (insurance company that paid negotiating bank for damaged goods sued time charterer who impleaded the customer); *Continental Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408, 409 (S.D.N.Y. 1982) (foreign court granted issuer's application to join its customer to the action); *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 317 n.8 (Me. 1978) (issuer's failure to implead its customer hinders its claim regarding risk of inconsistent obligations in beneficiary's suit for wrongful dishonor).

20. *See, e.g., Sisalcords do Brazil, Ltd. v. Fiacao Brasileira de Sisal, S.A.*, 450 F.2d 419, 421 app. (5th Cir. 1971) (per curiam), *cert. denied*, 406 U.S. 919 (1972); *Lantz Int'l Corp. v. Industria Termotecnica Campana, S.p.A.*, 358 F. Supp. 510, 512 (E.D. Pa. 1973); *Tueta v. Rodriguez*, 176 So. 2d 550, 551 (Fla. Dist. Ct. App. 1965); *Hohenberg Co. v. Comitex Knitters, Ltd.*, 104 Misc. 2d 232, 234-35, 428 N.Y.S.2d 156, 157-58 (Sup. Ct. 1980); *Falk & Co. v. South Tex. Cotton Oil Co.*, 368 Pa. 199, 202, 82 A.2d 27, 29 (1951); *cf. National Am. Corp. v. Federal Republic of Nig.*, 448 F. Supp. 622, 633 (S.D.N.Y. 1978) (attachment of letter of credit proceeds in action by beneficiary against issuer and customer), *aff'd*, 597 F.2d 314 (2d Cir. 1979); *Harvey Estes Contrs. Co. v. Dry Dock Sav. Bank*, 381 F. Supp. 271, 273 (W.D. Okla. 1974) (order to pay funds into court). It is important to know precisely when the beneficiary's right to the letter of credit proceeds becomes unconditional, because a contingent right cannot be attached or levied against. *Frederick v. Chicago Bearing Metal Co.*, 221 A.D. 588, 589-90, 224 N.Y.S. 629, 630 (1927); *see, e.g., Dick Warner Cargo Handling Corp. v. Aetna Bus. Credit, Inc.*, 700 F.2d 858, 861 (2d Cir. 1983); *Sisalcords do Brazil, Ltd. v. Fiacao Brasileira de Sisal, S.A.*, 450 F.2d 419, 423 (5th Cir. 1971), *cert. denied*, 406 U.S. 919 (1972). It is unclear whether the beneficiary's right becomes unconditional immediately on presentment or only after the issuer has had a reasonable time to examine the presentment. *State of N.Y. Law Revision Comm'n, supra note 4*, at 125 n.418, *reprinted in 1955 Report, supra note 4*, at 1693 n.418.

21. The Federal Rules of Civil Procedure "govern the procedure in the United States district courts in all suits of a civil nature" and are to be "construed to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. The spirit of the rules requires that matters be viewed in their entirety, and that there be a speedy adjudication of all controversies between the parties in a single action, without multiplicity of suits. *John R. Alley & Co. v. Federal Nat'l Bank*, 124 F.2d 995, 997 (10th Cir. 1942); *Jones v. St. Paul Fire & Marine Ins. Co.*, 108 F.2d 123, 125 (5th Cir. 1939). One purpose of the rules is to encourage the consolidation of suits involving related interests whenever fair and possible. *Popkin v. Eastern Airlines*, 204 F. Supp. 426, 431 (E.D. Pa. 1962), *modified on other grounds sub nom. VanDusen v. Barrack*, 376 U.S. 612 (1964). In every litigation the federal judiciary has an interest in having a whole case tried at one time. *Hargrave v. Oki Nursery, Inc.*, 646 F.2d 716, 720 (2d Cir. 1980).

The litigation options discussed in this Note, however, are not limited to federal forums; letter of credit litigation also occurs in state courts where state procedural rules govern. *See, e.g., First Arlington Nat'l Bank v. Stathis*, 90 Ill. App. 3d 802, 803-

letter of credit law may pose a substantial obstacle to multiple-party litigation.<sup>22</sup> The letter of credit is viewed as entirely separate and distinct from the underlying contract (independence principle)<sup>23</sup> and therefore, the issuer must honor a complying presentment unless the situation is within a statutorily-defined exception.<sup>24</sup> The issuer is not

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04, 413 N.E.2d 1288, 1290 (1980); *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 315 (Me. 1978); *Lustrelon, Inc. v. Prutscher*, 178 N.J. Super. 128, 131-32, 428 A.2d 518, 520 (App. Div. 1981).

22. For instance, the situation in which the customer sues the beneficiary and attaches the issuer's payment obligation has been criticized as hostile to the letter of credit device because a breach of contract claim thereby stops payment to the beneficiary. See *infra* notes 207-10 and accompanying text. Regarding the compulsory joinder device, it has been held that because the issuer-beneficiary relationship is completely independent of the underlying contract, a suit for wrongful dishonor may be fully adjudicated in the customer's absence. *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 316 (Me. 1978); *cf.* *Continental Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408, 410-11 (S.D.N.Y. 1982) (discussing indispensability of beneficiary's partial assignee). Moreover, with respect to impleader, the substantive letter of credit law obviated a finding of the requisite derivative liability of the third-party defendant. *Telenet Co. v. Com/Link Int'l Corp.*, No. 78-3329, slip op. at 5-6 (S.D.N.Y. Feb. 2, 1979).

23. U.C.P., *supra* note 9, art. 3. An official comment to the UCC provides that "[t]he letter of credit . . . is recognized by this Article as independent of the underlying contract between the customer and the beneficiary." U.C.C. § 5-114 official comment 1 (1977). This language has generally been interpreted to require complete separation of the letter of credit from the underlying contract. See, e.g., *KMW Int'l v. Chase Manhattan Bank*, 606 F.2d 10, 15 (2d Cir. 1979); *Fidelity Bank v. Lutheran Mut. Life Ins. Co.*, 465 F.2d 211, 214 (10th Cir. 1972); *Prudential Ins. Co. v. Marquette Nat'l Bank*, 419 F. Supp. 734, 736 (D. Minn. 1976); *West Va. Hous. Dev. Fund v. Sroka*, 415 F. Supp. 1107, 1114 (W.D. Pa. 1976); *New York Life Ins. Co. v. Hartford Nat'l Bank & Trust Co.*, 173 Conn. 492, 497-99, 378 A.2d 562, 566 (1977); *Maurice O'Meara Co. v. National Park Bank*, 239 N.Y. 386, 395, 146 N.E. 636, 639 (1925); *H. Harfield*, *supra* note 1, at 28; *J. White & R. Summers*, *supra* note 1, § 18-2, at 712.

24. U.C.C. § 5-114(1), (2) (1977). The issuer is liable if it fails to honor a presentment that conforms to the requirements of the letter of credit, see, e.g., *Venzelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 465 (2d Cir. 1970); *Crocker First Nat'l Bank v. DeSousa*, 27 F.2d 462, 464 (9th Cir. 1928); *Maurice O'Meara Co. v. National Park Bank*, 239 N.Y. 386, 395, 146 N.E. 636, 639 (1925), even if the goods do not conform to the specifications in the underlying contract. E.g., *East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 602 (5th Cir. 1979); *Asociacion de Azucareros de Guatemala v. United States Nat'l Bank*, 423 F.2d 638, 641 (9th Cir. 1970); *Data Gen. Corp. v. Citizens Nat'l Bank*, 502 F. Supp. 776, 780 (D. Conn. 1980); *cf.* *Banco di Roma v. Fidelity Union Trust Co.*, 464 F. Supp. 817, 824 (D.N.J. 1979) (bank not required to honor non-complying drafts even though goods complied with terms of the underlying contract). A statutory exception to this independence principle exists when, *inter alia*, a document "is forged or fraudulent or there is fraud in the transaction." U.C.C. § 5-114(2) (1977). Under such circumstances, the bank is permitted, but not required, to honor the draft, *id.*; see *Bank of Newport v. First Nat'l Bank & Trust Co.*, 34 U.C.C. Rep. Serv. (Callaghan) 650, 655 (8th Cir. 1982); *KMW Int'l v. Chase Manhattan Bank, N.A.*,

concerned with the proper performance of the underlying contract,<sup>25</sup> but rather is concerned solely with the apparent compliance of the required documents with the terms of the letter of credit.<sup>26</sup> This independence principle may render the application of the multiple-party procedural rules to letter of credit litigation questionable because application of the rules requires the resolution of issues common to both the letter of credit and the underlying contract.

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606 F.2d 10, 16 (2d Cir. 1979) (dictum), and the customer may seek to enjoin honor in a court of appropriate jurisdiction. U.C.C. § 5-114(2)(b) (1977). See generally *Sztejn v. J. Henry Schroder Banking Corp.*, 177 Misc. 719, 31 N.Y.S.2d 631 (Sup. Ct. 1941) (customer may enjoin for fraud).

Fraud must be distinguished from mere breach of warranty. *Id.* at 721-22, 31 N.Y.S.2d at 634. One court has stated that fraud in the transaction exists for § 5-114 purposes when "the wrongdoing of the beneficiary has so vitiated the entire transaction that the legitimate purposes of the independence of the issuer's obligation would no longer be served." *Intraworld Indus. v. Girard Trust Bank*, 461 Pa. 343, 359, 336 A.2d 316, 324-25 (1975). U.C.C. § 5-114(2) applies to letters of credit governed by the UCP, which does not contain an injunction provision. *Weisz & Blackman, supra* note 11, at 368 n.45; see *United Bank Ltd. v. Cambridge Sporting Goods Corp.*, 41 N.Y.2d 254, 258 n.2, 360 N.E.2d 943, 947 n.2, 392 N.Y.S.2d 265, 269 n.2 (1976).

25. See U.C.P., *supra* note 9, art. 4; U.C.C. §§ 5-109(1)(a), 5-114(1) (1977); *H. Harfield, supra* note 1, at 71, 107; see, e.g., *Venzelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 465 (2d Cir. 1970); *Dulien Steel Prods. v. Bankers Trust Co.*, 298 F.2d 836, 840 (2d Cir. 1962); *Bank of Canton, Ltd. v. Republic Nat'l Bank*, 509 F. Supp. 1310, 1314 (S.D.N.Y.), *aff'd per curiam*, 636 F.2d 30 (2d Cir. 1980); *United Bank Ltd. v. Cambridge Sporting Goods Corp.*, 41 N.Y.2d 254, 259, 360 N.E.2d 943, 948, 392 N.Y.S.2d 265, 270 (1976). As a result, the issuer may not avail itself of any legal defenses available to either party to the underlying contract. See, e.g., *East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 602 (5th Cir. 1979); *Pringle-Associated Mortgage Corp. v. Southern Nat'l Bank*, 571 F.2d 871, 874 (5th Cir. 1978); *Bossier Bank & Trust Co. v. Union Planters Nat'l Bank*, 550 F.2d 1077, 1081-82 app. A (6th Cir. 1977) (*per curiam*) (adopting memorandum decision of lower court); *Cappaert Enters., Inc. v. Citizens & S. Int'l Bank*, 486 F. Supp. 819, 826 (E.D. La. 1980); cf. *First Arlington Nat'l Bank v. Stathis*, 90 Ill. App. 3d 802, 808, 413 N.E.2d 1288, 1293-94 (1980) (issuer's liability unaffected by modification of underlying contract); *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 320 (Me. 1978) (issuer not released from liability for wrongful dishonor by settlement of underlying contract).

26. U.C.C. § 5-109(2) (1977); see *United States v. Sun Bank*, 609 F.2d 832, 833 (5th Cir. 1980) (*per curiam*); *Instituto Nacional de Comercializacion Agricola (Indeca) v. Continental Ill. Nat'l Bank & Trust Co.*, 530 F. Supp. 279, 282-83 (N.D. Ill. 1982); *Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92, 100 (M.D.N.C.), *rev'd on other grounds*, 528 F.2d 802 (4th Cir. 1975); *First Arlington Nat'l Bank v. Stathis*, 90 Ill. App. 3d 802, 808, 413 N.E.2d 1288, 1293 (1980). Moreover, the issuer must make its determination of documentary compliance in good faith, U.C.C. §§ 5-109(1), 5-114(2)(b) (1977); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Liberty Nat'l Bank & Trust Co.*, 116 F. Supp. 233, 237 n.13 (W.D. Okla. 1953), *aff'd*, 218 F.2d 831 (10th Cir. 1955), which is defined as "honesty in fact," U.C.C. § 1-201(19) (1977); see *Lustrelon, Inc. v. Prutscher*, 178 N.J. Super. 128, 143-44, 428 A.2d 518, 526 (App. Div. 1981), and which may never be disclaimed, U.C.C. § 1-102(3) (1977).

This Note examines the procedural devices of compulsory joinder, intervention, impleader and attachment in the context of letter of credit litigation. Part I discusses the application of the compulsory joinder rule to letter of credit suits and examines which, if any, of the parties to the letter of credit transaction should be deemed necessary or indispensable to the litigation. Part II examines when a party to the letter of credit arrangement is entitled to intervene, either permissively or of right, in an action between other parties to the transaction. Part III discusses the propriety of allowing a party-defendant in a letter of credit case to implead a third party that is, or may be, liable for all or part of the plaintiff's recovery. Part IV discusses whether the customer may attach the letter of credit proceeds, while they are in the possession of the issuer, in order to stop payment to, and establish quasi-in-rem jurisdiction over, the beneficiary.

Each Part of this Note concludes that in appropriate cases the independence principle does not preclude the implementation of these procedural devices in letter of credit litigation. This Note recognizes, however, that an unbridled implementation of these procedural rules will threaten the existence of the letter of credit as a means to facilitate commercial transactions. Accordingly, a court in a letter of credit dispute should not apply such rules summarily to all cases. The litigator, therefore, should view the suggestions presented in this Note as options to be considered solely in limited, fact-specific situations.

### I. PARTIES INDISPENSABLE TO LETTER OF CREDIT LITIGATION

Under Rule 19 of the Federal Rules,<sup>27</sup> a party must be joined in an action, if feasible, when complete relief cannot be granted in his absence,<sup>28</sup> or when disposition in his absence will either impair his ability to protect affected interests or subject the parties already before the court to multiple or inconsistent obligations.<sup>29</sup> When joinder is not feasible, a court has discretion to treat the party as dispensable

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27. Fed. R. Civ. P. 19. One of the main purposes of this rule is to avoid multiple litigation of essentially the same issues. *E.g.*, *CBS v. Film Corp. of Am.*, 545 F. Supp. 1382, 1389 (E.D. Pa. 1982); *Japan Petroleum Co. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 836 (D. Del. 1978). Rule 19, therefore, should be construed broadly. *See, e.g.*, *Dintino v. Dorsey*, 91 F.R.D. 280, 282 (E.D. Pa. 1981); *Japan Petroleum Co. v. Ashland Oil, Inc.*, 456 F. Supp. at 836.

28. Fed. R. Civ. P. 19(a)(1).

29. *Id.* R. 19(a)(2). A party is "necessary" when he possesses such an interest that he should be joined to determine the entire controversy, but his interest is separable. *See, e.g.*, *Lewis v. Lewis*, 358 F.2d 495, 500 & n.4 (9th Cir. 1966); *Savoia Film S.A.I. v. Vanguard Films, Inc.*, 10 F.R.D. 64, 66 (S.D.N.Y. 1950). A necessary party is "desirable" as opposed to indispensable. *Bradley v. School Bd.*, 51 F.R.D. 139, 142 (E.D. Va. 1970).

and thus proceed in his absence.<sup>30</sup> Alternatively, a court may classify the party as indispensable and dismiss the action.<sup>31</sup> In determining indispensability, a court examines the extent to which a judgment will be prejudicial to the absent or existing parties,<sup>32</sup> the extent to which this prejudice can be lessened or avoided,<sup>33</sup> the adequacy of the remedy rendered in the party's absence<sup>34</sup> and the availability of an adequate alternative remedy for the plaintiff if the action is dismissed.<sup>35</sup>

In a typical tripartite letter of credit arrangement, the relationship between any two parties is generally independent of any other two-party relationship.<sup>36</sup> This principle appears to preclude the use of the

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30. Fed. R. Civ. P. 19(b). The test is whether, "in equity and good conscience," the suit should proceed. *Id.*; Francis Oil & Gas, Inc. v. Exxon Corp., 661 F.2d 873, 878 (10th Cir. 1981); Manygoats v. Kleppe, 558 F.2d 556, 559 (10th Cir. 1977); Laird v. Chrysler Corp., 92 F.R.D. 473, 474 (D. Mass. 1981).

31. See Fed. R. Civ. P. 19(b). A party is deemed indispensable only after a court has determined that the litigation may not, in equity and good conscience, proceed in the party's absence. *E.g.*, Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118-19 (1968); Shields v. Barrow, 58 U.S. (17 How.) 129, 139 (1854); Challenge Homes, Inc. v. Greater Naples Care Center, Inc., 669 F.2d 667, 669 & n.3 (11th Cir. 1982); Fletcher Aircraft Co. v. Bond, 77 F.R.D. 47, 52-53 (C.D. Cal. 1977).

32. Fed. R. Civ. P. 19(b). A pragmatic approach should be used in determining prejudicial effect. See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110 (1968); Schutten v. Shell Oil Co., 421 F.2d 869, 874-75 (5th Cir. 1970); Gram v. May, 41 F.R.D. 52, 54 (E.D. Pa. 1966).

33. Fed. R. Civ. P. 19(b); see Doty v. St. Mary Parish Land Co., 598 F.2d 885, 887 (5th Cir. 1979); Sandobal v. Armour & Co., 429 F.2d 249, 257-58 (8th Cir. 1970); Estate of Johnson v. Bellville Hosp., 56 F.R.D. 380, 384 (S.D. Tex. 1972).

34. Fed. R. Civ. P. 19(b); see Anrig v. Ringsby United, 591 F.2d 485, 491 (9th Cir. 1978); Trebesch v. Astra Pharmaceutical Prods., Inc., 503 F. Supp. 79, 80 (D. Minn. 1980).

35. Fed. R. Civ. P. 19(b). The availability of an alternative forum in the event the action is dismissed is a critical consideration in determining the indispensability of the absent party. *E.g.*, Pasco Int'l (London) Ltd. v. Stenograph Corp., 637 F.2d 496, 500 (7th Cir. 1980); Doty v. St. Mary Parish Land Co., 598 F.2d 885, 888 (5th Cir. 1979); Anrig v. Ringsby United, 591 F.2d 485, 491 (9th Cir. 1978). If no alternative forum exists, "plaintiff's interest in having the federal forum would strongly influence a court to find that the absent person was not indispensable." Pasco Int'l (London) Ltd. v. Stenograph Corp., 637 F.2d at 500. Moreover, the factors listed in Rule 19(b) are not exclusive and must be applied pragmatically, focusing on the facts of each case. Bio-Analytical Servs., Inc. v. Edgewater Hosp., Inc., 565 F.2d 450, 452 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); see, e.g., Coastal Modular Corp. v. Laminators, Inc., 635 F.2d 1102, 1108 (4th Cir. 1980); Smith v. State Fire and Cas. Co., 633 F.2d 401, 405 (5th Cir. 1980); Prescription Plan Serv. Corp. v. Franco, 552 F.2d 493, 496 (2d Cir. 1977).

36. See J. White & R. Summers, *supra* note 1, § 18-2, at 711-12; Harfield, *Identity Crises in Letter of Credit Law*, 24 Ariz. L. Rev. 239, 241-42 (1982) [hereinafter cited as Harfield II]; see, e.g., KMW Int'l v. Chase Manhattan Bank, N.A., 606 F.2d 10, 15 (2d Cir. 1979); Consolidated Aluminum Corp. v. Bank of Va., 544 F. Supp. 386, 395 (D. Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983); Colorado Nat'l Bank v. Board of County Comm'rs, 634 P.2d 32, 36-37 (Colo. 1981) (en banc).

compulsory joinder doctrine in letter of credit litigation. For example, in an action on the underlying contract for either nonpayment or inadequate performance, the issuer is not a party to be joined if feasible.<sup>37</sup> Under the independence principle, the issuer has no legal interest in the actual performance of the underlying contract,<sup>38</sup> and therefore, is not connected with the customer's suit for the receipt of noncomplying goods.<sup>39</sup> Alternatively, when the beneficiary sues the customer for nonpayment after having substantially performed the underlying contract and after the issuer has dishonored the beneficiary's draft, complete relief can be granted in the issuer's absence.<sup>40</sup> Such a disposition does not lead to inconsistent or multiple obligations. Even if the beneficiary prevails, the customer, after making payment directly, has no duty to reimburse the issuer.<sup>41</sup> Thus, the issuer should never be classified as a Rule 19(a) party.

37. Cf. *Lewis v. Lewis*, 358 F.2d 495, 500 n.4 (9th Cir. 1966) (a party "must be interested" in the controversy to be classified as necessary); *Horwich v. Price*, 25 F.R.D. 500, 504 (W.D. Mich. 1960) (same); *Savoia Film S.A.I. v. Vanguard Films, Inc.*, 10 F.R.D. 64, 66 (S.D.N.Y. 1950) (same). The issuer is not an interested party because it deals in documents, not in goods. See *supra* note 25 and accompanying text.

38. See U.C.C. § 5-109(1)(a) (1977); U.C.P., *supra* note 9, art. 3. Allowing or requiring the issuer to monitor the performance of the underlying contract "would impose upon a bank a duty which in many cases would defeat the primary purpose of" the letter of credit, which is to assure the beneficiary of "prompt payment against documents." *Maurice O'Meara Co. v. National Park Bank*, 239 N.Y. 386, 397, 146 N.E. 636, 639 (1925); *accord Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 528 F.2d 802, 805 (4th Cir. 1975); see *Pringle-Associated Mortgage Corp. v. Southern Nat'l Bank*, 571 F.2d 871, 874 (5th Cir. 1978).

39. The issuer may not raise any defenses its customer has against the beneficiary. *East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 602 (5th Cir. 1979); see, e.g., *Pringle-Associated Mortgage Corp. v. Southern Nat'l Bank*, 571 F.2d 871, 874 (5th Cir. 1978) (inadequate performance of the underlying contract by the beneficiary does not affect the issuer's liability to the beneficiary); *Bossier Bank & Trust Co. v. Union Planters Nat'l Bank*, 550 F.2d 1077, 1081 app. A (6th Cir. 1977) (per curiam) (same) (adopting district court's memorandum decision).

40. In the event of dishonor, "the beneficiary may still recover from the customer in an action on the underlying contract." *J. White & R. Summers, supra* note 1, § 18-6, at 728; see *Corporacion de Mercadeo Agricola v. Mellon Bank Int'l*, 608 F.2d 43, 47 (2d Cir. 1979); *Far E. Textile, Ltd. v. City Nat'l Bank & Trust Co.*, 430 F. Supp. 193, 195-96 (S.D. Ohio 1977); *Bank of United States v. Seltzer*, 233 A.D. 225, 231, 251 N.Y.S. 637, 644 (1931); *H. Harfield, supra* note 1, at 72-73.

41. The issuer's right to reimbursement is contingent upon its "duly honoring" the beneficiary's draft. U.C.C. § 5-114(3) & official comment 3 (1977); *accord* U.C.P., *supra* note 9, art. 16(a). A draft is duly honored when it complies facially or when the issuer is entitled to honor in good faith despite the customer's allegations of fraud in the transaction. U.C.C. § 5-114 & official comment 3 (1977); see *Bossier Bank & Trust Co. v. Union Planters Nat'l Bank*, 550 F.2d 1077, 1081 app. A (6th Cir. 1977) (per curiam) (adopting district court's memorandum decision); *Dynamics Corp. of Am. v. Citizens & S. Nat'l Bank*, 356 F. Supp. 991, 995-96 (N.D. Ga. 1973). When the customer pays the beneficiary's draft, it may offset the amount paid

The compulsory joinder doctrine, however, may be applied to cases in which several parties have some degree of interest in common, by which a "community of interest"<sup>42</sup> exists among the multiple contracts involved.<sup>43</sup> For example, the beneficiaries of a trust agreement typically are classified as indispensable to an action affecting the trust property.<sup>44</sup> Arguably, under certain circumstances, this "community of interest" doctrine applies to the multi-contractual credit arrangement. Admittedly, the relationships within the arrangement are not interdependent with respect to the mutual performance obligations existing between any two parties.<sup>45</sup> Nevertheless, the letter of credit arrangement would not arise but for the underlying contract that it supports.<sup>46</sup> The letter of credit, therefore, is related to the existence and operation of the underlying contract if only to the extent that the beneficiary typically must present evidence of his performance of the underlying contract before the issuer's payment obligation is triggered<sup>47</sup> and the issuer must forward the presented documents to the customer in seeking reimbursement.<sup>48</sup> Thus, while the independence

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against any claim of the issuer on the letter of credit. *Bank of United States v. Seltzer*, 233 A.D. 225, 231, 251 N.Y.S. 637, 644 (1931); 6 *Michie*, *supra* note 1, ch. 12, § 33b, at 440.

42. 3A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 19.18[1], at 19-335 (2d ed. 1982); *see* *Commonwealth Trust Co. v. Smith*, 266 U.S. 152, 159, 161 (1924); *Bendix Aviation Corp. v. Kury*, 88 F. Supp. 243, 247 (E.D.N.Y. 1950).

43. 3A J. Moore & J. Lucas, *supra* note 42, ¶ 19.18[1], at 19-335 ("[A] community of interest may arise out of contracts which, while several in form, are interdependent in substance and operation.").

44. *See, e.g., Matthies v. Seymour Mfg. Co.*, 270 F.2d 365, 371 (2d Cir. 1959), *cert. denied*, 361 U.S. 962 (1960); *Hood v. James*, 256 F.2d 895, 903 (5th Cir. 1958).

45. *See supra* notes 21-26 and accompanying text.

46. A letter of credit "depends for its effectiveness upon the inducement it holds forth to third parties—to the beneficiary and to the negotiating bank or correspondent." H. Harfield, *supra* note 1, at 221. Letters of credit serve a ministerial function in financing the underlying contract. *See, e.g., Insurance Co. of N. Am. v. Heritage Bank, N.A.*, 595 F.2d 171, 173 (3d Cir. 1979); *Dulien Steel Prods., Inc. v. Bankers Trust Co.*, 298 F.2d 836, 840 (2d Cir. 1962); *Data Gen. Corp. v. Citizens Nat'l Bank*, 502 F. Supp. 776, 780-81 (D. Conn. 1980); *Joseph, supra* note 16, at 850-51.

47. *See supra* notes 1-9 and accompanying text.

48. J. White & R. Summers, *supra* note 1, § 18-5, at 727. The customer may waive nonconformity in the beneficiary's presentment. *See, e.g., Corporación de Mercadeo Agrícola v. Mellon Bank Int'l*, 608 F.2d 43, 46-47 (2d Cir. 1979); *Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 528 F.2d 802, 806-07 (4th Cir. 1975); *International Leather Distribs., Inc. v. Chase Manhattan Bank*, 464 F. Supp. 1197, 1201-02 (S.D.N.Y.), *aff'd mem.*, 607 F.2d 996 (2d Cir. 1979). The issuer would then be required to honor the presentment as if it complied strictly. *See Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 528 F.2d at 807; *International Leather Distribs. v. Chase Manhattan Bank*, 464 F. Supp. at 1201-03; *North Am. Foreign Trading Corp. v. General Elecs., Ltd.*, 67 A.D.2d 890, 891, 413 N.Y.S.2d 700, 702 (1979) (*mem.*).



principle may limit the use of the compulsory joinder doctrine in letter of credit cases, it should not foreclose summarily the doctrine's application. An analysis of the various relationships within the letter of credit arrangement suggests that compulsory joinder should be applied to letter of credit litigation solely in limited circumstances.

### A. *The Customer v. The Issuer*

In a customer's action to enjoin the issuer from honoring the beneficiary's presentment, requiring the joinder of the beneficiary is appropriate because the injunction may violate the beneficiary's rights to payment under the letter of credit.<sup>49</sup> The issuer may interpose the injunction as a defense to an action by the beneficiary for wrongful dishonor,<sup>50</sup> thereby potentially depriving the beneficiary of its right to legal process under the letter of credit.<sup>51</sup> It is arguable, therefore, that the beneficiary should be joined, if feasible. Disposition of the injunction proceeding in the beneficiary's absence will significantly impair its ability to protect its interest in the letter of credit proceeds,<sup>52</sup> and may in certain situations expose the issuer to inconsistent obligations.<sup>53</sup>

49. J. White & R. Summers, *supra* note 1, § 18-7, at 745; State of N.Y. Law Revision Comm'n, *supra* note 4, at 99, *reprinted in* 1955 Report, *supra* note 4, at 1667; *see* Thorup, *supra* note 11, at 15; Weisz & Blackman, *supra* note 11, at 364 n.35; *see also* Canadian Transp. Co. v. Irving Trust Co., 548 F.2d 53, 55 (2d Cir. 1977) (issue recognized but not decided); Werner Lehara Int'l, Inc. v. Harris Trust & Sav. Bank, 484 F. Supp. 65, 70 (W.D. Mich. 1980) (same); United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 260 n.4, 360 N.E.2d 943, 949 n.4, 392 N.Y.S.2d 265, 271 n.4 (1976) (same).

50. Baker v. National Blvd. Bank, 399 F. Supp. 1021, 1022 (N.D. Ill. 1975); State of N.Y. Law Revision Comm'n, *supra* note 4, at 101, *reprinted in* 1955 Report, *supra* note 4, at 1669; *see* J. White & R. Summers, *supra* note 1, § 18-7, at 744-45. The injunction may not excuse the issuer if the issuer's conduct or inactivity has contributed to the granting of the injunction. Bank of Canton, Ltd. v. Republic Nat'l Bank, 509 F. Supp. 1310, 1319-20 (S.D.N.Y.), *aff'd*, 636 F.2d 30 (2d Cir. 1980); *see* Lowenschuss v. Kane, 520 F.2d 255, 265 (2d Cir. 1975); Kama Rippa Music, Inc. v. Schekeryk, 510 F.2d 837, 842-43 (2d Cir. 1975); J. Calamari & J. Perillo, *supra* note 7, § 13-4, at 486.

51. State of N.Y. Law Revision Comm'n, *supra* note 4, at 101, *reprinted in* 1955 Report, *supra* note 4, at 1669. Wrongful dishonor occurs when "a draft or demand for payment which complies with the terms of the relevant credit" is not honored by the issuer. U.C.C. § 5-114(1) (1977). *See generally* J. White & R. Summers, *supra* note 1, § 18-6 (analysis of variations of wrongful dishonor and the remedies available to beneficiary); H. Harfield, *supra* note 1, at 109-10 (same).

52. *See supra* note 49. In Citibank, N.A. v. Klein, 396 So. 2d 763 (Fla. Dist. Ct. App. 1981), the court held that the issuer's honor may not be enjoined in the absence of jurisdiction over the beneficiary. *Id.* at 764.

53. In Bank of Canton, Ltd. v. Republic Nat'l Bank, 509 F. Supp. 1310 (S.D.N.Y.), *aff'd per curiam*, 636 F.2d 30 (2d Cir. 1980), the issuer argued that a state court injunction against honor foreclosed the beneficiary from obtaining relief for wrongful dishonor. *Id.* at 1319. The court rejected this contention, holding that

In determining whether the beneficiary should be classified as indispensable, several procedural issues are implicated. Initially, a court will align the parties according to their true interests before determining whether diversity exists.<sup>54</sup> Diversity jurisdiction must continue to exist after joinder.<sup>55</sup> Accordingly, it may be impossible to join the beneficiary, depending on its domicile.<sup>56</sup> The beneficiary's joinder, however, should rarely present a problem in this regard because its interests are diametrically opposed to those of the customer,<sup>57</sup> and the letter of credit is most often utilized when the parties to the underlying contract are from markets located in either different states or nations.<sup>58</sup>

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an injunction order will not protect an issuer when the issuer has not actively contested the injunction action, *id.* at 1320, and when the beneficiary was not a party to the action. *Id.* at 1319; *see Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1022-23 (N.D. Ill. 1975) (in answering beneficiary's claim for wrongful dishonor, issuer argued that an injunction prevented it from honoring the presentment despite the beneficiary's contention that the issuer did not oppose the issuance of the injunction); *cf. Chase Manhattan Bank v. Equibank*, 550 F.2d 882, 886 (3d Cir. 1977) (failure of customer to put the issuer in funds is no defense in suit by the beneficiary for wrongful dishonor); *Data Gen. Corp. v. Citizens Nat'l Bank*, 502 F. Supp. 776, 788 (D. Conn. 1980) (same).

54. *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, 494 F. Supp. 1139, 1150 (D. Del. 1980); *see, e.g., Eikel v. States Marine Lines*, 473 F.2d 959, 963-64 (5th Cir. 1973); *Mission Ins. Co. v. Mackey*, 340 F. Supp. 824, 829 (W.D. Mo. 1971).

55. *Haas v. Jefferson Nat'l Bank*, 442 F.2d 394, 396 (5th Cir. 1971); *Jett v. Zink*, 362 F.2d 723, 726 (5th Cir.), *cert. denied*, 385 U.S. 987 (1966); *Delta Drilling Co. v. Arnett*, 186 F.2d 481, 487 (6th Cir. 1950), *cert. denied*, 340 U.S. 954 (1951); *Codagnone v. Perrin*, 351 F. Supp. 1126, 1130-31 (D.R.I. 1972); *see* 3A J. Moore & J. Lucas, *supra* note 42, ¶ 19.04[2.-1].

56. Joinder would not be possible when the beneficiary and the customer are domiciliaries of the same state. *See, e.g., West Va. Hous. Fund v. Sroka*, 415 F. Supp. 1107, 1110 (W.D. Pa. 1976); *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 314 (Me. 1978); *Edgewater Constr. Co. v. Percy Wilson Mortgage & Fin. Corp.*, 44 Ill. App. 3d 220, 220-22, 357 N.E.2d 1307, 1309-10 (1976).

57. *H. Harfield, supra* note 1, at 104; *see Thorup, supra* note 11, at 14. These disparate interests are reflected in cases when the beneficiary or its successor intervenes in the customer's suit for an injunction. *See infra* note 103 and accompanying text.

58. *H. Harfield, supra* note 1, at 19 ("[T]he financial requirements of local markets ordinarily create no demand for the particular utility of the commercial letter of credit."); *see Tueta v. Rodriguez*, 176 So.2d 550, 552 (Fla. Dist. Ct. App. 1965); U.C.C. § 5-112 official comment 2 (1977); *see, e.g., Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630, 631 (5th Cir. 1980) (customer from Louisiana, beneficiary from France), *cert. denied*, 451 U.S. 910 (1981); *K Mart Corp. v. Knitjoy Mfg., Inc.*, 534 F. Supp. 153, 154-55 (E.D. Mich. 1981) (customer from Michigan, beneficiary from the Philippines); *Decor by Nikkei Int'l v. Federal Republic of Nig.*, 497 F. Supp. 893, 906 (S.D.N.Y. 1980) (customer from New York, Nigerian beneficiary), *aff'd sub nom. Texas Trading & Milling Corp. v. Federal Republic of Nig.*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

In addition, in the event that the beneficiary is not amenable to suit and cannot be joined, a serious conflict arises between the beneficiary's interest in receiving payment and the customer's intention to exercise his legal right to an injunction in the case of a fraudulent transaction or presentment.<sup>59</sup> If the beneficiary is classified as indispensable, resulting in a dismissal of the action, the customer may be left without an adequate alternative remedy.<sup>60</sup> For example, if a customer attempts to enjoin the issuer from honoring the presentment of a foreign beneficiary and the beneficiary is classified as indispensable, no adequate remedy may exist.<sup>61</sup> Initially, the beneficiary may not be amenable to suit in the customer's forum.<sup>62</sup> Moreover, while the beneficiary is the stakeholder of the letter of credit proceeds,<sup>63</sup> it may be unlikely that the beneficiary will hold these proceeds pending the outcome of litigation in the beneficiary's forum.<sup>64</sup>

To avoid this result, a court should not deem the beneficiary indispensable to the action if the issuer adequately represents and protects the beneficiary's interest. If the issuer has an interest in preventing the issuance of the injunction in order to protect its "commercial honor"<sup>65</sup>

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59. See U.C.C. 5-114(2)(b) (1977). If the indispensable beneficiary is not amenable to suit and the case is dismissed, the customer is foreclosed from seeking an injunction against honor when it is most critically needed. State of N.Y. Law Revision Comm'n, *supra* note 4, at 99, *reprinted in* 1955 Report, *supra* note 4, at 1667. Conversely, "by holding that the beneficiary is not an indispensable party, and by issuing an injunction in his absence, a court may violate the beneficiary's rights." *Id.*; see Thorup, *supra* note 11, at 14-15.

60. State of N.Y. Law Revision Comm'n, *supra* note 4, at 99, *reprinted in* 1955 Report, *supra* note 4, at 1667. An adequate alternative forum is perhaps the most critical factor listed in Rule 19(b). See *supra* note 35. See also Ramsey v. Bomin Testing, Inc., 68 F.R.D. 335, 338 (W.D. Okla. 1975) (an additional factor is the traditional right of the plaintiff to control his own litigation).

61. See State of N.Y. Law Revision Comm'n, *supra* note 4, at 89, 99, *reprinted in* 1955 Report, *supra* note 4, at 1657, 1667.

62. State of N.Y. Law Revision Comm'n, *supra* note 4, at 99, *reprinted in* 1955 Report, *supra* note 4, at 1667; J. White & R. Summers, *supra* note 1, § 18-7, at 745; Weisz & Blackman, *supra* note 11, at 360; see, e.g., H. Ray Baker, Inc. v. Associated Banking Corp., 592 F.2d 550, 553 (9th Cir.), *cert. denied*, 444 U.S. 832 (1979); American Steel, Inc. v. Cascade Steel Rolling Mills, Inc., 425 F. Supp. 301, 303-04 (S.D. Tex. 1975), *aff'd per curiam*, 548 F.2d 620 (5th Cir. 1977).

63. 1 A. Lowenfeld, *supra* note 16, § 5.52(b), at 143; Weisz & Blackman, *supra* note 11, at 375; Note, *Confirming Bank Liability in Letter of Credit Transactions: Whose Bank Is It Anyway?*, 51 Fordham L. Rev. 1219, 1224 (1983).

64. See Canadian Transp. Co. v. Irving Trust Co., 548 F.2d 53, 55 (2d Cir. 1977); cf. Werner Lehara Int'l, Inc. v. Harris Trust & Sav. Bank, 484 F. Supp. 65, 74 (W.D. Mich. 1980) (political unrest in beneficiary's forum rendered foreign litigation dubious); NMC Enters., Inc. v. CBS, 14 U.C.C. Rep. Serv. (Callaghan) 1427, 1428-29 (N.Y. Sup. Ct. 1974) (fraudulent call on letter of credit may bankrupt the customer).

65. KMW Int'l v. Chase Manhattan Bank, N.A., 606 F.2d 10, 17 (2d Cir. 1979); Itek Corp. v. First Nat'l Bank, 511 F. Supp. 1341, 1351 (D. Mass. 1981); Werner

and to guard against subsequent reprisals by out-of-state or foreign banks or corporations,<sup>66</sup> the beneficiary's interest will be adequately represented.

The issues of adequacy of representation and indispensability, however, may be avoided altogether if the court finds that the beneficiary's contacts with the forum state through its involvement in the credit arrangement render it fair and reasonable to compel the beneficiary to litigate in that forum.<sup>67</sup> Alternatively, even if the court decides the beneficiary's contacts are insufficient, it need not dismiss the action outright. It may, under Rule 19(b),<sup>68</sup> exercise its discretion to limit the action to a preliminary injunction or some other modified form of relief<sup>69</sup> in order to lessen the extent to which a judgment will be prejudicial to the absent or existing parties.<sup>70</sup> While this alternative may lessen the inequitable effect on the beneficiary, its utility may be limited because, as a general rule, time is of the essence in a letter of credit transaction.<sup>71</sup> Thus, even a temporary denial of access to the

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Lehara Int'l, Inc. v. Harris Trust & Sav. Bank, 484 F. Supp. 65, 75 (W.D. Mich. 1980); American Bell Int'l, Inc. v. Islamic Republic of Iran, 474 F. Supp. 420, 426 (S.D.N.Y. 1979); United Technologies Corp. v. Citibank, N.A., 469 F. Supp. 473, 477 (S.D.N.Y. 1979); Thorup, *supra* note 11, at 13-14; Weisz & Blackman, *supra* note 11, at 372-73.

66. KMW Int'l v. Chase Manhattan Bank, N.A., 606 F.2d 10, 17 (2d Cir. 1979); Werner Lehara Int'l, Inc. v. Harris Trust & Sav. Bank, 484 F. Supp. 65, 75 (W.D. Mich. 1980); American Bell Int'l, Inc. v. Islamic Republic of Iran, 474 F. Supp. 420, 426 (S.D.N.Y. 1979); Weisz & Blackman, *supra* note 11, at 372-73; *see* State of N.Y. Law Revision Comm'n, *supra* note 4, at 102 n.327, *reprinted in* 1955 Report, *supra* note 4, at 1670 n.327.

67. *E.g.*, K Mart Corp. v. Knitjoy Mfg., Inc., 534 F. Supp. 153, 159 (E.D. Mich. 1981); Decor by Nikkei Int'l v. Federal Republic of Nig., 497 F. Supp. 893, 906 (S.D.N.Y. 1980), *aff'd sub nom.* Texas Trading & Milling Corp. v. Federal Republic of Nig., 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); Barnes v. Irving Trust Co., 290 F. Supp. 116, 119 (S.D. Tex. 1968); Sheldon Steel Corp. v. Standard Fruit Co., 219 F. Supp. 521, 527-28 (D. Del. 1963).

68. Fed. R. Civ. P. 19(b).

69. A court must consider "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided." *Id.* Moreover, a court may modify an injunction request in balancing the equities of the affected parties. D. Dobbs, Handbook on the Law of Remedies § 2.10, at 111 (1973); *see, e.g.*, KMW Int'l v. Chase Manhattan Bank, N.A., 606 F.2d 10, 17 (2d Cir. 1979) (notice injunction granted instead of requested preliminary injunction); Werner Lehara Int'l, Inc. v. Harris Trust & Sav. Bank, 484 F. Supp. 65, 75-76 (W.D. Mich. 1980) (same); American Bell Int'l, Inc. v. Islamic Republic of Iran, 474 F. Supp. 420, 427 (S.D.N.Y. 1979) (same).

70. *See* State of N.Y. Law Revision Comm'n, *supra* note 4, at 101-02, *reprinted in* 1955 Report, *supra* note 4, at 1669-70.

71. Liberty Nat'l Bank & Trust Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 218 F.2d 831, 840-41 (10th Cir. 1955); *see, e.g.*, United Technologies Corp. v. Citibank, N.A., 469 F. Supp. 473, 480 (S.D.N.Y. 1979); Hyland Hills Metro. Park & Recrea-

letter of credit proceeds may have a permanent deleterious effect on the beneficiary.<sup>72</sup> In any event, the customer should always seek to join the beneficiary, or give it formal notice of the action, to obviate having to ask the court to affect the rights of an absent party.<sup>73</sup>

### B. *The Beneficiary v. The Issuer*

In an action by the beneficiary against the issuer for wrongful dishonor, the customer arguably should not be classified as an indispensable party or even a party to be joined if feasible because the customer's interest is limited to its duty to reimburse the issuer for duly honoring the letter of credit.<sup>74</sup> Consistent with this proposition, the independence principle establishes that the issuer's payment obligation is independent of the issuer-customer and customer-beneficiary relationships.<sup>75</sup> Notwithstanding the independence principle, however, precluding the customer from being joined in the beneficiary's suit in an appropriate case may expose parties already before the court to multiple obligations.<sup>76</sup>

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tion Dist. v. McCouy Enters., 38 Colo. App. 23, 26, 554 P.2d 708, 710 (1976); G. Jaris Co. v. Banque D'Athenes, 246 Mass. 546, 549, 141 N.E. 576, 577 (1923); Banco Tornquist, S.A. v. American Bank & Trust Co., 71 Misc. 2d 874, 874-75, 337 N.Y.S.2d 489, 490 (Sup. Ct. 1972).

72. Under the U.C.C., the issuer must determine whether or not to honor the beneficiary's draft by "the close of the third banking day following receipt of the documents," U.C.C. § 5-112(1)(a) (1977), unless the beneficiary consents to a later date, *id.* § 5-112(1)(b). Failure to honor within this time constitutes dishonor of the letter of credit. *Id.* § 5-112(1). Under the U.C.P., notice of dishonor must be given "without delay." U.C.P., *supra* note 9, art. 16(d). Beyond these waiting periods, denial of the letter of credit proceeds may constitute a material breach of the issuer's payment obligation. See J. Calamari & J. Perillo, *supra* note 7, § 11-22, at 407-10.

73. Weisz & Blackman, *supra* note 11, at 364 n.35; see, e.g., Steinmeyer v. Warner Consol. Corp., 42 Cal. App. 3d 515, 517-18, 116 Cal. Rptr. 57, 59 (1974); United Bank Ltd. v. Cambridge Sporting Goods, Inc., 41 N.Y.2d 254, 256-57, 360 N.E.2d 943, 946-47, 392 N.Y.S.2d 265, 268 (1976); Szejn v. J. Henry Schroder Banking Corp., 177 Misc. 719, 720, 31 N.Y.S.2d 631, 632 (Sup. Ct. 1941); Thorup, *supra* note 11, at 15.

74. See Bossier Bank & Trust Co. v. Union Planters Nat'l Bank, 550 F.2d 1077, 1081 app. A (6th Cir. 1977) (adopting district court's memorandum decision); U.C.C. § 5-114(3) & official comment 3 (1977). The customer has been found to be indispensable to an action for an injunction against the issuer. See Edgewater Constr. Co. v. Percy Wilson Mortgage & Fin. Corp., 44 Ill. App. 3d 220, 227-28, 357 N.E.2d 1307, 1313-14 (1976).

75. Housing Sec., Inc. v. Maine Nat'l Bank, 391 A.2d 311, 316 (Me. 1978). See *supra* notes 21-26 and accompanying text.

76. See Housing Sec., Inc. v. Maine Nat'l Bank, 391 A.2d 311, 316 n.6 (Me. 1978); Fed. R. Civ. P. 19(a). A purpose of Rule 19 is to avoid multiple litigation. See *supra* note 27.

For instance, in *Sztejn v. J. Henry Schroder Banking Corp.*,<sup>77</sup> the beneficiary fraudulently sent rubbish to the customer in performing the underlying contract for the sale of brush bristles.<sup>78</sup> Such fraud in the transaction is not always evident on the face of the documents, which can appear to comply strictly with the terms of the credit but actually do not comply due to the beneficiary's fraud in the inducement of the sales contract.<sup>79</sup> In such cases, the issuer is permitted, but not required, to honor the beneficiary's draft.<sup>80</sup> In a suit for wrongful dishonor, the issuer's defense is inexorably tied to the beneficiary's fraudulent performance of the underlying contract.<sup>81</sup> In addition, the customer has a legal right to seek to enjoin the bank's honoring the draft.<sup>82</sup> Therefore, the customer should be classified as a party to be joined if feasible under Rule 19(a). If the beneficiary prevails in the customer's absence, the customer's ability to protect its interest will be impaired and the issuer may be exposed to multiple litigation or inconsistent obligations.<sup>83</sup> For example, after the issuer is ordered to honor the beneficiary's presentment, the issuer may be forced to sue for reimbursement from the customer, resulting in multiple litigation.<sup>84</sup>

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77. 177 Misc. 719, 31 N.Y.S.2d 631 (Sup. Ct. 1941).

78. *Id.* at 720, 31 N.Y.S.2d at 633.

79. *Id.* at 723, 31 N.Y.S.2d at 635-36; *see* NMC Enters., Inc. v. CBS, 14 U.C.C. Rep. Serv. (Callaghan) 1427, 1430 (N.Y. Sup. Ct. 1974); O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 233-34, 250 S.E.2d 587, 601 (1978). This is consistent with the view that the "fraud in the transaction" defense exists when there is fraud in the underlying transaction. *See, e.g.,* Banco Espanol de Credito v. State St. Bank & Trust Co., 409 F.2d 711, 712 (1st Cir. 1969); United Technologies Corp. v. Citibank, N.A., 469 F. Supp. 473, 478 (S.D.N.Y. 1979); United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 259, 360 N.E.2d 943, 948, 392 N.Y.S.2d 265, 270 (1976). *See infra* note 168.

80. U.C.C. § 5-114(2)(b) (1977); *see* Bank of Newport v. First Nat'l Bank & Trust Co., 34 U.C.C. Rep. Serv. (Callaghan) 650, 656 (8th Cir. 1982); Scarsdale Nat'l Bank & Trust Co. v. Toronto-Dominion Bank, 533 F. Supp. 378, 385 (S.D.N.Y. 1982); Baker v. National Blvd. Bank, 399 F. Supp. 1021, 1024 (N.D. Ill. 1975).

81. *See, e.g.,* United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 259, 360 N.E.2d 943, 948, 392 N.Y.S.2d 265, 270 (1976); NMC Enters., Inc. v. CBS, 14 U.C.C. Rep. Serv. (Callaghan) 1427, 1430 (N.Y. Sup. Ct. 1974); O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 233-34, 250 S.E.2d 587, 601 (1978).

82. *See* U.C.C. § 5-114(2)(b) (1977).

83. Such a result would contravene the Federal Rules. *See* Fed. R. Civ. P. 19(a). *See supra* note 27.

84. *See* Housing Sec., Inc. v. Maine Nat'l Bank, 391 A.2d 311, 316 n.6 (Me. 1978). A letter of credit may be revocable or irrevocable. U.C.C. § 5-103(1)(a) (1977); U.C.P., *supra* note 9, art. 7(a). Because it can be modified or canceled without notice, the revocable letter of credit has been termed an illusory contract. West Va. Hous. Dev. Fund v. Sroka, 415 F. Supp. 1107, 1111 (W.D. Pa. 1976). Because revocable credits are of little utility, *see* H. Harfield, *supra* note 1, at 40, 47,

A court rarely will classify a customer indispensable.<sup>85</sup> In fact, a court typically will not reach an analysis of Rule 19(b) factors because it usually will be able to require a customer's joinder.<sup>86</sup> The customer's entrance into the action should rarely present jurisdictional problems because the customer ordinarily will seek to procure the issuance of the letter of credit from a local bank.<sup>87</sup> Thus, in the normal case, the customer will be subject to service of process and its joinder will not deprive the court of subject matter jurisdiction.<sup>88</sup>

## II. INTERVENTION IN LETTER OF CREDIT LITIGATION

Under Rule 24(a),<sup>89</sup> a party may intervene of right in a pending action when, upon timely application, it claims an interest related to the subject matter of the action<sup>90</sup> that is not adequately represented by

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prospective beneficiaries usually prefer irrevocable credits. *J. White & R. Summers, supra* note 1, § 18-4, at 721; *see Data Gen. Corp. v. Citizens Nat'l Bank*, 502 F. Supp. 776, 783 (D. Conn. 1980) (presumed irrevocability); U.C.C. § 5-106 official comment 2 (1977) (revocable credit has "no legal significance" concerning the customer and beneficiary). *But see Beathard v. Chicago Football Club, Inc.*, 419 F. Supp. 1133, 1138 (N.D. Ill. 1976) (letter silent on the issue deemed revocable); U.C.P., *supra* note 9, art. 7(c) (letter presumed to be revocable in the absence of any contrary indication).

85. *See Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 317 n.8 (Me. 1978). The one case in which the customer was deemed indispensable is rather anomalous because the suit to enjoin the issuer from honoring the draft was initiated by a corporation, all the stock of which was owned by the general partner of the limited partnership on whose behalf the letter of credit was issued. *Edgewater Constr. Co. v. Percy Wilson Mortgage & Fin. Corp.*, 44 Ill. App. 3d 220, 222-26, 357 N.E.2d 1307, 1310-13 (1976).

86. A court will not reach the issue of indispensability unless a party to be joined if feasible cannot be made a party to the action because either he is not amenable to suit within the forum or his joinder will destroy subject matter jurisdiction. *See Fed. R. Civ. P. 19; see, e.g., Samuel Goldwyn, Inc. v. United Artists Corp.*, 113 F.2d 703, 707 (3d Cir. 1940); *Laird v. Chrysler Corp.*, 92 F.R.D. 473, 474 (D. Mass. 1981); *Mayer v. Development Corp. of Am.*, 396 F. Supp. 917, 922 (D. Del. 1975).

87. *See, e.g., East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 600 (5th Cir. 1979); *Data Gen. Corp. v. Citizens Nat'l Bank*, 502 F. Supp. 776, 778 (D. Conn. 1980); *Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1022 (N.D. Ill. 1975); *Housing Sec., Inc. v. Maine Nat'l Bank*, 391 A.2d 311, 314 (Me. 1978). A customer typically "turns to some bank in his own locality . . . which is sufficiently well known abroad to make its obligation, evidenced by a . . . letter of credit," a useful financing device. *H. Harfield, supra* note 1, at 34; *accord Thorup, supra* note 11, at 14.

88. *See, e.g., Consolidated Aluminum Corp. v. Bank of Va.*, 544 F. Supp. 386, 387 n.1 (D. Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983); *Dynamics Corp. of Am. v. Citizens & S. Nat'l Bank*, 356 F. Supp. 991, 993 & n.1 (N.D. Ga. 1973). Process may be served anywhere within the forum state, or outside the state but within 100 miles from the place in which the action is commenced. *Fed. R. Civ. P. 4(f)*.

89. *Fed. R. Civ. P. 24(a)*.

90. *Id.* This interest must be a substantial and legally protectable interest in the proceedings. *E.g., Donaldson v. United States*, 400 U.S. 517, 531 (1971); *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir.), *cert. denied*, 400 U.S. 878

a party to the action.<sup>91</sup> Under Rule 24(b),<sup>92</sup> a party may intervene permissively if its application is timely and a common question of law or fact exists between the applicant's interest and the main action.<sup>93</sup>

Intervention of right is distinguished from permissive intervention in that the former involves a question of law while the latter is at the discretion of the court.<sup>94</sup> Courts, however, do not adhere fastidiously to this distinction.<sup>95</sup> An applicant generally attempts to intervene under both sections, and a court may grant this request without specifying under which section it is permitting intervention.<sup>96</sup> In addition, while only Rule 24(b) requires the court to justify its exercise of discretion,<sup>97</sup> both sections require timely applications by prospective intervenors.<sup>98</sup> The determination of timeliness requires a balancing of

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(1970); *Lane v. Bethlehem Steel Corp.*, 93 F.R.D. 611, 614 (D. Md. 1982); *United States v. Wood*, 435 F. Supp. 870, 873 (W.D. Ky. 1977). The "interest" test is a "practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967); see *United States v. American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072, 1080 (N.D. Ill. 1977); *United States v. Reserve Mining Co.*, 56 F.R.D. 408, 412 (D. Minn. 1972).

91. Fed. R. Civ. P. 24(a); see *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 691 (1961); *Kozak v. Wells*, 278 F.2d 104, 109-10 (8th Cir. 1960); *Roe v. Casey*, 464 F. Supp. 483, 485 (E.D. Pa. 1978), *aff'd*, 623 F.2d 829 (3d Cir. 1980).

92. Fed. R. Civ. P. 24(b).

93. *Id.* Rule 24(b) does not require that the prospective intervenor's interest be direct, personal or pecuniary. *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 459 (1940); *In re Estelle*, 516 F.2d 480, 485 (5th Cir. 1975), *cert. denied*, 426 U.S. 925 (1976); *Textile Workers Union of Am. v. Allendale Co.*, 226 F.2d 765, 769 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 909 (1956); *Brotherhood of Locomotive Eng'rs v. Chicago, M., St. P. & P. R.R. Co.*, 34 F. Supp. 594, 596 (E.D. Wis. 1940) (quoting *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 459 (1940)).

94. Compare Fed. R. Civ. P. 24(a) ("anyone shall be permitted to intervene") with Fed. R. Civ. P. 24(b) ("anyone may be permitted to intervene"); e.g., *Athens Lumber Co. v. Federal Election Comm'n*, 690 F.2d 1364, 1366-67 (11th Cir. 1982); *Shump v. Balka*, 574 F.2d 1341, 1345 (10th Cir. 1978) (quoting *Bumgarner v. Ute Indian Tribe*, 417 F.2d 1305, 1308-09 (10th Cir. 1969)); *Montgomery v. Rumsfeld*, 572 F.2d 250, 255 (9th Cir. 1978); *Brewer v. Republic Steel Corp.*, 513 F.2d 1222, 1225 (6th Cir. 1975); *Medd v. Westcott*, 32 F.R.D. 25, 28 (N.D. Iowa 1963); see 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1902 (1981).

95. See 7A C. Wright & A. Miller, *supra* note 94, § 1902.

96. *Id.*; see, e.g., *Lantz Int'l Corp. v. Industria Termotecnica Campana, S.p.A.*, 358 F. Supp. 510, 512 n.2 (E.D. Pa. 1973); *Dynamics Corp. of Am. v. Citizens & S. Nat'l Bank*, 356 F. Supp. 991, 995 (N.D. Ga. 1973); *Morgan v. Depositors Trust Co.*, 33 U.C.C. Rep. Serv. (Callaghan) 1473, 1476 (Me. Super. Ct. 1982).

97. Fed. R. Civ. P. 24(b) ("In exercising its discretion the court shall consider whether the intervention will unduly delay the adjudication of the rights of the original parties."); *United States Postal Serv. v. Brennan*, 579 F.2d 188, 191-92 (2d Cir. 1978); *Davis v. Board of School Comm'r*, 517 F.2d 1044, 1049 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Degge v. City of Boulder*, 336 F.2d 220, 222 (10th Cir. 1964).

98. Fed. R. Civ. P. 24(a), (b).



interests presented by the original parties, the applicant and the public.<sup>99</sup>

The letter of credit is a product of economic convenience and serves the financial interests of the various parties.<sup>100</sup> Accordingly, the intervention doctrine may serve an important function in letter of credit litigation. While the obligations in the letter of credit transaction are separate and distinct from the obligations in the underlying contract,<sup>101</sup> a deficient performance in one transaction may have financial repercussions in another.<sup>102</sup> Thus, a third party arguably may seek to intervene in order to protect its own pecuniary interests without impinging upon the independence principle.<sup>103</sup> Liberal use of intervention, however, may have a chilling effect on prospective participants to the letter of credit arrangement because an intervenor may present additional issues that could delay litigation.<sup>104</sup> The ability of a

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99. See, e.g., *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 582-85 (6th Cir.), cert. denied, 103 S. Ct. 297 (1982); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263-66 (5th Cir. 1977); *EEOC v. United Air Lines*, 515 F.2d 946, 949 (7th Cir. 1975); *Smith Petroleum Serv., Inc. v. Monsanto Chem. Co.*, 420 F.2d 1103, 1115 (5th Cir. 1970); *IA C. Wright & A. Miller*, *supra* note 94, § 1901.

100. See *East Girard Sav. Ass'n v. Citizens Nat'l Bank*, 593 F.2d 598, 601 (5th Cir. 1979); *Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 464-65 (2d Cir. 1970); *Bank of Newport v. First Nat'l Bank & Trust Co.*, 32 U.C.C. Rep. Serv. (Callaghan) 1572, 1576-77 (D.N.D. 1981), *aff'd*, 34 U.C.C. Rep. Serv. (Callaghan) 650 (8th Cir. 1982).

101. See *supra* notes 21-26 and accompanying text.

102. See, e.g., *Chase Manhattan Bank v. Equibank*, 550 F.2d 882, 886-87 (3d Cir. 1977) (waiving lateness and honoring presentment may adversely affect issuer's ability to obtain reimbursement from its customer); *Consolidated Aluminum Corp. v. Bank of Va.*, 544 F. Supp. 386, 388-90 (D. Md. 1982) (nonpayment on underlying contract caused beneficiary to call on letter of credit which was dishonored because it was received after expiration date due to mail delay), *aff'd*, 704 F.2d 136 (4th Cir. 1983); *NMC Enters., Inc. v. CBS*, 14 U.C.C. Rep. Serv. (Callaghan) 1427, 1429 (N.Y. Sup. Ct. 1974) (unjustified demand by beneficiary may lead to customer's bankruptcy); cf. *Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92, 102-03 (M.D.N.C. 1975) (apparent insolvency of customer may compel issuer to scrutinize beneficiary's presentment more closely for non-compliance), *rev'd on other grounds*, 528 F.2d 802 (4th Cir. 1975).

103. See, e.g., *National Am. Corp. v. Federal Republic of Nig.*, 425 F. Supp. 1365, 1367 (S.D.N.Y. 1977); *Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1022 (N.D. Ill. 1975); *Lantz Int'l Corp. v. Industria Termotecnica Campana, S.p.A.*, 358 F. Supp. 510, 512 n.2 (E.D. Pa. 1973); *Dynamics Corp. of Am. v. Citizens & S. Nat'l Bank*, 356 F. Supp. 991, 995 (N.D. Ga. 1973); *Morgan v. Depositors Trust Co.*, 33 U.C.C. Rep. Serv. (Callaghan) 1473, 1476 (Me. Super. Ct. 1982); *Pastor v. National Republic Bank*, 56 Ill. App. 3d 421, 425, 371 N.E.2d 1127, 1129-30 (1978), *aff'd*, 76 Ill. 2d 139, 390 N.E.2d 894 (1979).

104. For this reason litigants generally prefer to see the intervenor's application denied. See *National Am. Corp. v. Federal Republic of Nig.*, 425 F. Supp. 1365, 1368 (S.D.N.Y. 1977); *7 C. Wright & A. Miller*, *supra* note 94, § 1901, at 465 n.11.

party to the letter of credit to intervene, therefore, should be restricted. This chilling effect, however, may not be a significant factor because prospective participants do not always anticipate litigation and intervention prior to entering the letter of credit arrangement.

### A. *The Ability of the Beneficiary to Intervene*

Generally, a third party to a contractual agreement may intervene of right only if the contracting parties have intended to confer a benefit upon him.<sup>105</sup> It is not enough that some benefit inures to this third party as an incident of performance.<sup>106</sup> In the letter of credit arrangement, the customer-issuer relationship is contractual,<sup>107</sup> and the terms of the letter of credit typically state that it is issued "in favor of" the beneficiary.<sup>108</sup> Thus, in a suit by the customer to enjoin the issuer from honoring a draft, the beneficiary may be entitled to intervene of right if the issuer does not adequately represent the beneficiary's interests.<sup>109</sup> If an injunction issues, the beneficiary will be im-

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105. *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912); *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 52-53 (1st Cir. 1979); *Williams v. Fenix & Scisson, Inc.*, 608 F.2d 1205, 1208 (9th Cir. 1979); *Ogden Dev. Corp. v. Federal Ins. Co.*, 508 F.2d 583, 588 (2d Cir. 1974); *Vazman, S.A. v. Fidelity Int'l Bank*, 418 F. Supp. 1084, 1086 (S.D.N.Y. 1976).

106. *Norfolk & W. Co. v. United States*, 641 F.2d 1201, 1208 (6th Cir. 1980); *Vazman, S.A. v. Fidelity Int'l Bank*, 418 F. Supp. 1084, 1086 (S.D.N.Y. 1976); *see Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 53 (1st Cir. 1979); *Falzarano v. United States*, 607 F.2d 506, 511 (1st Cir. 1979).

107. *See Insurance Co. of N. Am. v. Heritage Bank, N.A.*, 595 F.2d 171, 173 (3d Cir. 1979); *East Girard Sav. Ass'n v. Citizens Nat'l Bank*, 593 F.2d 598, 601 (5th Cir. 1979); *Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1024 (N.D. Ill. 1975); *H. Harfield, supra* note 1, at 52, 103; *Verkuil, supra* note 16, at 719. Through its application, the customer specifies the terms of the letter of credit. *J. White & R. Summers, supra* note 1, § 18-4, at 722; *see, e.g., Anglo-South Am. Trust Co. v. Uhe*, 261 N.Y. 150, 155-56, 184 N.E. 741, 742-43 (1933) (customer specified terms); *H. Harfield, supra* note 1, at 310-11 (sample application form); *I A. Lowenfeld, supra* note 16, *supp.* at 77 (same).

108. *E.g., Pringle-Associated Mortgage Corp. v. Southern Nat'l Bank*, 571 F.2d 871, 873 n.1 (5th Cir. 1978); *Sisalcords do Brazil, Ltd. v. Fiacao Brasileira De Sisal, S.A.*, 450 F.2d 419, 422 (5th Cir. 1971), *cert. denied*, 406 U.S. 919 (1972); *Dynamics Corp. of Am. v. Citizens & S. Nat'l Bank*, 356 F. Supp. 991, 994 (N.D. Ga. 1973); *O'Grady v. First Union Nat'l Bank of N.C.*, 296 N.C. 212, 229, 250 S.E.2d 587, 598 (1978); *Edgewater Constr. Co. v. Percy Wilson Mortgage & Fin. Corp.*, 44 Ill. App. 3d 220, 224, 357 N.E.2d 1307, 1311 (1976); *see H. Harfield, supra* note 1, at 318-31 (sample letters of credit).

109. *See Vazman, S.A. v. Fidelity Int'l Bank*, 418 F. Supp. 1084, 1087 (S.D.N.Y. 1976) (dictum). Though the issuer-customer agreement intentionally benefits the beneficiary, the beneficiary technically is not a third-party beneficiary of this contract. *J. White & R. Summers, supra* note 1, § 18-2, at 714; *see Comment, Letters of Credit: Current Theories and Usages*, 39 La. L. Rev. 581, 590 (1979). In a third-party beneficiary contract, the promisor can set up any defense against the third-party beneficiary that it could assert against the promisee. *J. Calamari & J. Perillo, supra* note 7, § 17-8, at 623. By contrast, the issuer must honor a complying present-

peded from protecting its interest in the letter of credit proceeds.<sup>110</sup> In addition, the beneficiary is able to contribute to the resolution of the factual issues presented in the customer's allegations of a forged or fraudulent presentment, or fraud in the transaction.<sup>111</sup>

The issuer's interest in protecting its reputation in the financial community, however, may compel it to oppose the customer's suit strenuously.<sup>112</sup> The significance of the issuer's commercial reputation is evident because the issuer may choose to honor the beneficiary's draft even after receiving notice from the customer of a fraudulent transaction.<sup>113</sup> From a legal perspective, the issuer may contest the customer's suit actively to avoid being subject to a subsequent suit by the beneficiary for wrongful dishonor.<sup>114</sup> The issuer's representation of

ment despite any claims it may have against its customer. *East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 602 (5th Cir. 1979); see *Chase Manhattan Bank v. Equibank*, 550 F.2d 882, 886 (3d Cir. 1977); *Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1024 (N.D. Ill. 1975). See *supra* notes 24-26 and accompanying text. Some courts, however, have characterized the letter of credit as a third-party beneficiary contract. *E.g.*, *West Va. Hous. Dev. Fund v. Sroka*, 415 F. Supp. 1107, 1109-10 (W.D. Pa. 1976) (quoting *Harvey Estes Constr. Co. v. Dry Dock Sav. Bank*, 381 F. Supp. 271, 274 (W.D. Okla. 1974)); *Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92, 98 (M.D.N.C.), *rev'd on other grounds*, 528 F.2d 802 (4th Cir. 1975); *Harvey Estes Constr. Co. v. Dry Dock Sav. Bank*, 381 F. Supp. 271, 274 (W.D. Okla. 1974).

110. See *Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1022 (N.D. Ill. 1975); *J. White & R. Summers*, *supra* note 1, § 18-7, at 745; *State of N.Y. Law Revision Comm'n*, *supra* note 4, at 99, *reprinted in* 1955 Report, *supra* note 4, at 1667; *Thorup*, *supra* note 11, at 14; *Weisz & Blackman*, *supra* note 11, at 364 n.35; *cf. Pastor v. National Republic Bank*, 56 Ill. App. 3d 421, 425, 371 N.E.2d 1127, 1129-30 (1977) (discussing interests of the beneficiary's liquidator who seeks to intervene in the customer's injunction action against the issuer), *aff'd*, 76 Ill. 2d 139, 390 N.E.2d 894 (1979).

111. See *Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1023-24 (N.D. Ill. 1975) (intervenor-beneficiary contended that customer and issuer shared an interest in dishonor because issuer feared an inability to obtain reimbursement from the insolvent customer). A right to intervene arises only when "the prospective intervenor appears to have a sufficient stake in the outcome *and* enough to contribute to the resolution of the controversy." *Utah v. American Pipe & Constr. Co.*, 50 F.R.D. 99, 102 (C.D. Cal. 1970) (emphasis added), *modified on other grounds*, 473 F.2d 580 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974). Rule 24(a) is not "a comprehensive inventory of the allowable instances for intervention" of right, *Textile Workers Union of Am. v. Allendale Co.*, 226 F.2d 765, 768 (D.C. Cir. 1955) (quoting *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 505 (1941)), *cert. denied*, 351 U.S. 909 (1956), and therefore a court should consider that evidence presented by the beneficiary may lead to a speedy and economical resolution of the controversy. See *United States v. City of Jackson*, 519 F.2d 1147, 1151 (5th Cir. 1975).

112. See *supra* note 65 and accompanying text.

113. See U.C.C. § 5-114(2)(b) (1977).

114. *Bank of Canton, Ltd. v. Republic Nat'l Bank*, 509 F. Supp. 1310, 1319-20 (S.D.N.Y.) (injunction will not excuse honor if issuer's conduct or nonfeasance contributed to the issuance of the injunction order), *aff'd per curiam*, 636 F.2d 30 (2d

the beneficiary's interest in receiving payment, therefore, may foreclose the latter from intervening under Rule 24(a).

Situations exist, however, in which the issuer does not adequately represent the interests of the beneficiary. For instance, even if the customer is financially sound and the issuer's prospect of reimbursement is secure, the beneficiary's interest may be adverse to the issuer's interest because the issuer does not have the same stake in the outcome of the action.<sup>115</sup> While generally the issuer is interested in paying the beneficiary upon presentment in order to protect its commercial reputation,<sup>116</sup> at times the issuer may not adequately represent the beneficiary's interest because it may have a longstanding business relationship with the customer.<sup>117</sup> Accordingly, the issuer may be hesitant to disregard its customer's allegation of fraud particularly when payment on the fraudulent call may lead to the financial collapse of the customer.<sup>118</sup> The adequacy of the issuer's representation of the beneficiary's interest depends on a balancing of the interests presented by the issuer's commercial honor and its business relationship with the customer. Such a determination, therefore, should be dispositive of whether the beneficiary is able to intervene in the customer's injunction proceeding.

### B. *The Ability of the Customer to Intervene*

When the beneficiary sues the issuer for wrongful dishonor, the customer has a direct pecuniary interest in the litigation because the

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Cir. 1980). See *supra* note 50. The issuer also may actively contest the suit to avoid subsequent reprisals by foreign banks or corporations. See *supra* note 66.

115. *E.g.*, *Pastor v. National Republic Bank*, 56 Ill. App. 3d 421, 425, 371 N.E.2d 1127, 1129-30 (1977), *aff'd*, 76 Ill. 2d 139, 390 N.E.2d 894 (1979); see *Bank of Canton, Ltd. v. Republic Nat'l Bank*, 509 F. Supp. 1310, 1319 (S.D.N.Y.) (issuer did not actively contest the injunction proceeding), *aff'd per curiam*, 636 F.2d 30 (2d Cir. 1980); *cf.* *Thorup*, *supra* note 11, at 14 (characterizing injunction proceeding as *ex parte*). Furthermore, the interests of the applicant and the litigants "need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967); see *Providence Journal Co. v. FBI*, 460 F. Supp. 762, 766 (D.R.I. 1978), *rev'd on other grounds*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980).

116. See *supra* notes 65-66 and accompanying text.

117. *Thorup*, *supra* note 11, at 14; see *Weisz & Blackman*, *supra* note 11, at 373. The applicant's burden of showing inadequate representation "should be treated as minimal," *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972), and a court should be more inclined to find inadequate representation when the applicant is willing to bear the costs of litigation, because the applicant is the best judge of his own interests. 7A C. Wright & A. Miller, *supra* note 94, § 1909, at 522 (1972).

118. *Thorup*, *supra* note 11, at 14; *cf.* *Pubali Bank v. City Nat'l Bank*, 676 F.2d 1326, 1328-30 (9th Cir. 1982) (advising bank knowingly accepted false documents in honoring the beneficiary's draft in order to apply the proceeds to the balance of a loan it had outstanding with the beneficiary).

customer will be obligated to reimburse the issuer if the beneficiary prevails.<sup>119</sup> Under Rule 24(a), however, the customer may not be able to intervene of right when the beneficiary's deficient performance is limited to its documentary presentment because the disposition of the letter of credit litigation does not impair or impede the customer's ability to protect his interest in the underlying contract.<sup>120</sup> Alternatively, when the beneficiary's performance is lacking in both the presentment transaction and the underlying contract, as in a fraud situation, the customer's underlying contractual interests may be jeopardized by the disposition of the letter of credit case.<sup>121</sup> Nevertheless, the issuer's representation of the customer's interest may preclude the latter's intervention of right. Typically, the issuer will contest the beneficiary's suit actively,<sup>122</sup> particularly when the prospect of reimbursement from the customer is dubious due either to its financial

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119. See *Bank of Canton, Ltd. v. Republic Nat'l Bank*, 509 F. Supp. 1310, 1321 (S.D.N.Y.) (customer concedes liability if issuer is ordered to pay the beneficiary), *aff'd per curiam*, 636 F.2d 30 (2d Cir. 1980); *Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1024-25 (N.D. Ill. 1975) (issuer may look to its customer for reimbursement after honor); *Pastor v. National Republic Bank*, 56 Ill. App. 3d 421, 425, 371 N.E.2d 1127, 1129 (1977) (same), *aff'd*, 76 Ill. 2d 139, 390 N.E.2d 894 (1979).

120. See *KMW Int'l v. Chase Manhattan Bank*, 606 F.2d 10, 14-15 (2d Cir. 1979) (preliminary injunction vacated for lack of irreparable harm because customer's action on the underlying contract may provide an adequate remedy); U.C.C. § 5-109 official comment 1 (1977) ("[t]he customer will normally have direct recourse against the beneficiary if performance fails").

121. Under the view that fraud in the underlying transaction provides a basis for enjoining payment to the beneficiary, see *infra* note 168, if the suit against the issuer for wrongful dishonor is decided in favor of the beneficiary, the customer may be collaterally estopped from asserting fraud in its suit against the beneficiary on the underlying contract. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 n.23 (1979) (issue conclusively decided in one proceeding is excluded from the fact-finding process of a subsequent proceeding); *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 593 (1974) (same); *Southern Pac. R.R. v. United States*, 168 U.S. 1, 48-49 (1897) (same). For collateral estoppel to apply, the non-party must be in "privity" with the litigant. *Southern Pac. R.R. v. United States*, 168 U.S. at 48-49. It is commonly recognized, however, "that the privity label simply expresses a conclusion that preclusion [of the issue] is proper." 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4449, at 418 (1981); see *Bruszewski v. United States*, 181 F.2d 419, 422 & n.6 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950).

122. See, e.g., *Insurance Co. of N. Am. v. Heritage Bank, N.A.*, 595 F.2d 171, 172 (3d Cir. 1979) (*per curiam*); *Pringle-Associated Mortgage Corp. v. Southern Nat'l Bank*, 571 F.2d 871, 873-74 (5th Cir. 1978); *Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 528 F.2d 802, 803-04 (4th Cir. 1975); *Data Gen. Corp. v. Citizens Nat'l Bank*, 502 F. Supp. 776, 779 (D. Conn. 1980); *Far E. Textile, Ltd. v. City Nat'l Bank & Trust Co.*, 430 F. Supp. 193, 194-95 (S.D. Ohio 1977); *Oriental Pac. (U.S.A.), Inc. v. Toronto Dominion Bank*, 78 Misc. 2d 819, 819, 357 N.Y.S.2d 957, 958-59 (Sup. Ct. 1974).

instability or to its ability to prevail in a subsequent suit for wrongful honor.<sup>123</sup>

The customer, however, should be permitted to intervene permissively in the beneficiary's suit when common issues of law or fact affect both the issuer-beneficiary and customer-beneficiary relationships.<sup>124</sup> The customer's pecuniary interests are implicated regardless of the ultimate outcome of the litigation.<sup>125</sup> If the beneficiary prevails, the customer may be obligated to reimburse the issuer.<sup>126</sup> Conversely, if the issuer prevails, the customer is not automatically relieved of its contractual obligation to the beneficiary.<sup>127</sup> The justification for the issuer's dishonor, however, might also enable the customer to void the underlying contract.<sup>128</sup> Permitting the customer's intervention under Rule 24(b), therefore, may contribute to the resolution of the controversy because it may present important evidence otherwise unavailable to the court.<sup>129</sup> Thus, the court should balance the prospective

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123. See, e.g., *Transamerica Delaval, Inc. v. Citibank, N.A.*, 545 F. Supp. 200, 205 n.5 (S.D.N.Y. 1982) (issuer may not release itself from liability for wrongful honor through a provision in the agreement with its customer); *Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1023 (N.D. Ill. 1975) (issuer offered state court injunction in defense of beneficiary's suit for fear that collection from the customer would not be possible); *Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92, 102-03 (M.D.N.C.) (issuer unsuccessfully attempted to avoid payment with a technical defense of non-literal compliance after its customer had filed for bankruptcy), *rev'd and remanded*, 528 F.2d 802 (4th Cir. 1975) (issuer's tactic successful).

124. See Fed. R. Civ. P. 24 (b) (common issues of law and/or fact permit intervention).

125. See *Pastor v. National Republic Bank*, 56 Ill. App. 3d 421, 425, 371 N.E.2d 1127, 1129-30 (1977), *aff'd*, 76 Ill. 2d 139, 390 N.E.2d 894 (1979). This is more than is required under Rule 24(b), see *supra* note 93, because it is enough to have a mere economic interest in the outcome. E.g., *Textile Workers Union of Am. v. Allendale Co.*, 226 F.2d 765, 769 (D.C. Cir. 1955); *Brooks v. Flagg Bros., Inc.*, 63 F.R.D. 409, 415 (S.D.N.Y. 1974).

126. See *Dynamics Corp. v. Citizens & S. Nat'l Bank*, 356 F. Supp. 991, 995-96 (N.D. Ga. 1973); U.C.C. § 5-114(3) & official comment 3 (1977).

127. See *supra* note 40. Moreover, the beneficiary is not presumed to take the letter of credit proceeds in absolute payment of the underlying contract. *Greenough v. Munroe*, 53 F.2d 362, 365 (2d Cir. 1931); 6 *Michie, supra* note 1, ch. 12, § 33, at 440; see Note, *Recourse Against the Buyer in a Letter of Credit Transaction*, 40 *Harv. L. Rev.* 294, 296 (1926).

128. This may be limited to cases in which U.C.C. § 5-114(2)(b) is construed to include fraud in the underlying transaction as grounds for justifiable dishonor. See *supra* note 168. The beneficiary will be unable to enforce a fraudulently performed contract. See *J. Calamari & J. Perillo, supra* note 7, § 22-5, at 785. Under the doctrine of *in pari delicto*, if the beneficiary is not guilty of serious moral turpitude it may be entitled to a quasi-contractual recovery. *Id.* § 22-12, at 794; Restatement of Contracts § 604 (1932).

129. The issuer is obligated to examine the documents against the letter of credit in good faith, see U.C.C. § 5-109(1), (2) (1977), and need not go behind the

delay to be caused by the customer's intervention against the advantage of disposing of all related claims and defenses in one proceeding and the public interest in the efficient operation of the courts.<sup>130</sup>

By contrast, if the issuer receives improper documents from the beneficiary, but honors the draft due to the apparent conformity of the presentment, it later may sue the beneficiary for breach of warranty under section 5-111(1) of the Uniform Commercial Code (UCC).<sup>131</sup> Under such circumstances, the customer has a pecuniary interest in the litigation relative to the issuer's right to seek reimbursement for duly honoring the beneficiary's draft, and may seek to intervene.<sup>132</sup> While Rule 24 should be construed liberally,<sup>133</sup> sound policy dictates that it should not be applied indiscriminately.<sup>134</sup> In the above situation, the customer can contribute little to the resolution of the controversy because the documents, the focus of the litigation, are

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documents in examining the beneficiary's presentment. *See, e.g.*, Insurance Co. of N. Am. v. Heritage Bank, N.A., 595 F.2d 171, 175 (3d Cir. 1979) (per curiam); Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank, 528 F.2d 802, 805-06 (4th Cir. 1975); Consolidated Aluminum Corp. v. Bank of Va., 544 F. Supp. 386, 395 (D. Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983); Data Gen. Corp. v. Citizens Nat'l Bank, 502 F. Supp. 776, 780 (D. Conn. 1980). Therefore, the issuer may be unable to discern fraud in the transaction, when the presented documents apparently comply to the terms of the letter of credit, without the assistance of its customer. *See* U.C.C. § 5-114 official comment 2 (1977); Shaffer v. Brooklyn Park Garden Apts., 311 Minn. 452, 462-63, 250 N.W.2d 172, 179 (1977) (issuer received notice of the alleged falsification of apparently complying documents only after its customer commenced an action for an injunction).

130. *See* Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977); United States v. City of Jackson, 519 F.2d 1147, 1150-51 (5th Cir. 1975); Pace v. First Nat'l Bank, 277 F. Supp. 19, 20 (D. Kan. 1965), *aff'd*, 404 F.2d 52 (10th Cir. 1968).

131. *See* J. White & R. Summers, *supra* note 1, § 18-8, at 745-46. U.C.C. § 5-111(1) (1977) provides that "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," unless otherwise agreed. *Id.* This "gives an issuer who wrongfully honors a [draft] a remedy against the beneficiary." Werner v. A.L. Grootemaat & Sons, 80 Wis. 2d 513, 524 n.22, 259 N.W.2d 310, 315 n.22 (1977); *cf.* Northern Trust Co. v. Oxford Speaker Co., 109 Ill. App. 3d 433, 434-35, 440 N.E.2d 968, 969-70 (1982) (suit by advising bank against beneficiary for breach of warranty on presentment).

132. *See supra* note 126.

133. *E.g.*, Clark v. Sandusky, 205 F.2d 915, 919 (7th Cir. 1953); Brown v. Board of Educ., 84 F.R.D. 383, 396 (D. Kan. 1979); Greer v. Blum, 462 F. Supp. 619, 625 (S.D.N.Y. 1978); Lipsett v. United States, 37 F.R.D. 549, 552 (S.D.N.Y. 1965); Tatum v. Cardillo, 11 F.R.D. 585, 587 (S.D.N.Y. 1951); Twentieth Century-Fox Film Corp. v. Jenkins, 7 F.R.D. 197, 199 (S.D.N.Y. 1947).

134. *E.g.*, Stadin v. Union Elec. Co., 309 F.2d 912, 918 (8th Cir. 1962), *cert. denied*, 373 U.S. 915 (1963); Peterson v. United States, 41 F.R.D. 131, 135 (D. Minn. 1966); *see* Warheit v. Osten, 57 F.R.D. 629, 630 (E.D. Mich. 1973).

in the possession of the issuer. In addition, the issuer's interest in avoiding payment is substantial because it usually will bring suit against the beneficiary only when reimbursement is not readily available from its customer.<sup>135</sup> Hence, the customer's entrance into the action will be of little or no utility, and intervention should be denied under either section of Rule 24.

### III. THIRD-PARTY PRACTICE IN LETTER OF CREDIT CASES

Under Rule 14,<sup>136</sup> a third-party plaintiff is entitled to implead a person "who is or may be liable to him for all or part of the plaintiff's claim against him."<sup>137</sup> If the third-party plaintiff, in the absence of the original plaintiff's action, continues to have a claim against the third-party defendant, impleader may not be used.<sup>138</sup> Thus, impleader is appropriate only when the third-party defendant's liability is contingent upon the third-party plaintiff being found liable to the original plaintiff.<sup>139</sup> The main purpose of impleader is to promote judicial economy by avoiding the situation in which a defendant is forced to bring a new and separate action against a third party who may be liable for all or part of the original plaintiff's recovery.<sup>140</sup> As a result,

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135. If the issuer honors in good faith, it has a right of reimbursement against the customer despite the beneficiary's breach of warranty. U.C.C. § 5-114 official comment 2 (1977). The issuer, however, may disregard this litigation option if the customer is financially unsound, *cf.* *Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1022-23 (N.D. Ill. 1975) (injunction action uncontested by issuer because reimbursement from customer was dubious); *Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 387 F. Supp. 92, 103 (M.D.N.C.) (dishonor after picayune documentary examination because reimbursement was dubious), *rev'd on other grounds*, 528 F.2d 802 (4th Cir. 1975), or may prevail on a claim of wrongful honor. See *supra* note 123.

136. Fed. R. Civ. P. 14.

137. *Id.*

138. See, e.g., *Southeast Mortgage Co. v. Mullins*, 514 F.2d 747, 749 (5th Cir. 1975); *United States Fidelity & Guar. Co. v. American State Bank*, 372 F.2d 449, 450 (10th Cir. 1967); *A.J. Kellos Constr. Co. v. Balboa Ins. Co.*, 86 F.R.D. 544, 545 (S.D. Ga. 1980); *Index Fund, Inc. v. Hagopian*, 417 F. Supp. 738, 744 (S.D.N.Y. 1976).

139. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 368 n.3 (1978); *Southeast Mortgage Co. v. Mullins*, 514 F.2d 747, 749 (5th Cir. 1975); *United States v. Joe Grasso & Son, Inc.*, 380 F.2d 749, 751-52 (5th Cir. 1967); *Tesch v. United States*, 546 F. Supp. 526, 529 (E.D. Pa. 1982); *Tower Mortgage Corp. v. Reynolds*, 81 F.R.D. 560, 561-62 (W.D. Okla. 1978); *United States v. Scott*, 18 F.R.D. 324, 325-26 (S.D.N.Y. 1955).

140. 6 C. Wright & A. Miller, *supra* note 94, § 1442, at 202-03; see, e.g., *Lasa Per L'Industria Del Marmo Societa Per Azioni v. Alexander*, 414 F.2d 143, 146 (6th Cir. 1969); *Noland Co. v. Graver Tank & Mfg. Co.*, 301 F.2d 43, 50 (4th Cir. 1962); *Dery v. Wyer*, 265 F.2d 804, 806-07 (2d Cir. 1959); *Powell, Inc. v. Abney*, 83 F.R.D. 482, 485 (S.D. Tex. 1979); *Colton v. Swain*, 358 F. Supp. 859, 862-63 (N.D. Ill. 1973), *aff'd*, 527 F.2d 296 (7th Cir. 1975).



Rule 14 should be construed liberally, subject to this derivative liability requirement.<sup>141</sup>

The tripartite nature of the basic letter of credit arrangement appears suitable for third-party practice. The independence principle, however, poses a substantial obstacle to satisfying the derivative liability requirement. For example, if the beneficiary sues the customer for nonpayment on the underlying contract, the customer may not be able to implead the issuer effectively for failing to honor the presentment because two separate and distinct legal obligations are involved.<sup>142</sup> Nevertheless, in this situation, absent the beneficiary's action, the customer is without a claim against the issuer.<sup>143</sup> Thus, the independence principle may not preclude a finding of derivative liability in an appropriate case.

### A. *The Customer as the Third-Party Defendant*

The issuer may attempt to implead its customer as one "who is or may be liable" to it for the beneficiary's claim of wrongful dishonor. When the customer fraudulently procures the issuance of the credit, the third-party complaint against the customer may adequately allege the requisite derivative liability for impleader.<sup>144</sup> Derivative liability

141. See *United States Fidelity & Guar. Co. v. Perkins*, 388 F.2d 771, 773 (10th Cir. 1968); *United States v. Acord*, 209 F.2d 709, 712 (10th Cir.), *cert. denied*, 347 U.S. 975 (1954); *Baltimore & O. R.R. Co. v. Saunders*, 159 F.2d 481, 484 (4th Cir. 1947); *Wanta v. Powers*, 478 F. Supp. 990, 993 (M.D. Pa. 1979); *Tower Mortgage Corp. v. Reynolds*, 81 F.R.D. 560, 561 (W.D. Okla. 1978); *Stiber v. United States*, 60 F.R.D. 668, 670 (E.D. Pa. 1973).

142. U.C.C. § 5-114 official comment 1 (1977); U.C.P. art. 8(c) (1974); *see, e.g.*, *KMW Int'l v. Chase Manhattan Bank, N.A.*, 606 F.2d 10, 16 (2d Cir. 1979) (letter of credit and underlying contract are separate and distinct); *Chase Manhattan Bank v. Equibank*, 550 F.2d 882, 885 (3d Cir. 1977) (same); *Fidelity Bank v. Lutheran Mut. Life Ins. Co.*, 465 F.2d 211, 214 (10th Cir. 1972) (same); *Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 464-65 (2d Cir. 1970) (same). In such a case, the beneficiary may have a choice of suing the customer on the underlying contract, *see supra* note 40, or the issuer for wrongful dishonor. U.C.C. § 5-115(1) (1977).

143. The issuer owes its customer a duty to examine, in good faith, the beneficiary's presentment for facial compliance with the terms of the letter of credit. U.C.C. § 5-109(1), (2) (1977). Beyond this, the extent of the issuer's obligation is governed by its contractual agreement with the customer. *Id.* official comment 1 (1977); *see J. White & R. Summers, supra* note 1, § 18-7, at 741-42.

144. *Equilease Corp. v. Jefferson Bank*, 88 F.R.D. 208, 209 & n.1 (E.D. Pa. 1980). Other cases in which the customer has been impleaded include *Toyota Indus. Trucks U.S.A., Inc. v. Citizens Nat'l Bank*, 611 F.2d 465, 468-69 (3d Cir. 1979); *Bank of Canton, Ltd. v. Republic Nat'l Bank*, 509 F. Supp. 1310, 1311 (S.D.N.Y.), *aff'd*, 636 F.2d 30 (2d Cir. 1980); *Bank of the Southeast v. Jackson*, 413 So. 2d 1091, 1092 (Ala. 1982); *Mid-States Mortgage Corp. v. National Bank*, 77 Mich. App. 651, 653, 259 N.W.2d 175, 176 (1977); *cf. Housing Sec., Inc. v. Maine Nat'l Bank*, 391

exists because, absent the beneficiary's claim, the issuer would not have an action against its customer.<sup>145</sup> This analysis can be extended to permit the issuer to implead the customer when the latter conveys false information for the express purpose of preventing the beneficiary from receiving the letter of credit proceeds.<sup>146</sup> The customer has an incentive to misrepresent the facts of the transaction in order to prevent payment when, absent fraud, it receives non-conforming goods on the underlying contract,<sup>147</sup> or when it seeks to avoid the financial effects of its bad business judgment.<sup>148</sup> Permitting the use of Rule 14 in such situations will serve the primary purpose of the Rule by enabling the issuer to avoid having to institute a new and separate claim against the customer for all or part of the beneficiary's recovery.<sup>149</sup>

The requisite derivative liability is absent in the beneficiary's action for wrongful dishonor, however, when the issuer impleads the customer for failing to deposit funds with the issuer sufficient to cover the

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A.2d 311, 317 n.8 (Me. 1978) (issuer's failure to implead its customer diminishes its assertion regarding risk of inconsistent obligations).

145. See *supra* note 138.

146. Because the issuer is concerned only with documents, see *supra* note 25, it is dependent upon its customer for the transmission of facts which may justify dishonor. See *supra* note 129.

147. See J. White & R. Summers, *supra* note 1, § 18-1, at 706 (discussing beneficiary's risks of the customer's dishonesty and contractual disputes). It is possible that the customer need not misrepresent the facts to the issuer when the proper performance of the underlying contract is itself a condition of payment. See *In re Pine Tree Elec. Co.*, 33 U.C.C. Rep. Serv. (Callaghan) 343, 346-47 (D. Me. 1981); *Bank of the Southeast v. Jackson*, 413 So. 2d 1091, 1095-99 (Ala. 1982); *Raiffeisen-Zentralkasse Tirol Reg. Gen. M.B.H. v. First Nat'l Bank*, 671 P.2d 1008, 1009 (Colo. App. 1983). It is possible to condition payment on the conformity of the goods to specified standards if the intent to do so is clear. *Continental Nat'l Bank v. Nat'l City Bank*, 69 F.2d 312, 317 (9th Cir.), *cert. denied*, 293 U.S. 557 (1934). *But see* U.C.P., *supra* note 9, art. 3 (issuers are not concerned with underlying contract even if the letter of credit specifically refers to such contract).

148. For instance, in *National Am. Corp. v. Federal Republic of Nig.*, 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979), the beneficiary apparently sought to corner the world's supply of cement, *id.* at 626, but this caused severe congestion problems at the port of Lagos and the beneficiary had to place an embargo on the port. *Id.* at 627. Due to this large volume, the beneficiary was unable to pay demurrage charges, *id.* at 629, which payment was supported by an irrevocable letter of credit in favor of the plaintiff. *Id.* at 627. Moreover, customers vigilantly search for a defect in the presentment when the price of goods drops precipitously, *Kozolchyk III*, *supra* note 13, at 82. A thorough examination can usually disclose at least one defect. 1 A. Lowenfeld, *supra* note 16, § 5.55(d), at 147-48 (quoting G. Gilmore & C. Black, *The Law of Admiralty* § 3-23, at 120 (2d ed. 1975)); *accord* State of N.Y. Law Revision Comm'n, *supra* note 4, at 66-67, *reprinted in* 1955 Report, *supra* note 4, at 1634-35.

149. See *supra* note 140 and accompanying text.

issuer's payment obligation.<sup>150</sup> The customer's failure in this instance pertains only to the issuer-customer contract.<sup>151</sup> The independence principle dictates that the issuer cannot consider the prospect or adequacy of the buyer-customer's ability to put the issuer in funds in determining whether to honor the beneficiary's demand for payment.<sup>152</sup> Derivative liability is lacking because if the issuer honors the beneficiary's presentment, it still may maintain a breach of contract action against the customer.<sup>153</sup> Thus, Rule 14 is unavailable to the issuer under such circumstances. If so impleaded, the customer should move to dismiss the complaint, or the court should deny the defendant-issuer's motion for leave to implead.<sup>154</sup>

### B. *The Beneficiary as a Third-Party Defendant*

The issuer may seek to implead the beneficiary for presenting forged, fraudulent or other non-complying documents when the customer sues the issuer for wrongful honor.<sup>155</sup> The issuer's duty in exam-

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150. See *Toyota Indus. Trucks U.S.A., Inc. v. Citizens Nat'l Bank*, 611 F.2d 465, 469-70 (3d Cir. 1979); cf. *Mid-States Mortgage Corp. v. National Bank*, 77 Mich. App. 651, 653, 259 N.W.2d 175, 176 (1977) (customers defaulted on loan payment).

151. The customer's promise to reimburse or put the bank in funds is explicitly provided for in the Code, subject to the parties' agreement. U.C.C. § 5-114(3) (1977); accord U.C.P., *supra* note 9, art. 16(a); 12 C.F.R. § 7.7016(e) (1983).

152. The issuer may not raise any defenses it may have against its customer if the beneficiary makes a complying presentment. See, e.g., *East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 602 (5th Cir. 1979); *Chase Manhattan Bank v. Equibank*, 550 F.2d 882, 886 (3d Cir. 1977); *Data Gen. Corp. v. Citizens Nat'l Bank*, 502 F. Supp. 776, 788 (D. Conn. 1980); *Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1024-25 (N.D. Ill. 1975).

153. See U.C.C. § 5-114(3) (1977); U.C.P., *supra* note 9, art. 16(a); 12 C.F.R. § 7.7016(e) (1983); cf. *Banco di Roma v. Fidelity Union Trust Co.*, 464 F. Supp. 817, 824, 826-27 (D.N.J. 1979) (issuer had right to reimbursement upon a justified dishonor after advising bank wrongfully made payment).

154. The customer's motion would be for failure of the issuer to state a claim for which relief could be granted due to the independent nature of the issuer's third-party claim. Fed. R. Civ. P. 12(b)(6), 14(a); see, e.g., *U.S. Gen., Inc. v. City of Joliet*, 598 F.2d 1050, 1054-55 (7th Cir. 1979) (third-party claim independent of original claim properly dismissed); *United States Fidelity & Guar. Co. v. American State Bank*, 372 F.2d 449, 450 (10th Cir. 1967) (same); *Independent Liberty Life Ins. Co. v. Fiduciary Gen. Corp.*, 91 F.R.D. 535, 537 (W.D. Mich. 1981) (same). If the third-party complaint is filed 10 days or longer after the defendant serves his original answer, he must obtain leave to file this complaint upon notice to all parties to the action, Fed. R. Civ. P. 14(a), and the use of impleader here is discretionary. Fed. R. Civ. P. 14 advisory committee note, reprinted in 31 F.R.D. 635, 636 (1962).

155. Cases are rare "in which [the issue of wrongful honor] was squarely raised and decided," and it is improbable "that such a case would arise," because generally the beneficiary's presentment "[is] not lightly dishonored." H. Harfield, *supra* note 1, at 111. Nevertheless, the litigation option exists. See, e.g., *Transamerica Delaval*,

ining the beneficiary's presentment is merely to check one document against another in good faith.<sup>156</sup> The superficial and ministerial nature of this duty may give rise to a situation in which a reasonably diligent documentary examination will not reveal the deficiencies in the presentment. The beneficiary, therefore, may be secondarily liable for any loss incurred by the customer as a result of the beneficiary's breach of warranty under section 5-111(1) of the UCC.<sup>157</sup> Moreover, the adequacy of the issuer's performance may be a controverted issue. Such a case presents a classic example of the derivative liability requirement: The issuer denies its liability to the customer, but if found liable for wrongful honor, it should be indemnified by the beneficiary for damages payable to the customer.<sup>158</sup>

Derivative liability is absent when the customer, after a reasonable time for inspection, elects to accept the non-conforming documents and waive the defect.<sup>159</sup> Impleader would not be proper because the issuer's responsibilities are discharged by the customer's acceptance of the documents,<sup>160</sup> and an action will lie by the customer directly against the beneficiary by virtue of the underlying contract or section 5-111(1) of the UCC.<sup>161</sup>

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Inc. v. Citibank, N.A., 545 F. Supp. 200, 203 (S.D.N.Y. 1982); Interco, Inc. v. Schwartz, 20 U.C.C. Rep. Serv. (Callaghan) 716, 719-20 (D. Mass. 1976), *vacated on other grounds sub. nom.* Interco, Inc. v. First Nat'l Bank, 560 F.2d 480 (1st Cir. 1977); H. Harfield, *supra* note 1, at 110-11; J. White & R. Summers, *supra* note 1, § 18-8, at 746.

156. U.C.C. § 5-109(2) (1977). See *supra* notes 25-26.

157. U.C.C. § 5-111(1) (1977). See *supra* note 131.

158. See *supra* notes 138-39. Claims of indemnity, subrogation, contribution and breach of warranty are ideally suited to the derivative liability requirement of Rule 14. See 6 C. Wright & A. Miller, *supra* note 94, § 1446, at 246-48.

159. See, e.g., Corporacion de Mercadeo Agricola v. Mellon Bank Int'l, 608 F.2d 43, 46-47 (2d Cir. 1979); Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank, 528 F.2d 802, 806-07 (4th Cir. 1975); International Leather Distribs., Inc. v. Chase Manhattan Bank, 464 F. Supp. 1197, 1201-02 (S.D.N.Y.), *aff'd mem.*, 607 F.2d 996 (2d Cir. 1979); J. White & R. Summers, *supra* note 1, § 18-6, at 732-33; Kozolchyk III, *supra* note 13, at 81 & n.451.

160. Upon the customer's waiver, the issuer is obligated to honor the beneficiary's draft as if it had strictly complied with the terms of the letter of credit. See Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank, 528 F.2d 802, 807 (4th Cir. 1975); International Leather Distribs. v. Chase Manhattan Bank, 464 F. Supp. 1197, 1201-03 (S.D.N.Y.), *aff'd mem.*, 607 F.2d 996 (2d Cir. 1979); North Am. Trading Corp. v. General Elec., Ltd., 67 A.D.2d 890, 891, 413 N.Y.S.2d 700, 702-03 (1979).

161. See U.C.C. § 5-114 official comment 2 (1977). The customer, as an "interested party," benefits from the beneficiary's warranty of presentment. *Id.* § 5-111(1); Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 524 n.22, 259 N.W.2d 310, 315 n.22 (1977); see Pubali Bank v. City Nat'l Bank, 676 F.2d 1326, 1329-30 & n.5 (9th Cir. 1982).

When the issuer sues the customer for reimbursement, the latter may assert as an affirmative defense that the issuer failed in its duty to examine the beneficiary's presentment in good faith.<sup>162</sup> Alternatively, the customer may seek to implead the beneficiary under section 5-111(1) of the UCC.<sup>163</sup> The independence principle does not interfere with the customer's third-party complaint because by statute the beneficiary warrants "to all interested parties"<sup>164</sup> that its documentary presentment complies with the necessary conditions of the letter of credit.<sup>165</sup> The derivative liability requirement, however, may preclude the use of Rule 14 in this situation because the customer retains the right to sue the beneficiary for breach of warranty concerning its presentment even in the absence of the issuer's claim for reimbursement.<sup>166</sup>

#### IV. PERSONAL JURISDICTION AND THE ATTACHMENT MANEUVER

Section 5-114(2) of the UCC<sup>167</sup> enables the customer by legal process to enjoin the issuer from honoring the beneficiary's documentary demand for payment under the letter of credit when the documents presented are forged or fraudulent, or there is fraud in the transaction.<sup>168</sup> Rather than resort to this equitable remedy, some customers

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162. See *Intraworld Indus., Inc. v. Girard Trust Bank*, 461 Pa. 343, 364, 336 A.2d 316, 327 (1975); U.C.C. § 5-109(1) (1977). Every duty in the Code includes a duty of good faith. U.C.C. § 1-203 (1977). Accordingly, the issuer's duty of good faith under § 5-109 has been extended to the beneficiary. *AMF Head Sports Wear, Inc. v. Ray Scott's All-American Sports Club, Inc.*, 448 F. Supp. 222, 224 (D. Ariz. 1978).

163. See *supra* note 161.

164. U.C.C. § 5-111(1) (1977).

165. *Id.*

166. U.C.C. § 5-114 official comment 2 (1977) ("In the event of honor, an action by the customer against the beneficiary will lie by virtue of either the underlying contract or section 5-111(1) of [the UCC.]). This remedy is not contingent upon the customer being held liable to the issuer for reimbursement, and therefore would constitute an improper third-party complaint. See *supra* notes 138-39 and accompanying text.

167. U.C.C. § 5-114(2) (1977).

168. *Id.*; see, e.g., *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344, 1356 (11th Cir. 1982); *Werner Lehara Int'l, Inc. v. Harris Trust & Sav. Bank*, 484 F. Supp. 65, 73 (W.D. Mich. 1980) (dictum); *Intraworld Indus. v. Girard Trust Bank*, 461 Pa. 343, 358-59, 336 A.2d 316, 324-25 (1975). See generally Harfield, *Enjoining Letter of Credit Transactions*, 95 Banking L.J. 596 (1978) (discussing fraud as basis for injunction) [hereinafter cited as Harfield III]; *Judicial Development*, *supra* note 15, at 162-63 (same). Because the UCC does not define "fraud in the transaction," see U.C.C. § 5-114(2) and official comment 2, application of this defense is not uniform. Some courts accept this defense when there is active fraud in the underlying contract. See, e.g., *Rockwell Int'l Sys., Inc. v. Citibank, N.A.*, 719 F.2d 583, 588-89 (2d Cir. 1983); *Banco Espanol de Credito v. State St. Bank & Trust*

presented are forged or fraudulent, or there is fraud in the transaction.<sup>168</sup> Rather than resort to this equitable remedy, some customers have elected to sue the beneficiary for breach of the underlying contract, or a warranty incidental thereto, and attach the issuer's payment obligation by appropriate state or local procedure.<sup>169</sup> In so doing, the customer seeks to secure quasi-in-rem jurisdiction over, and prevent payment to, the beneficiary.<sup>170</sup> Reported cases involving this attachment maneuver are rare. In addition, commentators are critical of this concept<sup>171</sup> because it threatens the basic foundation and commercial utility of letters of credit by violating the independence principle.<sup>172</sup>

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Co., 409 F.2d 711, 712-13 (1st Cir. 1969); *United Technologies Corp. v. Citibank, N.A.*, 469 F. Supp. 473, 478 (S.D.N.Y. 1979) (dictum); *Colorado Nat'l Bank v. Board of County Comm'rs*, 634 P.2d 32, 39-40 (Colo. 1981) (en banc); *United Bank Ltd. v. Cambridge Sporting Goods Corp.*, 41 N.Y.2d 254, 260-61, 360 N.E.2d 943, 949, 392 N.Y.S.2d 265, 271 (1976); *Intraworld Indus. v. Girard Trust Bank*, 461 Pa. 343, 359, 336 A.2d 316, 324-25 (1975). Other courts require the fraud to exist in the presentment transaction itself. *See, e.g.*, *West Va. Hous. Dev. Fund v. Sroka*, 415 F. Supp. 1107, 1114-15 (W.D. Pa. 1976); *Shaffer v. Brooklyn Park Garden Apts.*, 311 Minn. 452, 464, 250 N.W.2d 172, 180 (1977); *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 233-34, 250 S.E.2d 587, 600-01 (1978); *Thorup, supra* note 11, at 16. These views are not necessarily mutually exclusive because the presentment transaction typically will be fraudulent to the extent that the underlying transaction is marred by the beneficiary's active or egregious fraud. *Compare* H. Harfield, *supra* note 1, at 82-83 (independence principle dictates that the exception should be limited to when fraud occurs *only* in the letter of credit transaction itself) *with* Harfield III, *supra*, at 614-15 (injunctions should issue only when fraud in the underlying contract is intentional and egregious). Thus, the distinction that fraud under § 5-114(2) must be "intrinsic to the documents" and not just to the underlying contract may be specious. *NMC Enterprises, Inc. v. CBS*, 14 U.C.C. Rep. Serv. (Callaghan) 1427, 1430 (N.Y. Sup. Ct. 1974); *J. White & R. Summers, supra* note 1, § 18-6, at 736-37; *see* *Thorup, supra* note 11, at 10 n.12.

169. *E.g.*, *Sisalcorde do Brazil, Ltd. v. Fiacao Brasileira de Sisal, S.A.*, 450 F.2d 419, 421 (5th Cir. 1971), *cert. denied*, 406 U.S. 919 (1972); *Lantz Int'l Corp. v. Industria Termotecnica Campana, S.p.A.*, 358 F. Supp. 510, 511-13 (E.D. Pa. 1973); *Tueta v. Rodriguez*, 176 So. 2d 550, 551 (Fla. Dist. Ct. App. 1965); *Hohenburg Co. v. Comitex Knitters, Ltd.*, 104 Misc. 2d 232, 232, 428 N.Y.S.2d 156, 157 (Sup. Ct. 1980); *see* *Falk & Co. v. South Tex. Cotton Oil Co.*, 368 Pa. 199, 200-03, 82 A.2d 27, 29 (1951); *cf.* *Harvey Estes Constr. Co. v. Dry Dock Sav. Bank*, 381 F. Supp. 271, 273 (W.D. Okla. 1974) (beneficiary ordered to pay proceeds into court); *Mareva Compania Naviera, S.A. v. International Bulkcarriers, S.A.*, 2 Lloyd's L.R. 509, 510 (C.A. 1975) (prohibiting beneficiary from seeking honor).

170. *See supra* notes 20, 169 and accompanying text.

171. Justice, *Letters of Credit: Expectations and Frustrations—Part 2*, 94 *Banking L.J.* 493, 495 (1977) [hereinafter cited as Justice II].

172. *See* *J. White & R. Summers, supra* note 1, § 18-10, at 752-53 (attachment maneuver is hostile to the letter of credit arrangement); 100 *Banking L.J.* 730, 730 (1983) (deemed an "end run" whereby customer seeks judicial intervention to prevent honor not by way of an injunction, but furtively by attaching the credit proceeds while they are still in the hands of the issuer); Justice II, *supra* note 171, at 495 (the

In determining the efficacy of the attachment maneuver to establish quasi-in-rem jurisdiction over and to block payment to the beneficiary, two issues must be examined. Initially, when the letter of credit is the beneficiary's sole contact with the forum state, it must be determined whether a party's involvement in the letter of credit arrangement alone is sufficient to establish quasi-in-rem jurisdiction.<sup>173</sup> In addition, it must be determined whether this maneuver has any commercial utility in light of its inconsistency with the independence principle.

### A. *Personal Jurisdiction in Letter of Credit Cases*

The Supreme Court has held that, in order to establish in personam or quasi-in rem jurisdiction, a party must have sufficient "minimum contacts" with the forum state<sup>174</sup> so that compelling the party to litigate in the forum does not offend "traditional notions of fair play

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attachment procedure has an "insidious effect" on the dependability of the letter of credit device because it interferes with the beneficiary's expectations without directly challenging the near-absolute character of the issuer's payment obligation).

173. An initial distinction must be made between general and specific or limited jurisdiction. Under the former, the relationship between the defendant and the forum is sufficient to support jurisdiction even if the plaintiff's claim is unrelated to the defendant's contacts, provided that the defendant's forum-related activities are "substantial" or "continuous and systematic." *H. Ray Baker, Inc. v. Associated Banking Corp.*, 592 F.2d 550, 552 (9th Cir.), *cert. denied*, 444 U.S. 832 (1979); *Data Disc, Inc. v. Systems Technology Assocs., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977). Under a general jurisdiction analysis, defendant's unrelated contacts with the forum must be more substantial than when the defendant's contacts give rise to plaintiff's claims. *Hanson v. Denckla*, 357 U.S. 235, 251-53 (1958); *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 233-34 (2d Cir. 1963); *Tillay v. Idaho Power Co.*, 425 F. Supp. 376, 379 (E.D. Wa. 1976). Even if general jurisdiction is lacking, jurisdiction may still lie if the nature and quality of defendant's activities in the forum, which give rise to plaintiff's claim, make the assertion of jurisdiction fair and reasonable in the particular case. *Shaffer v. Heitner*, 433 U.S. 186, 203-04 (1977); *International Shoe Co. v. Washington*, 326 U.S. 310, 317-19 (1945); *H. Ray Baker, Inc. v. Associated Banking Corp.*, 592 F.2d at 552. This Note is concerned with specific jurisdiction. For cases discussing general jurisdiction and the letter of credit contact, see *Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630, 643-44 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981); *K Mart Corp. v. Knitjoy Mfg., Inc.*, 534 F. Supp. 153, 159 (E.D. Mich. 1981); *Decor by Nikkei Int'l v. Federal Republic of Nig.*, 497 F. Supp. 893, 906 (S.D.N.Y. 1980), *aff'd sub nom. Texas Trading & Milling Corp. v. Federal Republic of Nig.*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *Barnes v. Irving Trust Co.*, 290 F. Supp. 116, 118-19 (S.D. Tex. 1968); *Sheldon Steel Corp. v. Standard Fruit Co.*, 219 F. Supp. 521, 526 (D. Del. 1963).

174. *Rush v. Savchuk*, 444 U.S. 320, 327 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 207, 211-12 (1977); *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 319-20 (1945).

and substantial justice.”<sup>175</sup> A sufficient minimum contact is an act “by which [a] defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”<sup>176</sup> When dealing with quasi-in-rem jurisdiction, the presence within the forum of a res that is directly related to the action may provide a sufficient contact to establish personal jurisdiction.<sup>177</sup> By contrast, the mere presence within a forum of a res that is unrelated to the action generally does not in itself establish personal jurisdiction over the affected party.<sup>178</sup>

The beneficiary's involvement in the letter of credit arrangement may be a sufficient minimum contact to warrant the imposition of quasi-in-rem jurisdiction over the issuer's payment obligation. Typi-

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175. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

176. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); see *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (exercising the privilege of conducting activities within a state, thereby enjoying the benefits and protection of the laws of that state, gives rise to the concomitant duty to subject oneself to the court's personal jurisdiction); see, e.g., *Southern Mach. Co. v. Mohasco Indus.*, 401 F.2d 374, 381 (6th Cir. 1968); *Uppgren v. Executive Aviation Servs., Inc.*, 304 F. Supp. 165, 168-69 (D. Minn. 1969); *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 458, 209 N.E.2d 68, 76, 261 N.Y.S.2d 8, 19, cert. denied, 382 U.S. 905 (1965).

177. *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977). For instance, “when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction” because this would normally indicate that the defendant “expected to benefit from the State's protection of his interest.” *Id.* at 207-08 (footnotes omitted). A judgment quasi-in-rem affects the rights of particular persons in a designated res. *Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958). The plaintiff may use this form of jurisdiction to secure a claim in the subject matter and extinguish similar claims of particular persons, or to apply property that is concededly the defendant's to the satisfaction of a claim against him. *Id.*; see *Restatement of Judgments* §§ 3, 5-9 (1942). Nevertheless, “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,” *Shaffer v. Heitner*, 433 U.S. at 212 (footnote omitted), which is a “fairness standard.” *Id.* at 211.

178. *Shaffer v. Heitner*, 433 U.S. 186, 208-09 (1977). The fifth amendment due process clause imposes no jurisdictional limits on the federal courts within the United States. See *Mississippi Publishing Co. v. Murphree*, 326 U.S. 438, 442 (1946); *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979) (quoting *United States v. Union Pac. R.R.*, 98 U.S. 569, 603-04 (1878)); *Mariash v. Morrill*, 496 F.2d 1138, 1143 n.6 (2d Cir. 1974). But see *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 331 (1964) (Black, J., dissenting) (jurisdictional limits on state courts should apply to federal courts in diversity cases). Federal courts nevertheless exercise self-restraint regarding personal jurisdiction and generally will reach only as far as state courts can. See *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 226 (2d Cir. 1963); 2 J. Moore & J. Lucas, *supra* note 42, ¶ 4.25[7]; 4 C. Wright & A. Miller, *supra* note 94, § 1075.



cally, the customer seeks to attach the issuer's payment obligation after the beneficiary demands payment but before payment is actually made.<sup>179</sup> In making its demand for payment under the letter of credit, the beneficiary secures the benefits and protections of the laws of the state in which the letter of credit is issued.<sup>180</sup> The availability of legal sanctions to compel the obligor's performance or to provide compensatory substitutes for such performance is an important component of credit.<sup>181</sup> Once a letter of credit is established, a legally enforceable obligation arises running directly from the issuer to the beneficiary.<sup>182</sup>

179. *E.g.*, *Lantz Int'l Corp. v. Industria Termotecnia Compana, S.p.A.*, 358 F. Supp. 510, 512-13 (E.D. Pa. 1973); *Eriksson v. Refiners Export Co.*, 264 A.D. 27, 31, 35 N.Y.S.2d 829, 831 (1951); *Falk & Co. v. South Tex. Cotton Oil Co.*, 368 Pa. 199, 205-06, 82 A.2d 27, 31 (1951); *cf.* *Sisalcords do Brazil, Ltd. v. Fiacao Brasileira de Sisal, S.A.*, 450 F.2d 419, 422-23 (5th Cir. 1971) (attachment ineffective because effective presentment not yet made), *cert. denied*, 406 U.S. 919 (1972); *Tueta v. Rodriguez*, 176 So. 2d 550, 552 (Fla. Dist. Ct. App. 1965) (same).

180. The issuer is legally obligated to pay the beneficiary if complying documents are tendered. *See* U.C.C. § 5-114(1) (1977); *see, e.g.*, *Pringle-Associated Mortgage Corp. v. Southern Nat'l Bank*, 571 F.2d 871, 875 (5th Cir. 1978); *Bossier Bank & Trust Co. v. Union Planters Nat'l Bank*, 550 F.2d 1077, 1081 app. A (6th Cir. 1977) (*per curiam*) (adopting memorandum decision of lower court); *AMF Head Sports Wear, Inc. v. Ray Scott's All-American Sports Club, Inc.*, 448 F. Supp. 222, 223 (D. Ariz. 1978). Some courts have characterized the issuer-beneficiary relationship as contractual. *E.g.*, *Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230, 235 (5th Cir. 1983); *East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 601 (5th Cir. 1979); *Bank of N.C., N.A. v. Rock Island Bank*, 570 F.2d 202, 207 (7th Cir. 1978); *Venzelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 465-66 (2d Cir. 1970). No consideration, however, is necessary to establish the letter of credit, U.C.C. § 5-105 (1977); *see* *Toyota Indus. Trucks U.S.A., Inc. v. Citizens Nat'l Bank*, 611 F.2d 465, 469 (3d Cir. 1979); *Bank of N.C., N.A. v. Rock Island Bank*, 570 F.2d at 207, and there is no mutual assent between the issuer and the beneficiary, *J. White & R. Summers, supra* note 1, § 18-2, at 711; *Joseph, supra* note 16, at 850-51; *Comment, Letter of Credit: Current Theories and Usages*, 39 La. L. Rev. 581, 588-90 (1979). Perhaps the better view is "to call a letter of credit a transaction *sui generis*—a relationship with no perfect analogies but nevertheless a well defined set of rights and obligations." 1 A. Lowenfeld, *supra* note 16, § 5.53, at 144 (footnote omitted); *accord* *Joseph, supra* note 16, at 850-51; *see* *H. Harfield, supra* note 1, at 53; *J. White & R. Summers, supra* note 1, § 18-2, at 711.

181. *H. Harfield, supra* note 1, at 3; *see* *Richard v. American Union Bank*, 123 Misc. 92, 95, 204 N.Y.S. 719, 722 (Sup. Ct.) ("a credit . . . is a claim or cause of action for money"), *rev'd on other grounds*, 210 A.D. 22, 205 N.Y.S. 622 (1924), *aff'd*, 241 N.Y. 163, 149 N.E. 338 (1925); *cf.* 1 *Michie, supra* note 1, ch. 1, § 3 (nature of banking business requires state and federal legislation to protect depositors). Two other components of credit include the acceptance of a duty by the obligor and the presumed ability of the obligor to perform that duty. *H. Harfield, supra* note 1, at 3.

182. *J. White & R. Summers, supra* note 1, § 18-2, at 711; *see* *Baker v. National Blvd. Bank*, 399 F. Supp. 1021, 1024 & n.3 (N.D. Ill. 1975); *Schweibish v. Pontchartrain State Bank*, 389 So. 2d 731, 734-35 (La. Ct. App. 1980).

In addition, the beneficiary derives substantial commercial advantages from the issuance of the letter of credit. Commercially, the beneficiary may be unwilling to enter into the underlying contract unless the credit of the issuer is substituted for that of the customer.<sup>183</sup> Moreover, through the issuance of the letter of credit, the beneficiary is protected against the prospective insolvency or dishonesty of the customer,<sup>184</sup> and therefore is able to participate in a wider range of interstate and international trade.<sup>185</sup>

The nature of the plaintiff's claim may determine whether the issuer's payment obligation is related or unrelated to the suit. If the suit is for breach of the underlying contract, the independence principle dictates that the issuer's payment obligation is entirely unrelated to the suit.<sup>186</sup> Hence, contacts in addition to the letter of credit arrangement would be necessary to subject the beneficiary to a court's jurisdiction. If the case is based on the "fraud in the transaction" exception<sup>187</sup> to the independence principle, however, no basis exists for a

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183. H. Harfield, *supra* note 1, at 17-18; J. White & R. Summers, *supra* note 1, § 18-1, at 707-08; *see* East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co., 593 F.2d 598, 601 (5th Cir. 1979); Venizelos, S.A. v. Chase Manhattan Bank, 425 F.2d 461, 464 (2d Cir. 1970).

184. State of N.Y. Law Revision Comm'n, Report of the Law Revision Comm'n to the Legislature Relating to the Uniform Commercial Code, Legislative Doc. No. 65(A), at 5, 35 (1956), *reprinted in* State of N.Y. Law Revision Comm'n Report and Appendices Relating to the Uniform Commercial Code 15, 45 (1956); *see* East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co., 593 F.2d 598, 601 (5th Cir. 1979); Consolidated Aluminum Corp. v. Bank of Va., 544 F. Supp. 386, 394 (D. Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983); 1 A. Lowenfeld, *supra* note 16, § 5.3, at 130; J. White & R. Summers, *supra* note 1, § 18-1, at 706-08; Harfield II, *supra* note 36, at 241; McLaughlin, *supra* note 11, at 5.

185. *See* Sheldon Steel Corp. v. Standard Fruit Co., 219 F. Supp. 521, 527 (D. Del. 1963) (interstate transaction would not have been possible but for the letter of credit); H. Harfield, *supra* note 1, at 24 (In the absence of efficient overseas financing, "only heavily capitalized firms could afford to trade in world markets.").

186. *See* U.C.C. § 5-114 official comment 1 (1977); U.C.P., *supra* note 9, art. 3. The prospect of inadequate performance of the underlying contract is the reason for the wide-spread use of the letter of credit. *See* Pringle-Associated Mortgage Corp. v. Southern Nat'l Bank, 571 F.2d 871, 874 (5th Cir. 1978); Venizelos, S.A. v. Chase Manhattan Bank, 425 F.2d 461, 465 (2d Cir. 1970); Bank of Newport v. First Nat'l Bank & Trust Co., 32 U.C.C. Rep. Serv. (Callaghan) 1572, 1577 (D.N.D. 1981), *aff'd*, 34 U.C.C. Rep. Serv. (Callaghan) 650 (8th Cir. 1982). Thus, the primary utility of the letter of credit is preserved to the extent that it is kept entirely separate from the issuer-customer and customer-beneficiary contracts. Harfield II, *supra* note 36, at 241-42; *see, e.g.*, KMW Int'l v. Chase Manhattan Bank, N.A., 606 F.2d 10, 15-16 (2d Cir. 1979); Consolidated Aluminum Corp. v. Bank of Va., 544 F. Supp. 386, 395 (D. Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983); Colorado Nat'l Bank v. Board of County Comm'rs, 634 P.2d 32, 36-37 (Colo. 1981) (en banc).

187. U.C.C. § 5-114(2) (1977). *See supra* note 168.

procedural objection to finding the beneficiary amenable to suit in the customer's preferred forum.<sup>188</sup>

For example, when the beneficiary has fraudulently performed the underlying contract and, as a result, presents fraudulent documents to the issuer, the customer's interest, as outlined in section 5-114(2)(b) of the UCC, renders the letter of credit proceeds directly related to the customer's action.<sup>189</sup> By contrast, if the documents are forged or fraudulent in the absence of any fraud in the underlying contract, then the customer's interest is more attenuated and the letter of credit proceeds may be considered unrelated to an action by the customer against the beneficiary.<sup>190</sup> Thus, absent additional contacts, the cus-

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188. When the right to letter of credit proceeds is controverted, "these funds would appear to have a sufficient nexus to plaintiff's cause of action to justify their attachment as a basis for *quasi-in-rem* jurisdiction." *National Am. Corp. v. Federal Republic of Nig.*, 448 F. Supp. 622, 635 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979). The reason is that when the res itself "is the subject matter or directly related to the litigation, its presence within the state would almost invariably provide a sufficient contact" to satisfy the requirements of *International Shoe, Inc. v. Evans*. *Id.* (discussing *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977)). "The requirement of fair notice . . . includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign." *Shaffer v. Heitner*, 433 U.S. at 218 (Stevens, J., concurring). By opening a bank account in another state, one may "knowingly assume some risk that the State will exercise its power over" the res. *Id.* Moreover, the attachment of a bank account completely unrelated to a suit for wrongful death has been held to provide an adequate basis for jurisdiction. *Feder v. Turkish Airlines*, 441 F. Supp. 1273, 1278 (S.D.N.Y. 1977). The fact that "New York banks . . . are uniquely qualified to service foreign depositors . . . may tend to support a finding of sufficient contacts with the forum." *Id.* This same analysis may apply to a breach of contract action supported by an attachment of unrelated letter of credit proceeds. See Memo for Plaintiff at 5-12, *Standard Steel & Tinplate Corp. v. Manuel Int'l D.I.S.C., Inc.*, No. 81-5118 (S.D.N.Y. 1981). Such application, however, would violate the substantive independence principle. Nevertheless, no procedural objection is warranted when the case is based on an exception to the independence principle. Moreover, a "substantial contact" for purposes of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330(a)-(c), 1332(a)(4), 1391(f), 1441(d), 1602-1611 (1976), includes "receiv[ing] financing from a private or public lending institution located in the United States." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6615-16.

189. The letter of credit proceeds are related to the action under such circumstances irrespective of the manner in which the "fraud in the transaction" claim is construed, see *supra* note 168, because a res is related to an action to the extent that claims to the res itself are the source of the controversy. *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977). Likewise, if the res is so related, the defendant's claim to the proceeds would normally indicate that the defendant expected to benefit from the protection of his interest by the laws of the state of issuance. See *id.* at 207-08.

190. When there is fraud in the underlying contract, generally there will also be a fraudulent document in the beneficiary's presentment. See, e.g., *Sztejn v. J. Henry Schroder Banking Corp.*, 177 Misc. 719, 722-23, 31 N.Y.S.2d 631, 635-36 (Sup. Ct. 1941); *O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 233-34, 250 S.E.2d 587,

tomers may be able to attach the letter of credit proceeds when there is fraud in the underlying transaction, but not when there is a forged or fraudulent presentment absent such underlying fraud. This attachment procedure, therefore, should be permitted when the customer's suit falls under the "fraud in the transaction" exception to the independence principle as provided in section 5-114(2) of the UCC.<sup>191</sup>

In international transactions, the beneficiary typically enlists the services of a local bank to confirm the letter of credit.<sup>192</sup> In such a situation, the attachment maneuver may not be available to the customer because the letter of credit proceeds no longer belong to the beneficiary, but rather are the property of the confirming bank.<sup>193</sup>

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601 (1978); J. White & R. Summers, *supra* note 1, § 18-6, at 736. Conversely, the presented documents may be forged or fraudulent absent any fraud in the underlying contract. *See, e.g.*, Dynamics Corp. of Am. v. Citizens & S. Nat'l Bank, 356 F. Supp. 991, 996 (N.D. Ga. 1973); Shaffer v. Brooklyn Park Garden Apts., 311 Minn. 452, 462-64, 250 N.W.2d 172, 179-80 (1977); J. White & R. Summers, *supra* note 1, § 18-6, at 736.

191. Although the beneficiary has never been held amenable to suit in the customer's forum based solely on the letter of credit contact, *see, e.g.*, Standard Fittings Co. v. Sapag, S.A., 625 F.2d 630, 643-44 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981); K Mart Corp. v. Knitjoy Mfg., Inc., 534 F. Supp. 153, 159 (E.D. Mich. 1981); Decor by Nikkei Int'l v. Federal Republic of Nig., 497 F. Supp. 893, 906 (S.D.N.Y. 1980), *aff'd sub nom.* Texas Trading & Milling Corp. v. Federal Republic of Nig., 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), it is arguable that these contacts are sufficient for finding in personam jurisdiction over the beneficiary. In such an instance, the utility of the attachment procedure would be limited to its security function of stopping payment to the beneficiary because it would not be needed to secure jurisdiction over this party. *See supra* note 170 and accompanying text.

192. *See* R. Braucher & R. Riegert, *supra* note 12, at 367; H. Harfield, *supra* note 1, at 37; J. White & R. Summers, *supra* note 1, § 18-1, at 710; *see, e.g.*, Voest-Alpine Int'l Corp. v. Chase Manhattan Bank, N.A., 707 F.2d 680, 683 (2d Cir. 1983); Venizelos, S.A. v. Chase Manhattan Bank, 425 F.2d 461, 464-65 (2d Cir. 1970); Lustrelon, Inc. v. Prutscher, 178 N.J. Super. 128, 139, 428 A.2d 518, 524 (App. Div. 1981). Because the confirming bank becomes "directly obligated on the credit . . . as though it were its issuer," U.C.C. § 5-107(2) (1977), the beneficiary receives an additional measure of protection by confirming the letter of credit. J. White & R. Summers, *supra* note 1, § 18-1, at 707; 42 Fordham L. Rev. 706, 710-11 (1974); 19 Vill. L. Rev. 686, 688 (1974); *see* U.C.C. § 5-107 official comment 2 (1977); 52 Tex. L. Rev. 578, 579 (1974). By contrast, an advising bank does not assume any obligation to honor the beneficiary's drafts, but merely assumes an obligation to account for the accuracy of its own statements. U.C.C. § 5-107(1) (1977). Advisory banks and other intermediary banks, as mere conveyors of information, perform a different function than confirming banks in the letter of credit arrangement. *See id.* § 5-107; Kozolchik I, *supra* note 4, at 235.

193. *See* Lantz Int'l Corp. v. Industria Termotecnica Campana, S.p.A., 358 F. Supp. 510, 515-16 (E.D. Pa. 1973); United Bank, Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 256, 360 N.E.2d 943, 946, 392 N.Y.S.2d 265, 269 (1976);

Moreover, the beneficiary's contacts with the state of issuance become more attenuated because the confirming bank, instead of the beneficiary, makes the demand on the issuer.<sup>194</sup> The customer, therefore, may have to resort to the injunction remedy. This remedy is available even if a third party makes the presentment unless this third party is an innocent third party, such as a holder in due course<sup>195</sup> of the beneficiary's draft.<sup>196</sup>

In addition, it may be argued that the beneficiary need not avail itself of the laws of the state of issuance because the UCC and the Uniform Customs and Practices for Commercial Documentary Credits (UCP) apply universally. The UCP, however, is not law; it is merely a compilation of custom in letter of credit transactions.<sup>197</sup> Generally, the letter of credit transaction will not render the issuer amenable to suit in the beneficiary's state.<sup>198</sup> In a typical case, therefore, the beneficiary may, by suing the issuer for wrongful dishonor in the state in which the letter of credit is issued, avail itself of the protections of the laws of that state.

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Badler v. L. Gillarde Sons Co., 387 Pa. 266, 270, 127 A.2d 680, 683 (1956); Falk & Co. v. South Tex. Cotton Oil Co., 368 Pa. 199, 206, 82 A.2d 27, 31 (1951).

194. See Instituto Nacional de Comercializacion Agricola (Indeca) v. Continental Ill. Nat'l Bank & Trust Co., 530 F. Supp. 279, 282-83 (N.D. Ill. 1982); United Bank, Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 256-57, 360 N.E.2d 943, 946-47, 392 N.Y.S.2d 265, 268-69 (1976). A confirming bank acquires the rights of an issuer. U.C.C. § 5-107(2) (1977).

195. A "holder in due course" is a holder that takes an instrument for value in good faith and without notice of any defense or claim to it by another person. U.C.C. § 3-302 (1977).

196. When the presenter is a holder in due course, the issuer must pay even if the documents are forged or fraudulent, or there is fraud in the transaction. U.C.C. § 5-114(2)(a) (1977). Whether the presenter of the draft is actually a holder depends upon the intent of the parties. Badler v. L. Gillarde Sons Co., 387 Pa. 266, 270, 127 A.2d 680, 683 (1956); see 5A Michie, *supra* note 1, ch. 9, § 32a. Moreover, the presenters may have the burden of proving holder in due course status, United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 257-58, 262-63, 360 N.E.2d 943, 947, 949-50, 392 N.Y.S.2d 265, 269, 272-73 (1976), which may be a difficult burden for the confirming bank because it usually is in a good position to detect fraud or forgery. See Gillette, *supra* note 10, at 44-45. Professor Gillette suggests eliminating the holder in due course status of transferee banks, because such banks would be compelled to detect fraud or forgery if forced to bear the loss. *Id.*

197. See H. Harfield, *supra* note 1, at 225-27; Kozolchuk III, *supra* note 13, at 14 & n.54. The UCP generally outlines the rights and responsibilities of the parties to the letter of credit arrangement. See U.C.P., *supra* note 9, arts. 15-21. By contrast, article 5 of the UCC is a codification of pre-Code case law. United Bank, Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 258 n.2, 360 N.E.2d 943, 947-48 n.2, 392 N.Y.S.2d 265, 269-70 n.2 (1976); see U.C.C. § 5-101 official comment (1977).

198. *E.g.*, Leney v. Plum Grove Bank, 670 F.2d 878, 880-81 (10th Cir. 1982); H. Ray Baker, Inc. v. Associated Banking Corp., 592 F.2d 550, 553 (9th Cir.), *cert.*

As a matter of policy, the letter of credit contact alone, despite its benefits, arguably should not render the beneficiary amenable to suit within the customer's forum.<sup>199</sup> Such a procedure may have a chilling effect on prospective transactions.<sup>200</sup> If merely entering the letter of credit arrangement makes the beneficiary automatically amenable to suit in the state of issuance, a foreign seller may be reluctant to become a party to future letter of credit arrangements.<sup>201</sup> This would curtail severely the commercial usefulness and desirability of the letter of credit.<sup>202</sup>

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*denied*, 444 U.S. 832 (1979); *Empire Abrasive Equip. Corp. v. H.H. Watson, Inc.*, 567 F.2d 554, 557-58 (3d Cir. 1977); *cf. Amigo Foods Corp. v. Marine Midland Bank*, 39 N.Y.2d 391, 396, 348 N.E.2d 581, 584, 384 N.Y.S.2d 124, 127 (1976) (correspondent bank relationship alone may not form basis for long-arm jurisdiction); *contra Van Schaak & Co. v. District Court*, 189 Colo. 145, 146-47, 538 P.2d 425, 426 (1975).

199. Certainty of payment is a crucial aspect of the letter of credit's usefulness. *See Insurance Co. of N. Am. v. Heritage Bank, N.A.*, 595 F.2d 171, 173 (3d Cir. 1979); *Pringle-Associated Mortgage Corp. v. Southern Nat'l Bank*, 571 F.2d 871, 874 (5th Cir. 1978); *Far E. Textile, Ltd. v. City Nat'l Bank & Trust Co.*, 430 F. Supp. 193, 196 (S.D. Ohio 1977); *cf. Asociacion De Azucareros De Guatemala v. United States Nat'l Bank*, 423 F.2d 638, 641 (9th Cir. 1970) ("[i]n the interests of certainty and stability" a modification of underlying agreement had no effect on letter of credit). To the extent that holding the beneficiary amenable to suit in the customer's forum disturbs the certainty of payment, this should be considered as a factor in the personal jurisdiction analysis regarding the interest of the forum state in furthering substantive social policies. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (substantive social policies to be considered in personal jurisdiction analysis); *Kulko v. California Superior Court*, 436 U.S. 84, 93, 98 (1978) (same). Moreover, in appropriate cases the forum's interest extends to overseeing the disposition of the res within the state. *Hanson v. Denckla*, 357 U.S. 235, 246 (1958); *Quasha v. Shale Dev. Corp.*, 667 F.2d 483, 486-87 (5th Cir. 1982).

200. This chilling effect may be exacerbated due to the relative ease with which a customer can procure an attachment of the letter of credit proceeds as opposed to an injunction order under U.C.C. § 5-114(2) (1977). *See infra* notes 215-32 and accompanying text.

201. The letter of credit is established in favor of the beneficiary when the beneficiary receives the letter of credit or is advised of its issuance. U.C.C. § 5-106(1)(b) (1977). As a general rule, the beneficiary, upon establishment, receives protection against the customer's dishonesty. *See* 1 A. Lowenfeld, *supra* note 16, § 5.3, at 130; J. White & R. Summers, *supra* note 1, § 18-1, at 706-08; McLaughlin, *supra* note 11, at 5. Automatic amenability to suit may engender dishonest claims by the customer, which, when coupled with an attachment of the letter of credit proceeds, would adversely affect the beneficiary's protective interest.

202. The prospect of foreign litigation over the letter of credit proceeds may not be consistent with the view that the beneficiary should be the stakeholder in letter of credit litigation. *See Insurance Co. of N. Am. v. Heritage Bank, N.A.*, 595 F.2d 171, 173 (3d Cir. 1979) (per curiam) (beneficiary holds the stakes in letter of credit litigation); 1 A. Lowenfeld, *supra* note 16, § 5.52(b), at 143 (same); Weisz & Blackman, *supra* note 11, at 375 (same). In turn, this prospect may disturb the

While this policy argument has merit, limited implementation of the attachment maneuver may minimize this chilling effect. If the finding of quasi-in-rem jurisdiction based solely on the letter of credit contact is limited to situations of fraud in the underlying contract, a scrupulous seller intending to perform the underlying contract in good faith should not be deterred from entering the letter of credit arrangement.<sup>203</sup> Rather, the chilling effect will deter only prospective beneficiaries that intend to commit fraud in the letter of credit transaction.<sup>204</sup> The adoption of this proposal, therefore, may decrease the incidence of fraud in letter of credit transactions. Moreover, such a chilling effect on prospective beneficiaries should rarely materialize because other contacts with the forum state sufficient to confer jurisdiction often exist in addition to those provided by the letter of credit arrangement.<sup>205</sup>

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beneficiary's interest in prompt payment against documents. See *Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 528 F.2d 802, 805 (4th Cir. 1975) (beneficiary has an interest in prompt payment); *Far E. Textile, Ltd. v. City Nat'l Bank & Trust Co.*, 430 F. Supp. 193, 196 (S.D. Ohio 1977) (same); *Maurice O'Meara Co. v. National Park Bank*, 239 N.Y. 386, 397, 146 N.E. 636, 639 (1925) (same). Nevertheless, these fundamental principles "should not be extended to protect the unscrupulous" beneficiary. *Sztejn v. J. Henry Schroder Banking Corp.*, 177 Misc. 719, 722, 31 N.Y.S.2d 631, 634 (Sup. Ct. 1941).

203. Every duty governed by the UCC includes an obligation of good faith, U.C.C. § 1-203 (1977), which may not be disclaimed. *Id.* § 1-102(3). Thus, the beneficiary is obligated to display "honesty in fact," *id.* § 1-201(19), in making its presentment to the issuer. See *id.* § 5-111(1).

204. By permitting a thorough examination for fraud in the presentment, the limited "notice" injunctions granted in cases brought after the collapse of the Shah's regime in Iran provide an analogous effect. *E.g.*, *Werner Lehara Int'l, Inc. v. Harris Trust & Sav. Bank*, 484 F. Supp. 65, 75-76 (W.D. Mich. 1980); *Stromberg-Carlson Corp. v. Bank Melli Iran*, 467 F. Supp. 530, 532-33 (S.D.N.Y. 1979); *Olin Corp. v. Chase Manhattan Bank, N.Y.L.J.*, May 1, 1979, at 6, col. 1 (N.Y. Sup. Ct. Apr. 30, 1979). Like the notice injunction, the attachment remedy "may have a salutary chilling effect on any inclination by the beneficiary to call the letter of credit without just cause." *Weisz & Blackman, supra* note 11, at 365.

In addition, although the attachment maneuver may appear to impose additional burdens, it insulates the issuer from litigation on the underlying contract and throws the true adverse parties, the customer and the beneficiary, into court to determine the apportionment of liability. Issuing banks, therefore, may not limit future involvement in letter of credit arrangements solely on the basis of this maneuver.

205. See, *e.g.*, *Gemini Shipping, Inc. v. Foreign Trade Org. for Chems. and Foodstuffs*, 647 F.2d 317, 320 (2d Cir. 1981); *Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630, 643-44 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981); *H. Ray Baker, Inc., v. Associated Banking Corp.*, 592 F.2d 550, 552 (9th Cir.), *cert. denied*, 444 U.S. 832 (1979); *Tampimex Oil Ltd. v. Latina Trading Corp.*, 558 F. Supp. 1201, 1202 (S.D.N.Y. 1983); *K Mart Corp. v. Knitjoy Mfg., Inc.*, 534 F. Supp. 153, 159 (E.D. Mich. 1981); *Decor by Nikkei Int'l, Inc. v. Federal Republic of Nig.*, 497

### B. Commercial Utility of the Attachment Maneuver

Commentators universally have criticized the attachment maneuver on the grounds that permitting a breach of contract claim to stop payment to the beneficiary is hostile to the fundamental principle of letter of credit law.<sup>206</sup> Indeed, this is precisely the situation the letter of credit device seeks to avoid.<sup>207</sup> The effect of the attachment on the issuer's near-absolute payment obligation may interfere with the beneficiary's expectations without posing a direct challenge to the issuer's obligation.<sup>208</sup> The issuer, however, is forced into a situation indistinguishable from litigation directed against itself.<sup>209</sup>

Nonetheless, the attachment maneuver does have commercial merit. To date, commentators have criticized it solely in the context of allegations of breach in the underlying mercantile contract.<sup>210</sup> The maneuver is useful, however, when the customer has been defrauded by the beneficiary on the underlying contract.<sup>211</sup> While the customer

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F. Supp. 893, 906 (S.D.N.Y. 1980), *aff'd sub nom.* Texas Trading & Milling Corp. v. Federal Republic of Nig., 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); National Am. Corp. v. Federal Republic of Nig., 448 F. Supp. 622, 633, 635 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979); Barnes v. Irving Trust Co., 290 F. Supp. 116, 119 (S.D. Tex. 1968); Sheldon Steel Corp. v. Standard Fruit Co. 219 F. Supp. 521, 526 (D. Del. 1963).

206. *E.g.*, J. White & R. Summers, *supra* note 1, § 18-10, at 752-53; Justice II, *supra* note 171, at 495-98; *see* 100 Banking L.J. 730, at 730.

207. J. White & R. Summers, *supra* note 1, § 18-10, at 753; *see* East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co., 593 F.2d 598, 601 (5th Cir. 1979); Pringle-Associated Mortgage Corp. v. Southern Nat'l Bank, 571 F.2d 871, 874 (5th Cir. 1978); Venizelos, S.A. v. Chase Manhattan Bank, 425 F.2d 461, 464-65 (2d Cir. 1970).

208. Justice II, *supra* note 171, at 495.

209. 100 Banking L.J. 730, at 730.

210. *See, e.g.*, J. White & R. Summers, *supra* note 1, § 18-10, at 752-53; Justice II, *supra* note 171, at 495; 100 Banking L.J. 730, at 730.

211. *See* United Bank Ltd. v. Cambridge Sporting Goods, Corp., 41 N.Y.2d 254, 256-57, 360 N.E.2d 943, 946, 392 N.Y.S.2d 265, 268 (1976). When there is fraud in the transaction, the customer may have a remedy at law against the beneficiary on the underlying contract, *see* KMW Int'l v. Chase Manhattan Bank, N.A., 606 F.2d 10, 14-15 (2d Cir. 1979); U.C.C. § 2-325 (1977); J. White & R. Summers, *supra* note 1, § 18-7, at 741, but this remedy may be inadequate if, for instance, the call on the customer's funds by the issuer will render the customer insolvent. NMC Enters., Inc. v. CBS, 14 U.C.C. Rep. Serv. (Callaghan) 1427, 1429 (N.Y. Sup. Ct. 1974). This problem can be avoided by attaching the letter of credit proceeds, which freezes payment pending the resolution of the customer's legal claim. *See* Lantz Int'l Corp. v. Industria Termotecnica Campana, S.p.A, 358 F. Supp. 510, 513-14 (E.D. Pa. 1973); Tueta v. Rodriguez, 176 So. 2d 550, 551 (Fla. Dist. App. 1965); Morgan v. Depositors Trust Co., 33 U.C.C. Rep. Serv. (Callaghan) 1473, 1483 (Me. Super. Ct. 1982); Eriksson v. Refiners Export Co., 264 A.D. 525, 526, 35 N.Y.S.2d 829, 831 (1942); *cf.* Harvey Estes Constr. Co. v. Dry Dock Sav. Bank, 381 F. Supp. 271, 273, 275 (W.D. Okla. 1974) (beneficiary ordered to pay letter of credit proceeds into court).



may be able to sue the issuer in order to enjoin the honor of the beneficiary's presentment,<sup>212</sup> it is preferable to allow the customer to protect itself against this fraud by suing the beneficiary directly. The injunction is an extraordinary remedy that should be used only when no alternative course of action is available.<sup>213</sup>

Because an injunctive remedy already exists,<sup>214</sup> the utility of the attachment maneuver in fraud situations may be questioned. The attachment maneuver, however, may be more readily available to the customer than the injunction remedy.<sup>215</sup> The attachment proceeding is a remedy at law,<sup>216</sup> while the injunction is equitable.<sup>217</sup> The remedy at law should be preferred.<sup>218</sup> Moreover, notwithstanding that the injunction remedy is statutorily authorized, a court must still examine factors other than those listed in the statutory provision in order for the injunction to issue.<sup>219</sup> Pretrial injunctive relief is an extraordinary

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212. See *supra* note 168.

213. *Morgan v. Depositors Trust Co.*, 33 U.C.C. Rep. Serv. (Callaghan) 1473, 1484 (Me. Super. Ct. 1982). See *infra* notes 215-20 and accompanying text.

214. U.C.C. § 5-114(2)(b) (1977).

215. *Morgan v. Depositors Trust Co.*, 33 U.C.C. Rep. Serv. (Callaghan) 1473, 1484 (Me. Super. Ct. 1982) ("Where lesser remedies, such as attachment, are available to protect the interest which is asserted, such lesser remedies should be invoked. . ."). Traditionally, the New England states in particular have attachment statutes that are "available for all types of legal claims and with few restrictions." 7 J. Moore & J. Lucas, *supra* note 42, ¶ 64.04[3], at 64-13; see Comment, 38 Yale L.J. 376, 377 (1929). In Connecticut, for example, a creditor institutes an action by garnishing the debtor's funds in the hands of a third party. Conn. Gen. Stat. Ann. § 52-329 (West Supp. 1984). If the debtor challenges the attachment, the attachment is tested only to the extent of determining whether probable cause exists to sustain the creditor's claim. *Dick Warner Cargo Handling Corp. v. Aetna Bus. Credit, Inc.*, 700 F.2d 858, 860 (2d Cir. 1983); *William M. Raveis & Assocs. v. Kimball*, 186 Conn. 329, 334, 441 A.2d 200, 202-03 (1982); Conn. Gen. Stat. Ann. § 52-278d(a) (West Supp. 1984).

216. See, e.g., *Sisalcords do Brazil, Ltd. v. Fiacao Brasileira de Sisal, S.A.*, 450 F.2d 419, 421 (5th Cir. 1971), *cert. denied*, 406 U.S. 919 (1972) (contract action with attachment); *Lantz Int'l Corp. v. Industria Termotecnica Campana, S.p.A.*, 358 F. Supp. 510, 511-12 (E.D. Pa. 1973) (same).

217. *D. Dobbs*, *supra* note 69, § 1.1, at 3; see, e.g., *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344, 1346 (11th Cir. 1982); *Sperry Int'l Trade, Inc. v. Government of Israel*, 670 F.2d 8, 11 (2d Cir. 1982).

218. The grant of injunctive relief is "a remedy whose basis 'in the federal courts has always been irreparable harm and inadequacy of legal remedies.'" *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57 (1975) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959)); see, e.g., *Harris Corp. v. National Iranian Radio & Television*, 691 F. 2d 1344, 1353 (11th Cir. 1982); *Interco, Inc. v. First Nat'l Bank*, 560 F.2d 480, 486 (1st Cir. 1977); *American Bell Int'l v. Islamic Republic of Iran*, 474 F. Supp. 420, 422-23 (S.D.N.Y. 1979).

219. *Thorup*, *supra* note 11, at 18 ("Interpretations that a more free exercise of injunctive power is allowed under Section 5-114(2) have absolutely no case support."); see, e.g., *Rockwell Int'l Sys., Inc. v. Citibank, N.A.*, 719 F.2d 583, 586 (2d

remedy, and therefore may be invoked only after the plaintiff has proven the prospect of immediate injury resulting in irreparable harm.<sup>220</sup> This requirement is particularly burdensome because courts generally do not consider the harm to be irreparable when the prospective loss is either speculative or solely financial in nature.<sup>221</sup> Moreover, the plaintiff must show either that it is likely to prevail on the merits<sup>222</sup> or that sufficiently serious questions going to the merits exist to make such questions a fair ground for litigation.<sup>223</sup>

By contrast, the requirements of the attachment remedy are less onerous to the plaintiff.<sup>224</sup> The requirements vary from state to

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Cir. 1983); *Warner v. Central Trust Co., N.A.*, 715 F.2d 1121, 1123 (6th Cir. 1983); *Sperry Int'l Trade, Inc. v. Government of Israel*, 670 F.2d 8, 11 (2d Cir. 1982); *Cappaert Enters., Inc. v. Citizens & S. Nat'l Bank*, 486 F. Supp. 819, 830 (E.D. La. 1980); *Morgan v. Depositors Trust Co.*, 33 U.C.C. Rep. Serv. (Callaghan) 1473, 1477-78 (Me. Super. Ct. 1982).

220. Fed. R. Civ. P. 65(b)(1); e.g., *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57 (1975); *Warner v. Central Trust Co., N.A.*, 715 F.2d 1121, 1123 (6th Cir. 1983); *KMW Int'l v. Chase Manhattan Bank, N.A.*, 606 F.2d 10, 14 (2d Cir. 1979).

221. E.g., *Rockwell Int'l Sys., Inc. v. Citibank, N.A.*, 719 F.2d 583, 588 (2d Cir. 1983); *Warner v. Central Trust Co., N.A.*, 715 F.2d 1121, 1123 (6th Cir. 1983); *KMW Int'l v. Chase Manhattan Bank, N.A.*, 606 F.2d 10, 15 (2d Cir. 1979); *United Technologies Corp. v. Citibank, N.A.*, 469 F. Supp. 473, 481 (S.D.N.Y. 1979); *Morgan v. Depositors Trust Co.*, 33 U.C.C. Rep. Serv. (Callaghan) 1473, 1482-83 (Me. Super. Ct. 1982).

222. E.g., *Warner v. Central Trust Co., N.A.*, 715 F.2d 1121, 1123 (6th Cir. 1983); *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344, 1353 (11th Cir. 1982); *Interco, Inc. v. First Nat'l Bank*, 560 F.2d 480, 482 (1st Cir. 1977).

223. E.g., *Rockwell Int'l Sys., Inc. v. Citibank, N.A.*, 719 F.2d 583, 586 (2d Cir. 1983); *Sperry Int'l Trade, Inc. v. Government of Israel*, 670 F.2d 8, 11 (2d Cir. 1982); *KMW Int'l v. Chase Manhattan Bank, N.A.*, 606 F.2d 10, 14 (2d Cir. 1979).

224. See *Morgan v. Depositors Trust Co.*, 33 U.C.C. Rep. Serv. (Callaghan) 1473, 1483 (Me. Super. Ct. 1982) ("A defendant's prospective ability to pay a monetary claim is an effective bar to an injunction, but a defendant's prospective ability to pay a monetary claim cannot even be considered in an attachment proceeding.").

Article 5 was not intended to be the last word on letter of credit law. See U.C.C. § 5-102(3) official comment 2 (1977); see, e.g., *Barclays Bank D.C.O v. Mercantile Nat'l Bank*, 481 F.2d 1224, 1231-32 (5th Cir. 1973), cert. dismissed, 414 U.S. 1139 (1974); *Consolidated Aluminum Corp. v. Bank of Va.*, 544 F. Supp. 386, 399-400 (D. Md. 1982), aff'd, 704 F.2d 136 (4th Cir. 1983); *Data Gen. Corp. v. Citizens Nat'l Bank*, 502 F. Supp. 776, 783 (D. Conn. 1980). Therefore, because Rule 64 sanctions the use of state law attachment procedures in federal court, Fed. R. Civ. P. 64, this remedy should be available when appropriate in letter of credit cases because "[t]he Code cannot be read to preclude a common law action," *Girard Bank v. Mount Holly State Bank*, 474 F. Supp. 1225, 1239 (D.N.J. 1979); see U.C.C. § 1-103 (1977), and the attachment maneuver in fraud cases merely applies rules already set out by the UCC, cf. *Barclays Bank D.C.O v. Mercantile Nat'l Bank*, 481 F.2d at 1230-32 (applying Code rules to a situation not explicitly covered in the UCC), cert.

state.<sup>225</sup> Even when the availability of the attachment remedy is restricted, however, the requirements to obtain or confirm an order of attachment may be satisfied more easily than the injunction requirements.<sup>226</sup> For instance, in New York, a state noted for its strict attach-

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*dismissed*, 414 U.S. 1139 (1974); *Consolidated Aluminum Corp. v. Bank of Va.*, 544 F. Supp. 386, 400 (D. Md. 1982) (same), *aff'd*, 704 F.2d 136 (4th Cir. 1983); U.C.C. § 5-102 official comment 2 (1977) (courts have authority to apply Code rules by analogy).

225. 7 J. Moore & J. Lucas, *supra* note 42, ¶ 64.04[3]; *see* Ala. Code §§ 6-6-30 to -53 (1975); Alaska Stat. §§ 09.40.010-.110 (1983); Ariz. Rev. Stat. Ann. §§ 12-1521 to -1538 (1982); Ark. Stat. Ann. §§ 31-101 to -411 (1962 & Supp. 1983); Cal. Civ. Proc. Code §§ 484.010-.110 (West Supp. 1984); Colo. R. Civ. P. 102; Conn. Gen. Stat. Ann. §§ 52-279 to -328 (West 1960 & Supp. 1984); Del. Code Ann. tit. 10, §§ 3501-3513 (1974); D.C. Code Ann. §§ 16-501 to -584 (1981); Fla. Stat. Ann. §§ 76.01-.32 (West 1964 & Supp. 1983); Ga. Code Ann. §§ 18-3-1 to -55 (1982); Hawaii Rev. Stat. §§ 651-1 to -123 (1976 & Supp. 1982); Idaho Code §§ 8-501 to -540 (1979); 1981 Ill. Ann. Stat. ch. 110, §§ 4-101 to -228 (Smith-Hurd 1983); Ind. Code Ann. §§ 34-1-11 to -48 (Burns 1973 & Supp. 1983); Iowa Code Ann. §§ 639.1-.70 (West 1950 & Supp. 1983); Kan. Stat. Ann. §§ 60-701 to -725 (1983); Ky. Rev. Stat. Ann. §§ 425.301-.316 (Bobbs-Merrill Supp. 1982); La. Code Civ. Proc. Ann. arts. 3541-3545 (West 1961); Me. Rev. Stat. Ann. tit. 14, §§ 4101-4613 (1980 & Supp. 1984); Md. Cts. & Jud. Proc. Code Ann. §§ 3-301 to -305 (1981 & Supp. 1983); Mass. Ann. Laws ch. 223, §§ 42-133 (Michie/Law. Co-op. 1974 & Supp. 1983); Mich. Comp. Laws Ann. §§ 600.4001-.4045 (West 1968 & Supp. 1983); Minn. Stat. Ann. §§ 570.01-.14 (West 1947 & Supp. 1984); Miss. Code Ann. §§ 11-31-1 to -11, 11-33-1 to -107 (1972 & Supp. 1983); Mo. Ann. Stat. § 521.010-.890 (Vernon 1953 & Supp. 1984); Mont. Code Ann. §§ 27-18-101 to -1506 (1983); Neb. Rev. Stat. §§ 25-1001 to -1056 (1979); Nev. Rev. Stat. §§ 31.010-.220 (1979); N.H. Rev. Stat. Ann. §§ 511-A:1 to :10 (1983); N.J. Stat. Ann. §§ 2A:26-1 to -16 (West 1952 & Supp. 1983); N.M. Stat. Ann. §§ 42-9-1 to -39 (1978); N.Y. Civ. Prac. Law §§ 6201-6226 (McKinney 1980); N.C. Gen. Stat. §§ 1-440.1-.44 (1983); N.D. Cent. Code §§ 32-08.1-01 to -24 (Supp. 1983); Ohio Rev. Code Ann. §§ 2715.01-.51 (Page Supp. 1983); Okla. Stat. Ann. tit. 12, §§ 1151-1244 (West 1961 & Supp. 1983); Or. Rev. Stat. § 29.115 (1981); Pa. R. Civ. P. 1251-1292; R.I. Gen. Laws §§ 10-5-1 to -45 (1969 & Supp. 1983); S.C. Code Ann. §§ 15-19-10 to -110 (Law. Co-op. 1976); S.D. Codified Laws Ann. §§ 21-17A-1 to -32 (Supp. 1983); Tenn. Code Ann. §§ 29-6-101 to -165 (1980); Tex. Rev. Civ. Stat. Ann. arts. 275-302 (Vernon 1973); Utah R. Civ. P. 64C; Vt. R. Civ. P. 4.1; Va. Code §§ 8.01-533 to -576 (1977 & Supp. 1982); Wash. Rev. Code Ann. §§ 7.12.010-.330 (1961 & Supp. 1983); W. Va. Code §§ 38-7-1 to -46 (1966 & Supp. 1982); Wis. Stat. Ann. §§ 266.01-.25 (West 1971 & Supp. 1984); Wyo. Stat. §§ 1-15-101 to -407 (1977).

226. The state statutes provide safeguards against abuse of the attachment remedy by unscrupulous customers seeking to prevent payment to the beneficiary without due cause. Initially, the customer would have to post a bond, with the amount usually set by the court, to cover the beneficiary's damages and fees in the event the attachment was wrongful. *See, e.g.*, Ala. Code § 6-6-45 (1975); Ariz. Rev. Stat. Ann. § 12-1524 (1982); Colo. R. Civ. P. 102(d); Fla. Stat. Ann. § 76.12 (West Supp. 1983); Ohio Rev. Code Ann. § 2715.044 (Page Supp. 1982). Moreover, the beneficiary may be able to avoid the effects of the attachment either by posting a bond to release the attached res, *see, e.g.*, Alaska Stat. § 09.40.110 (1983); Ky. Rev. Stat. Ann. § 425.280 (Bobbs-Merrill 1972); Mo. Ann. Stat. § 521.260 (Vernon 1953); N.Y. Civ.

ment requirements,<sup>227</sup> grounds for attachment exist when a plaintiff seeks a money judgment from a foreign corporation<sup>228</sup> or when a defendant attempts to remove property from the state with the intention of defrauding his creditors.<sup>229</sup> The plaintiff also must post a bond to secure the cost and damages incurred by the defendant in the event of wrongful attachment.<sup>230</sup> The only requirement common to both the attachment and injunction remedies is that plaintiff must show a likelihood of success on the merits.<sup>231</sup> Unlike the injunction requirements, no showing of irreparable harm is required.<sup>232</sup>

The attachment remedy, therefore, should be available to the customer in its suit against the beneficiary for fraud whenever the customer is entitled to seek injunctive relief against the issuer because of "fraud in the transaction."<sup>233</sup> Such a narrow interpretation of the attachment maneuver would assist the customer who has been defrauded in the underlying contract, and yet maintain the integrity of the letter of credit device.

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Prac. Law § 6222 (McKinney 1980), or by moving to discharge or dissolve the attachment if it believes the customer's claim to be baseless, *see, e.g.*, Ark. Stat. Ann. § 31-128 (1962); Cal. Civ. Proc. Code § 484.060 (West Supp. 1984); Ga. Code Ann. § 18-3-15 (1982); S.D. Codified Laws Ann. § 21-17A-20 (Supp. 1983); Va. Code § 8.01-568 (1977); Wis. Stat. Ann. § 266.18 (1971).

227. 7 J. Moore & J. Lucas, *supra* note 42, ¶ 64.04[3] n.10; *see* N.Y. Civ. Prac. Law §§ 6201-6222 (McKinney 1980).

228. N.Y. Civ. Prac. Law § 6201(1) (McKinney 1980).

229. *Id.* § 6201(3). The plaintiff must show by affidavit that one or more of these statutory grounds exist. *Id.* § 6212(a).

230. *Id.* § 6212(b). The cost of this bond requirement should not be prohibitive relative to the sums of money typically at stake in letter of credit litigation, which can be quite substantial. *See, e.g.*, Rockwell Int'l Sys., Inc. v. Citibank, N.A., 719 F.2d 583, 584 (2d Cir. 1983) (over two million dollars); Philadelphia Gear Corp. v. Central Bank, 717 F.2d 230, 232 (5th Cir. 1983) (4.5 million dollars); American Bell Int'l, Inc. v. Islamic Republic of Iran, 474 F. Supp. 420, 421 (S.D.N.Y. 1979) (over 38 million dollars).

231. *Compare* National Bank & Trust Co. v. J.L.M. Int'l, Inc., 421 F. Supp. 1269, 1272 (S.D.N.Y. 1976) (attachment) *and* William A. White & Sons v. Scott, 14 A.D.2d 307, 310, 220 N.Y.S.2d 342, 345 (1961) (same) *with* Warner v. Central Trust Co., N.A., 715 F.2d 1121, 1123 (6th Cir. 1983) (injunction). A court must give a plaintiff seeking an attachment the benefit of all reasonable inferences from the stated facts. National Bank & Trust Co. v. J.L.M. Int'l, Inc., 421 F. Supp. at 1272; Marklin v. Drew Properties Corp., 280 F. Supp. 176, 179 (S.D.N.Y. 1967) (quoting Cocoline Chocolate Co. v. Hillside Enters., 45 Misc. 2d 594, 596, 257 N.Y.S.2d 444, 446 (Sup. Ct. 1965)); Swiss Bank Corp. v. Eatessami, 26 A.D.2d 287, 290, 273 N.Y.S.2d 935, 938 (1966).

232. *See* N.Y. Civ. Prac. Law §§ 6201-6222 (McKinney 1980).

233. The state legislatures of California and Nevada have deleted the injunction provision of § 5-114(2) of the official text from their version of the U.C.C.. *See* Cal. Com. Code § 5114(2)(b) (West 1964); Nev. Rev. Stat. § 104.5114 (1979). The attachment remedy, therefore, may be particularly beneficial to customers in these states.

## CONCLUSION

Given the versatility of the letter of credit, its use undoubtedly will increase in the future. The letter of credit inevitably will be the subject of increased litigation in federal courts as the parameters of its commercial utility are realized. The independence principle, though important to the commercial significance of the letter of credit, should not be used to foreclose summarily and capriciously the use of the doctrines of indispensable party, intervention, impleader and quasi-in-rem jurisdiction in letter of credit litigation. Rather, the facts and procedural posture of each case must be examined carefully to determine whether the implementation of these procedural devices will lead to an expeditious resolution of the dispute and a mutually consistent and equitable adjudication of the rights of all interested parties. Such use of these devices in future letter of credit litigation will lead to the fair resolution of multiple-party disputes and the conservation of judicial resources.

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