1984

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

David C. Howard

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol52/iss5/10

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
THE APPLICATION OF COMPULSORY JOINER, INTERVENTION, IMPLEADER AND ATTACHMENT TO LETTER OF CREDIT LITIGATION

INTRODUCTION

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


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.

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

---


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).


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). 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 18. Collectively, these documents evidence the beneficiary's performance of the underlying contract. 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\textsuperscript{10} and as a “guaranty” to ensure performance in non-goods transactions.\textsuperscript{11}


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. \textit{Decker Steel Co. v. Exchange Nat’l Bank}, 330 F.2d 82, 86-87 (7th Cir. 1964); \textit{see U.C.C. § 5-116 official comment 1} (1977); \textit{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. \textit{U.C.C. § 5-116(1)} (1977); \textit{U.C.P. supra} note 9, art. 54(b). Nevertheless, the assignor-beneficiary remains liable for the nature of performance. \textit{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. \textit{U.C.C. § 5-116(2)} (1977); \textit{U.C.P. supra} note 9, art. 55.

Alternatively, the beneficiary may discount the letter of credit to a local bank. \textit{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); \textit{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. \textit{J. White & R. Summers, supra} note 1, § 18-1, at 710; \textit{see H. Harfield, supra} note 1, at 212. \textit{See generally} \textit{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, \textit{see U.C.C. § 3-302} (1977), it also becomes a protected third party under Article 5, \textit{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

...
confirmed, negotiated, assigned or transferred, the ways in which a valid, irrevocable letter of credit can break down are numerous. 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., Venizelos, 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(l)). 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 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. 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.

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). 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. 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. Finally, when the beneficiary breaches the


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.20

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

---


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.22 The letter of credit is viewed as entirely separate and distinct from the underlying contract (independence principle)23 and therefore, the issuer must honor a complying presentment unless the situation is within a statutorily-defined exception.24 The issuer is not


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).


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., Venizelos, S.A. v. Chase Manhattan Bank, 425 F.2d 461, 465 (2d Cir. 1970); Crocker First Nat'l Bank v. DeSousa, 27 F.2d 402, 404 (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 Azucaferos 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, but rather is concerned solely with the apparent compliance of the required documents with the terms of the letter of credit. This independence principle may render the application of the multiparty 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.

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).


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,\(^{27}\) a party must be joined in an action, if feasible, when complete relief cannot be granted in his absence,\(^{28}\) 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.\(^ {29}\) When joinder is not feasible, a court has discretion to treat the party as dispensable.


\(^{29}\) \textit{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. \textit{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.\textsuperscript{30} Alternatively, a court may classify the party as indispensable and dismiss the action.\textsuperscript{31} In determining indispensability, a court examines the extent to which a judgment will be prejudicial to the absent or existing parties,\textsuperscript{32} the extent to which this prejudice can be lessened or avoided,\textsuperscript{33} the adequacy of the remedy rendered in the party's absence\textsuperscript{34} and the availability of an adequate alternative remedy for the plaintiff if the action is dismissed.\textsuperscript{35}

In a typical tripartite letter of credit arrangement, the relationship between any two parties is generally independent of any other two-party relationship.\textsuperscript{36} This principle appears to preclude the use of the


\textsuperscript{31} \textit{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. \textit{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).


\textsuperscript{34} Fed. R. Civ. P. 19(b); \textit{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).

\textsuperscript{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 indispensable of the absent party. \textit{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 855, 885 (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), \textit{cert. denied}, 439 U.S. 820 (1978); see, \textit{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).

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.\textsuperscript{37} Under the independence principle, the issuer has no legal interest in the actual performance of the underlying contract,\textsuperscript{38} and therefore, is not connected with the customer's suit for the receipt of noncomplying goods.\textsuperscript{39} 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.\textsuperscript{40} 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.\textsuperscript{41} Thus, the issuer should never be classified as a Rule 19(a) party.

\begin{footnotesize}
\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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" exists among the multiple contracts involved. For example, the beneficiaries of a trust agreement typically are classified as indispensable to an action affecting the trust property. 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. Nevertheless, the letter of credit arrangement would not arise but for the underlying contract that it supports. 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 and the issuer must forward the presented documents to the customer in seeking reimbursement. Thus, while the independence

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.


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.").


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


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

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. The issuer may interpose the injunction as a defense to an action by the beneficiary for wrongful dishonor, thereby potentially depriving the beneficiary of its right to legal process under the letter of credit. 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, and may in certain situations expose the issuer to inconsistent obligations.


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. Diversity jurisdiction must continue to exist after joinder. Accordingly, it may be impossible to join the beneficiary, depending on its domicile. The beneficiary’s joinder, however, should rarely present a problem in this regard because its interests are diametrically opposed to those of the customer, 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.

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).


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.

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. If the beneficiary is classified as indispensable, resulting in a dismissal of the action, the customer may be left without an adequate alternative remedy. 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. Initially, the beneficiary may not be amenable to suit in the customer's forum. Moreover, while the beneficiary is the stakeholder of the letter of credit proceeds, it may be unlikely that the beneficiary will hold these proceeds pending the outcome of litigation in the beneficiary's forum. 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."
and to guard against subsequent reprisals by out-of-state or foreign banks or corporations, 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. 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), exercise its discretion to limit the action to a preliminary injunction or some other modified form of relief in order to lessen the extent to which a judgment will be prejudicial to the absent or existing parties. 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. Thus, even a temporary denial of access to the


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).


letter of credit proceeds may have a permanent deleterious effect on the beneficiary. 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.

**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. Consistent with this proposition, the independence principle establishes that the issuer’s payment obligation is independent of the issuer-customer and customer-beneficiary relationships. 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.
LETTER OF CREDIT LITIGATION

For instance, in Sztejn v. J. Henry Schroder Banking Corp., the beneficiary fraudulently sent rubbish to the customer in performing the underlying contract for the sale of brush bristles. 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. In such cases, the issuer is permitted, but not required, to honor the beneficiary's draft. In a suit for wrongful dishonor, the issuer's defense is inexorably tied to the beneficiary's fraudulent performance of the underlying contract. In addition, the customer has a legal right to seek to enjoin the bank's honoring the draft. 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. 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.

77. 177 Misc. 719, 31 N.Y.S.2d 631 (Sup. Ct. 1941).
78. Id. at 720, 31 N.Y.S.2d at 633.
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.\textsuperscript{85} 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.\textsuperscript{86} 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.\textsuperscript{87} 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.\textsuperscript{88}

\section*{II. Intervention in Letter of Credit Litigation}

Under Rule 24(a),\textsuperscript{89} 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\textsuperscript{90} that is not adequately represented by prospective beneficiaries usually prefer irrevocable credits. J. White & R. Summers, \textit{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). \textit{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., \textit{supra} note 9, art. 7(c) (letter presumed to be revocable in the absence of any contrary indication).

\textsuperscript{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).

\textsuperscript{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. \textit{See} Fed. R. Civ. P. 19; \textit{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).


\textsuperscript{89} Fed. R. Civ. P. 24(a).

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

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. Courts, however, do not adhere fastidiously to this distinction. 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. In addition, while only Rule 24(b) requires the court to justify its exercise of discretion, both sections require timely applications by prospective intervenors. The determination of timeliness requires a balancing of


3. 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)).


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


7. 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).

interests presented by the original parties, the applicant and the public.\textsuperscript{99}

The letter of credit is a product of economic convenience and serves the financial interests of the various parties.\textsuperscript{100} 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,\textsuperscript{101} a deficient performance in one transaction may have financial repercussions in another.\textsuperscript{102} Thus, a third party arguably may seek to intervene in order to protect its own pecuniary interests without impinging upon the independence principle.\textsuperscript{103} 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.\textsuperscript{104} The ability of a

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); 1A C. Wright & A. Miller, supra note 94, § 1901.


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).


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. It is not enough that some benefit inures to this third party as an incident of performance. In the letter of credit arrangement, the customer-issuer relationship is contractual, and the terms of the letter of credit typically state that it is issued "in favor of" the beneficiary. 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. If an injunction issues, the beneficiary will be im-


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. 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.

The issuer's interest in protecting its reputation in the financial community, however, may compel it to oppose the customer's suit strenuously. 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. 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. The issuer's representation of
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.\textsuperscript{115} While generally the issuer is interested in paying the beneficiary upon presentment in order to protect its commercial reputation,\textsuperscript{116} at times the issuer may not adequately represent the beneficiary's interest because it may have a longstanding business relationship with the customer.\textsuperscript{117} 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.\textsuperscript{118} 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

---

\textsuperscript{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 \textit{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).

\textsuperscript{116} See supra notes 65-66 and accompanying text.

\textsuperscript{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).

\textsuperscript{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. 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. 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. 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, particularly when the prospect of reimbursement from the customer is dubious due to its financial


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) ("the 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 (1879) (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).

instability or to its ability to prevail in a subsequent suit for wrongful honor.\(^1\)

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.\(^2\) The customer’s pecuniary interests are implicated regardless of the ultimate outcome of the litigation.\(^3\) If the beneficiary prevails, the customer may be obligated to reimburse the issuer.\(^4\) Conversely, if the issuer prevails, the customer is not automatically relieved of its contractual obligation to the beneficiary.\(^5\) The justification for the issuer’s dishonor, however, might also enable the customer to void the underlying contract.\(^6\) 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.\(^7\) Thus, the court should balance the prospective

---


\(^2\) See Fed. R. Civ. P. 24 (b) (common issues of law and/or fact permit intervention).

\(^3\) 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).

\(^4\) 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).

\(^5\) 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).

\(^6\) 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.\textsuperscript{130}

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).\textsuperscript{131} 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.\textsuperscript{132} While Rule 24 should be construed liberally,\textsuperscript{133} sound policy dictates that it should not be applied indiscriminately.\textsuperscript{134} In the above situation, the customer can contribute little to the resolution of the controversy because the documents, the focus of the litigation, are


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.


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. 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, 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." 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. 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. 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. As a result,

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.


137. Id.


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.\(^{141}\)

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.\(^{142}\) Nevertheless, in this situation, absent the beneficiary's action, the customer is without a claim against the issuer.\(^{143}\) 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.\(^{144}\) Derivative liability


\(^{142}\) 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.

exists because, absent the beneficiary's claim, the issuer would not have an action against its customer.\textsuperscript{145} 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.\textsuperscript{146} 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,\textsuperscript{147} or when it seeks to avoid the financial effects of its bad business judgment.\textsuperscript{148} 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.\textsuperscript{149}

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

\textsuperscript{145} See \textit{supra} note 138.

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

\textsuperscript{147} See J. White & R. Summers, \textit{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 \textit{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.), \textit{cert. denied}, 293 U.S. 557 (1934). \textit{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).

\textsuperscript{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, \textit{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. \textit{Id.} at 627. Due to this large volume, the beneficiary was unable to pay demurrage charges, \textit{id.} at 629, which payment was supported by an irrevocable letter of credit in favor of the plaintiff. \textit{Id.} at 627. Moreover, customers vigilanty search for a defect in the presentment when the price of goods drops precipitously, Kozolchyk III, \textit{supra} note 13, at 82. A thorough examination can usually disclose at least one defect. 1 A. Lowenfeld, \textit{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, \textit{supra} note 4, at 66-67, \textit{reprinted in} 1955 Report, \textit{supra} note 4, at 1634-35.

\textsuperscript{149} See \textit{supra} note 140 and accompanying text.
The customer's failure in this instance pertains only to the issuer-customer contract. 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. 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. 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.

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. The issuer's duty in exam-
ning the beneficiary's presentment is merely to check one document against another in good faith. 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. 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.

Derivative liability is absent when the customer, after a reasonable time for inspection, elects to accept the non-conforming documents and waive the defect. Impleader would not be proper because the issuer's responsibilities are discharged by the customer's acceptance of the documents, 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.


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 Distrs. 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. Alternatively, the customer may seek to implead the beneficiary under section 5-111(1) of the UCC. The independence principle does not interfere with the customer's third-party complaint because by statute the beneficiary warrants "to all interested parties" that its documentary presentment complies with the necessary conditions of the letter of credit. 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.

IV. Personal Jurisdiction and the Attachment Maneuver

Section 5-114(2) of the UCC 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. Rather than resort to this equitable remedy, some customers


163. See supra note 161.


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.


presented are forged or fraudulent, or there is fraud in the transaction.\textsuperscript{168} 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.\textsuperscript{169} In so doing, the customer seeks to secure quasi-in rem jurisdiction over, and prevent payment to, the beneficiary.\textsuperscript{170} Reported cases involving this attachment maneuver are rare. In addition, commentators are critical of this concept\textsuperscript{171} because it threatens the basic foundation and commercial utility of letters of credit by violating the independence principle.\textsuperscript{172}

\textsuperscript{168} 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 (1975); 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. \textit{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.


\textsuperscript{170} See supra notes 20, 169 and accompanying text.

\textsuperscript{171} 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. 493, 495 (1977) [hereinafter cited as Justice II].
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. 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 so that compelling the party to litigate in the forum does not offend "traditional notions of fair play."

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).


and substantial justice." 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." 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. 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.

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-

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.
cally, the customer seeks to attach the issuer's payment obligation after the beneficiary demands payment but before payment is actually made.\textsuperscript{179} 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.\textsuperscript{180} 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.\textsuperscript{181} Once a letter of credit is established, a legally enforceable obligation arises running directly from the issuer to the beneficiary.\textsuperscript{182}


\textsuperscript{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 (5th 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); Venizelos, 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.

\textsuperscript{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.

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. Moreover, through the issuance of the letter of credit, the beneficiary is protected against the prospective insolvency or dishonesty of the customer, and therefore is able to participate in a wider range of interstate and international trade.

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. 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 to the independence principle, however, no basis exists for a
procedural objection to finding the beneficiary amenable to suit in the customer's preferred forum.\textsuperscript{188}

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.\textsuperscript{189} 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.\textsuperscript{190} Thus, absent additional contacts, the cus-

\textsuperscript{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 \textit{quasi-in-rem} jurisdiction." National Am. Corp. v. Federal Republic of Nig., 448 F. Supp. 622, 635 (S.D.N.Y. 1978), \textit{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 \textit{International Shoe}. Id. (discussing Shaffer v. Heitner, 433 U.S. 186, 207 (1977)). "The requirement of fair notice \ldots 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. \textit{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 \ldots are uniquely qualified to service foreign depositors \ldots may tend to support a finding of sufficient contacts with the forum." \textit{Id.} This same analysis may apply to a breach of contract action supported by an attachment of unrelated letter of credit proceeds. See \textit{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 "receiving financing from a private or public lending institution located in the United States." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17, \textit{reprinted in} 1976 U.S. Code Cong. & Ad. News 6604, 6615-16.

\textsuperscript{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 \textit{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 \textit{id.} at 207-08.

\textsuperscript{190} When there is fraud in the underlying contract, generally there will also be a fraudulent document in the beneficiary's presentment. \textit{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,
Customer 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. 1

In international transactions, the beneficiary typically enlists the services of a local bank to confirm the letter of credit. 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.

---

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.


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. 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 of the beneficiary’s draft.

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. Generally, the letter of credit transaction will not render the issuer amenable to suit in the beneficiary’s state. 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.


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.


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.\textsuperscript{199} Such a procedure may have a chilling effect on prospective transactions.\textsuperscript{200} 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.\textsuperscript{201} This would curtail severely the commercial usefulness and desirability of the letter of credit.\textsuperscript{202}


199. Certainty of payment is a crucial aspect of the letter of credit's usefulness. \textit{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); \textit{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. \textit{See} World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (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). \textit{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. \textit{See} 1 A. Lowenfeld, \textit{supra} note 16, § 5.3, at 130; J. White & R. Summers, \textit{supra} note 1, § 18-1, at 706-08; McLaughlin, \textit{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. \textit{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, \textit{supra} note 16, § 5.52(b), at 143 (same); Weisz & Blackman, \textit{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. Rather, the chilling effect will deter only prospective beneficiaries that intend to commit fraud in the letter of credit transaction. 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.


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.

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. Indeed, this is precisely the situation the letter of credit device seeks to avoid. 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. The issuer, however, is forced into a situation indistinguishable from litigation directed against itself.

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. The maneuver is useful, however, when the customer has been defrauded by the beneficiary on the underlying contract. While the customer


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.


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.


1984] LETTER OF CREDIT LITIGATION 1003
may be able to sue the issuer in order to enjoin the honor of the beneficiary's presentment, 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.

Because an injunctive remedy already exists, 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. The attachment proceeding is a remedy at law, while the injunction is equitable. 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. Prettrial injunctive relief is an extraordinary

212. See supra note 168.
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).
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. 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. Moreover, the plaintiff must show either that it is likely to prevail on the merits or that sufficiently serious questions going to the merits exist to make such questions a fair ground for litigation.

By contrast, the requirements of the attachment remedy are less onerous to the plaintiff. The requirements vary from state to state.
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. For instance, in New York, a state noted for its strict attach-


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,227 grounds for attachment exist when a plaintiff seeks a money judgment from a foreign corporation228 or when a defendant attempts to remove property from the state with the intention of defrauding his creditors.229 The plaintiff also must post a bond to secure the cost and damages incurred by the defendant in the event of wrongful attachment.230 The only requirement common to both the attachment and injunction remedies is that plaintiff must show a likelihood of success on the merits.231 Unlike the injunction requirements, no showing of irreparable harm is required.232

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."233 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.


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).


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.

David C. Howard