

A Critical Evaluation of the Use of Sanctions Clauses in Letters of Credit

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Abstract

With the sharp increase in sanctions-related compliance requirements and expectations over the last decade, banks have sought various methods to mitigate the legal risk of engaging sanctioned persons or entities. The inclusion of so-called sanctions clauses in commercial contracts is one such method. In this article the author explores the use of sanctions clauses specifically in letters of credit, a practice which appears to be gaining ground. More particularly, the article explores the issues associated with the non-documentary nature of sanctions clauses, as well as the question whether the mandate given by the issuing bank to the nominated bank in respect of a letter of credit containing a sanctions clause meets the requirements of a valid contract. The author contends that sanctions clauses militate against conventional letter-of-credit practice and seriously undermine the irrevocable nature of the issuing bank's payment obligations. This is especially the case when a reference is made in a sanctions clause to internal sanctions policies or a discretion of the issuing bank in relation to honouring the credit. Consequently, banks would be well-advised not to use sanctions clauses, but if contemplated, then a reference to internal policies or a discretion of the issuing bank must be avoided at all costs. This much is in alignment with the views of leading international organisations.

Keywords

Letters of credit; issuing bank; payment; sanctions; sanctions clauses.

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1 Introduction

Clauses in relation to trade, economic or financial sanctions, so-called sanctions clauses, are increasingly encountered in letters of credit.¹ Described as one of the "unintended consequences"² of increased and stricter sanctions-related compliance rules and regulations, sanctions clauses are intended to mitigate the legal risk of engaging sanctioned persons or entities. Although this "legal risk" is generally contemplated in relation to a single sanctions regime, banks involved in international transactions are frequently subject to risks relating to multiple sanctions regimes.³ This holds particularly true for international letter-of-credit transactions where the sanctions regimes applicable to the issuing bank, the confirming or nominated bank, the currency or place of payment, and the law stipulated in the choice of law clause may all potentially apply.⁴ To alleviate potential conflict between regulatory requirements and expectations in this regard, banks usually implement internal sanctions policies⁵ which, as will be seen below, may be referred to in sanctions clauses. Sanctions clauses are mostly included at the behest of the issuing bank.

Although indicative of the issuing bank's commitment to complying with sanctions, sanctions clauses are not beyond criticism. The main problem is

* Cayle S Lupton. LLB LLM LLD candidate (UJ). Assistant Lecturer of Law, University of Johannesburg, South Africa and Attorney of the High Court of South Africa. Email: clupton@uj.ac.za. ORCID ID: <https://orcid.org/0000-0002-8575-9395>. This article is based on research from the author's doctoral studies.

¹ ICC 2014 <https://iccwbo.org/content/uploads/sites/3/2014/08/Guidance-Paper-on-The-Use-Of-Sanctions-Clauses-In-Trade-Finance-Related-Instruments-Subject-To-ICC-Rules.pdf> 2. They are also used in other trade finance instruments, including documentary collections and demand guarantees. The International Chamber of Commerce (ICC) is a leading organisation on matters relating to, *inter alia*, trade finance law and practice. For more information on the ICC, see ICC Date unknown <https://iccwbo.org/about-us/>.

² Hugo and Strydom "Sanctions, Ships, International Sales and Security of Payment" 126.

³ When sanctions laws are determined to be applicable to a particular transaction, they will generally be regarded as being mandatory. The issue of overriding mandatory rules has received much attention in private international law and falls outside the scope of this article. For further reading on South African private international law relating to overriding mandatory rules, see Forsyth *Private International Law* 343-349.

⁴ ICC 2020 <https://iccwbo.org/content/uploads/sites/3/2020/05/20200504-addendum-to-sanction-clauses-paper.pdf> 2; Barnes "Sanctions Mention in LC Text" 60. See further in this regard Fredericks and Neels 2003 *SA Merc LJ* 207 *et seq.*

⁵ ICC 2014 <https://iccwbo.org/content/uploads/sites/3/2014/08/Guidance-Paper-on-The-Use-Of-Sanctions-Clauses-In-Trade-Finance-Related-Instruments-Subject-To-ICC-Rules.pdf> 2.

that they have the effect of restricting performance under letters of credit. More specifically, they afford the issuing bank an opportunity to determine whether or not it must pay the beneficiary or reimburse the nominated or confirming bank with reference to factors outside of the stipulated documents. This is especially the case when a reference is made in the sanctions clause to internal policies or a discretion of the issuing bank.⁶ The purpose of this article is to evaluate fully the implications of the use of such sanctions clauses on letters of credit.

It begins by providing essential background to letters of credit. This is followed by an assessment of the issues relating to the non-documentary nature of sanctions clauses. Thereafter, the specific issue of whether the mandate given by the issuing bank to the nominated bank relating to a letter of credit containing a sanctions clause meets the requirements of a valid contract is examined. The article concludes by casting some light on what the author regards as best practice in the use of sanctions clauses.

2 Background to letters of credit

Letters of credit⁷ are a common feature of international trade. Their importance to the facilitation of international trade, particularly as a method of payment, has led them to be described as "the lifeblood of international commerce".⁸ Letters of credit are almost always issued subject to the ICC's UCP 600.

Letters of credit constitute an undertaking by a bank to pay a beneficiary upon compliance with the conditions specified in the credit.⁹ In an international sale, they are normally issued on application by the buyer in favour of the seller. The bank issuing the credit is referred to as the "issuing bank", the seller as the "beneficiary" and the buyer as the "applicant". The conditions specified in the letter of credit are typically documentary in

⁶ See para 3.1 below.

⁷ Also known as, *inter alia*, documentary credits, documentary letters of credit and bankers' irrevocable credits.

⁸ *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1977] 2 All ER 862 (QB) 870b per Kerr J. The phrase was repeated in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 All ER 976 (CA) 983; and *Intraco Ltd v Notis Shipping Corporation (the Bhoja Trader)* [1981] 2 Lloyd's Rep 256 (CA) 257. South African courts have also cited the phrase in *Ex parte Sapan Trading (Pty) Ltd* 1995 1 SA 218 (W) 224H; and *Loomcraft Fabrics CC v Landmark Holdings (Pty) Ltd* 1996 1 SA 812 (A) 816E, I.

⁹ Hugo "Payment in and Financing of International Sale Transactions" 403.

nature.¹⁰ This is to say that the beneficiary must deliver certain stipulated documents which the bank must in turn examine to determine whether it must pay. These documents must, however, comply strictly with the requirements set forth in the letter of credit. If the documents are not in conformance with the requirements, the bank is entitled to reject the claim for payment.¹¹ This is the first of two fundamental principles of documentary credit law and is known as the doctrine of documentary compliance.

The second fundamental principle is the so-called independence principle, which entails that the bank's payment undertaking is independent of both the performance of the underlying contract (for example, an international sale) between the applicant and the beneficiary and the relationship between the applicant and the issuing bank.¹² In effect, this principle provides the beneficiary with the assurance that it will receive payment under the credit irrespective of any dispute arising from the underlying contract of sale, provided it tenders conforming documents.¹³ The independence principle is, however, subject to one universally accepted exception: fraud by the beneficiary.¹⁴

These two fundamental principles are also *mutatis mutandis* applicable to demand guarantees.¹⁵ Letters of credit and demand guarantees do,

¹⁰ The documents normally called for in documentary sales include the commercial invoice, transport document, insurance document and any of several certificates such as a certificate of quality, origin or inspection.

¹¹ *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 3 SA 688 (SCA) 697G-698C.

¹² Oelofse *Law of Documentary Letters of Credit* 354-357; Hugo "Payment in and Financing of International Sale Transactions" 422; *Phillips v Standard Bank of South Africa Ltd* 1985 3 SA 301 (W) 302I-304C; and *Ex parte Sapan Trading (Pty) Ltd* 1995 1 SA 218 (W).

¹³ Kelly-Louw "Limiting Exceptions" 198. Also see Mugasha *Law of Letters of Credit* 24.

¹⁴ See, for example, *Sztejn v J Henry Schroder Banking Corporation* (1941) 31 NYS 2d 631 634-635; *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168 (HL) 183F-G; and *Loomcraft Fabrics CC v Landmark Holdings (Pty) Ltd* 1996 1 SA 812 (A) 817E-F.

¹⁵ On the independence principle, see *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* (050/13) [2013] ZASCA 202 (2 December 2013) paras 11-13; *Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd* (94/2013) [2013] ZASCA 182 (29 November 2013) paras 14, 28; *Eskom Holdings v Hitachi Power Africa* (139/2013) [2013] ZASCA 101 (12 September 2013) para 15; and *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd* 2010 2 SA 86 (SCA). On the doctrine of documentary compliance, see generally *Kristabel Developments (Pty) Ltd v Credit Guarantee Insurance Corporation of Africa Limited* (23125/2014) [2015] ZAGPJHC 264 (20 October 2015); *Compass Insurance Company Ltd v Hospitality Hotel Developments (Pty) Ltd* 2012 2 SA 537 (SCA); *Nedbank v Proccrops* (108/13) [2013] ZASCA 153 (20 November 2013); *University*

however, fulfil different functions. A letter of credit is an instrument of payment and a demand guarantee, an instrument of security. This means that

a letter of credit is concerned with performance, an autonomous guarantee with non-performance. It is expected that payment will be made under a letter of credit; it is hoped that no payment will be claimed under an autonomous guarantee.¹⁶

Consequently, letters of credit are frequently called up while calls on demand guarantees, in contrast, are seldom.¹⁷ Since sanctions clauses typically only come into play once payment (or reimbursement) is claimed, the implication of this is that disputes relating to sanctions clauses will arise more in cases concerning letters of credit than in those concerning demand guarantees. This does not, however, mean that sanctions clauses used in demand guarantees may never be the subject of disputes. On the "rare"¹⁸ occasion a demand guarantee is called up, a sanctions clause may necessitate an interference with payment.

The issuing bank, buyer, and seller, as observed above, are not the only parties encountered in documentary credit transactions. For the purposes of this article, it is sufficient to provide explanations on the advising, nominated, confirming and reimbursing bank(s).¹⁹

As the seller and the issuing bank are normally in different jurisdictions, the issuing bank may instruct an advising bank in the seller's country to communicate the credit to the seller. The communication between the banks is typically transmitted by way of SWIFT.²⁰ The advising bank's role is

of the Western Cape v ABSA Insurance Company Ltd (100/2015) [2015] ZAGPJHC 303 (28 October 2015); *Lombard Insurance Co Ltd v Schoeman* 2018 1 SA 240 (GJ); and *Schoeman v Lombard Insurance Co Ltd* (1299/2017) [2019] ZASCA 66 (29 May 2019).

¹⁶ *Bridge Benjamin's Sale of Goods* 2199. Also see Horowitz *Defences to Payment* 227.

¹⁷ *Bertrams Bank Guarantees* 287, estimates that "demands for actual payment are made in approximately 3%-5%, or even less, of all guarantees and standby letters of credit".

¹⁸ Lehtinen 2010 *ICLR* 511. Note, however, that South African case law has in recent years seen a surge in the calling up of demand guarantees, particularly in the construction industry (see Marxen *Demand Guarantees* 2).

¹⁹ A discussion on transferring, collecting and claiming banks is not provided. On the role of these other banks, see Hugo "Payment in and Financing of International Sale Transactions" 430-432 and Malek and Quest *Jack* 146 and 162 respectively.

²⁰ The acronym stands for "Society for Worldwide Interbank Financial Telecommunications" and is described on its official website as "a global member-owned cooperative and the world's leading provider of secure financial messaging services". See SWIFT 2022 <https://www.swift.com/about-us/discover-swift>.

accordingly confined to that of a mere messenger acting on the instructions of the issuing bank and it makes no payment undertaking towards the seller (in this context – the beneficiary). The beneficiary, moreover, is also not expected to present the documents to the foreign issuing bank. To this end, the issuing bank will nominate a bank (the nominated bank) in the beneficiary's country to take delivery of the documents from the beneficiary and, provided they comply with the terms of the credit, to honour the credit as mandatary of the issuing bank. The nominated bank also does not make a payment undertaking towards the beneficiary. A nominated bank that has honoured the credit in accordance with its mandate is entitled to be reimbursed by the issuing bank.

Certain situations, particularly where the issuing bank or the country in which it is located is suspect,²¹ may necessitate the need for a bank in a reputable country to confirm the issuing bank's credit by adding its own undertaking to that of the issuing bank. This bank is referred to as the confirming bank. As the confirming bank's undertaking is independent of that of the issuing bank,²² the beneficiary acquires the right to enforce payment against either bank. The confirming bank that has performed in accordance with its mandate is accordingly entitled to be reimbursed by the issuing bank.²³ The advising, nominated and confirming bank may be, but not necessarily, the same bank.

A letter of credit, finally, may provide for so-called bank-to-bank reimbursement. The idea behind such an arrangement is that the nominated bank will claim reimbursement from a reimbursing bank and not the issuing bank. The issuing bank is not, however, relieved from its reimbursement obligations towards the nominated bank if the reimbursing bank fails to reimburse the nominated bank (in this context – the claiming bank).²⁴ Bank-to-bank reimbursement arrangements can be made subject to the ICC's *Uniform Rules for Bank-to-Bank Reimbursement* (URR 725).

The manner in which the payment obligation of the issuing, nominated or confirming bank is honoured may take a number of different forms.²⁵ These

²¹ See DiMatteo *International Contracting* 123-124.

²² See the definition of "confirmation" in art 2 of the ICC *Uniform Customs and Practice for Documentary Credits* (ICC Publication 600, 2007) (UCP 600).

²³ It must, however, be noted that when discharging its obligations, the confirming bank acts in two capacities: firstly, as the principal (in discharging its own obligation) as against the beneficiary, and secondly as the mandatary of the issuing bank in so far as proper performance by the confirming bank discharges the obligations of the issuing bank against the beneficiary.

²⁴ Article 13(c) of the UCP 600.

²⁵ See the definition of "honour" in art 2 of the UCP 600.

are (i) to pay on delivering of conforming documents (sight payment credits); (ii) to pay some time after the delivery of conforming documents (deferred payment credits);²⁶ (iii) to accept a term bill of exchange against delivery of conforming documents and to pay the bill of exchange (the banker's acceptance) when it matures (acceptance credits); or (iv) in the case of the nominated bank or any bank, to purchase the conforming documents from the beneficiary (obviously at a discount) and then present them for payment to the issuing bank (credits available by negotiation). In the case of (ii) and (iii), moreover, the presentation of conforming documents by the seller means that it acquires an unconditional right against the bank to be paid on a specific future date. Consequently, the seller should be able to be paid earlier by discounting its right to payment to a third party.

3 Issues relating to the non-documentary nature of sanctions clauses

As stated above, sanctions clauses are most problematic when a reference is made to the issuing bank's internal policies or discretion. Such clauses effectively enable the issuing bank to embark on an investigation into the facts, and therefore not the documents, when determining whether or not it must pay. For this reason, sanctions clauses are said to be non-documentary in nature²⁷ and accordingly constitute non-documentary conditions. A non-documentary condition can be described as a condition stipulated in the letter of credit without indicating any document required to comply with the credit. Non-documentary conditions are in principle unacceptable as they give rise to serious issues relating to the operation and fundamental characteristics of letters of credit. This paragraph intends to explore these issues in the context of sanctions clauses. First, however, it is necessary to provide examples of the types of sanctions clauses encountered in trade finance practice, including those referred to above.

²⁶ For example, "90 days after the date of the bill of lading".

²⁷ ICC 2014 <https://iccwbo.org/content/uploads/sites/3/2014/08/Guidance-Paper-on-The-Use-Of-Sanctions-Clauses-In-Trade-Finance-Related-Instruments-Subject-To-ICC-Rules.pdf> 3.

3.1 *Types of sanctions clauses*

Although sanctions clauses may vary significantly in scope,²⁸ three types have become increasingly popular. An example of each type is quoted by the ICC in its 2014 guidance paper:²⁹

- (a) Presentation of document(s) that are not in compliance with the applicable anti-boycott, anti-money laundering, anti-terrorism, anti-drug trafficking and economic sanctions laws and regulations is not acceptable. Applicable laws vary depending on the transaction and may include United Nations, United States and/or local laws.³⁰
- (b) [Bank] complies with the international sanction laws and regulations issued by the United States of America, the European Union and the United Nations (as well as local laws and regulations applicable to the issuing branch) and in furtherance of those laws and regulations, *[Bank] has adopted policies which in some cases go beyond the requirement of applicable laws and regulations*. Therefore [Bank] undertakes no obligation to make any payment under, or otherwise to implement, this letter of credit (including but not limited to processing documents or advising the letter of credit), if there is involvement by any person (natural, corporate or governmental) listed in the USA, EU, UN or local sanctions lists, or any involvement by or nexus with Cuba, Sudan, Iran or Myanmar, or any of their governmental agencies.³¹
- (c) Trade and economic sanctions ('sanctions') imposed by governments, government agencies or departments, regulators, central banks and/or transnational organizations (including the United Nations and European Union) impact upon transactions involving countries, or persons resident within countries currently including [long list of countries follows] ... Issuing bank and all of its related bodies corporate might be subject to and affected by, sanctions, with which it will comply. Please contact issuing bank for clarification before presenting documents to issuing bank ... or undertaking any dealings regarding this credit involving countries or persons affected by sanctions. Issuing bank is not and will not be liable for any loss or damage whatsoever associated directly or indirectly with the application of sanctions to a transaction or financial service involving issuing bank. *Issuing bank is not required to perform any obligation under this credit which it determines in its discretion will, or would be likely to, contravene or breach any sanction.*

²⁸ The imaginative and innovative nature of contractual drafting certainly plays a role in this regard.

²⁹ ICC 2014 <https://iccwbo.org/content/uploads/sites/3/2014/08/Guidance-Paper-on-The-Use-Of-Sanctions-Clauses-In-Trade-Finance-Related-Instruments-Subject-To-ICC-Rules.pdf> 4. These three types of sanctions clauses are also considered in ReedSmith 2012 <https://www.reedsmith.com/en/perspectives/2012/01/sanctions-clauses--safeguarding-payment-under-lett>.

³⁰ Para 3.1 (a).

³¹ Para 3.1 (b) (author's italics).

This clause applies notwithstanding any inconsistency with the current edition of the ... [UCP].³²

The first clause, clause (a), simply states that the issuing bank is bound by the laws to which it is subject. Such laws find automatic application and, in the event of a conflict, will trump the provisions of the UCP 600. In this regard, it must be noted that ICC rules have no higher status than contractually incorporated terms of contract and cannot override mandatory law. These types of sanctions clauses are unproblematic since they merely draw attention to the existence of sanctions laws and regulations.

The second clause quoted above, clause (b), is problematic, however. The clause stipulates that the bank has adopted internal policies relating to sanctions which may extend beyond the applicable laws and regulations. A logical interpretation of this clause suggests that, in addition to the manifestation of the involvement of a listed party, the bank may refuse to authorise payment or to process the transaction if doing so would violate its own internal policies irrespective of the law.³³ The problem with this position is that none of the other parties involved would have knowledge of these internal policies. In other words, they would not be privy to the circumstances, as contemplated by the policies, that would trigger a rejection of a complying presentation or refusal to otherwise process the transaction. It follows that the beneficiary is unbeknownst of the strength of the issuing bank's undertaking and the nominated and/or confirming banks are uncertain as to whether they will be reimbursed should they pay a complying presentation.

The third clause quoted above, clause (c), is equally problematic. This clause effectively allows the issuing bank to decline to pay or process payment based on a determination "in its discretion" that such payment would contravene or would be likely to contravene sanctions. The beneficiary and the nominated and/or confirming banks are, similarly, without any certainty in so far as the performance of the issuing bank's contractual obligations towards them are concerned.

3.2 The issues

To begin with, the position of the UCP 600 on non-documentary conditions must be considered. Article 14(h) provides: "If a credit contains a condition

³² Para 3.1 (c) (author's italics).

³³ Hugo and Strydom "Sanctions, Ships, International Sales and Security of Payment" 127.

without stipulating the document to indicate compliance with the condition, banks will deem such condition as not stated and will disregard it." While non-documentary conditions in general appear to be included at the instance of the beneficiary,³⁴ sanctions clauses are typically included on the request of the issuing bank. This is indicative of the peculiar nature of sanctions clauses.

Against this background it is argued that sanctions clauses do not fit neatly into the mould of article 14(h). The issuing bank is essentially required to disregard a clause which it requested. Bearing in mind the significance of the purpose for which sanctions clauses are utilised,³⁵ it is unlikely that the issuing bank will be willing to do so. It stands to reason that article 14(h) may not be effective in cases of sanctions clauses. Moreover, as an express term of the letter-of-credit contract, a sanctions clause may well override article 14(h). It is a well-established principle of the construction of contracts that where there is a conflict between an express term of a contract and a standard incorporated term (i.e. article 14(h)), the express term should prevail.³⁶ Commenting from an English perspective, Bridge explains that article 14(h) will be disregarded in the case of a non-documentary condition because no provision in the UCP 600 accords it dominant status over any inconsistent provisions.³⁷ These remarks are equally applicable in relation to sanctions clauses.

The main characteristic of non-documentary conditions, as referred to above, is that they require of banks to investigate facts, as opposed to documents, to assess whether the condition has been fulfilled. Because factual investigations run counter to conventional letter-of-credit practice, they may lead to lengthy and unintended procedures for which banks are generally not equipped. In the context of sanctions clauses, this could mean that the issuing bank would have to determine whether payment will

³⁴ See, for instance, *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 2 Lloyd's Rep 1; *Banque de l'Indochine et de Suez SA* [1983] QB 711; and *Chailease Finance Corp v Credit Agricole Indosuez* [2000] 1 All ER (Comm) 399. See also *Tecnicas Reunidas Saudia v Korea Development Bank* 2020 (EWHC) 968 (TCC) para 8; *Leonardo SpA v Doha Bank Assurance Company LLC* [2020] QIC (A) 1 paras 33-35; and *Lukoil Mid-East Ltd v Barclays Bank Plc* 2016 (EWHC) 166 (TCC) para 6.

³⁵ That is, to mitigate the legal sanctions risks to which it is exposed.

³⁶ Bradfield *Christie's Law of Contract* 240-255; Van Huyssteen *et al Contract* 357 ("effect will preferably be given to the 'immediate' words of the parties"); and *Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd* (624/10) [2011] ZASCA 158 (28 September 2011). Also see the Singaporean case of *Kumagai-Zenecon Construction Pte Ltd v Arab bank Plc* [1997] 2 SLR 805 para 25. However, attention must also be directed to the assessment in para 4 below.

³⁷ Bridge *Benjamin's Sale of Goods* 2090-2091.

contravene or is likely to contravene sanctions by evaluating transactional information³⁸ against applicable sanctions lists or will have to conduct other onerous transactional compliance checks for the purposes of sanctions evasion and financial crime in general.³⁹ For the nominated or confirming bank which is uncertain as to whether it will be reimbursed if it pays a complying demand, it may need to update its transactional risk assessment. The ICC puts it thus:

[A] nominated [or confirming] bank's risk assessment is likely not only to include the issuing bank and the country risk, but also the assessment of the likelihood of a prohibited reimbursement due to sanctions regulations or an internal, sanctions-related policy. This may result in increased costs, delays and potential disputes.⁴⁰

The factual investigations necessitated by sanctions clauses may in turn have a negative effect upon the time frame within which the beneficiary receives payment or a notice of rejection,⁴¹ thus paving the way for disputes between the parties and as a result the institution of legal proceedings by the beneficiary against the issuing bank and/or the nominated/confirming banks.

Investigations beyond the documents further hold the danger of violating the independence principle of letters of credit. The issuing bank's internal policies or discretion may draw it into the underlying contract. This means that the bank will determine whether to honour the presentation with reference also to the underlying contract. The absence of an appreciation for the independence principle blurs the distinction between accessory guarantees⁴² and letters of credit. Hence in past times the bank's

³⁸ Most notably a description of the parties, vessels and goods involved, as well as the shipping routes.

³⁹ On the compliance obligations and expectations of South African banks, see Spruyt 2020 *TSAR 12 et seq.*

⁴⁰ ICC 2014 <https://iccwbo.org/content/uploads/sites/3/2014/08/Guidance-Paper-on-The-Use-Of-Sanctions-Clauses-In-Trade-Finance-Related-Instruments-Subject-To-ICC-Rules.pdf> 3.

⁴¹ See art 16(c) of UCP 600, which sets the prescribed period of examination and possible rejection as within a maximum of five days after a presentation has been made by the beneficiary. See further ICC Banking Commission *Document 470/TA920rev* (October 2021) 4.

⁴² Under this instrument the guarantor is liable to pay only if the debtor is in law in default of its obligations as against the creditor (beneficiary). Consequently, if the default by the debtor is disputed by the guarantor, the beneficiary would be required to prove or verify the debtor's default, which invariably would require attention to be paid to the underlying contract. See Kelly-Louw "Construing whether a Guarantee is Accessory or Independent is Key" 113.

undertaking was sometimes treated as being accessory, to give effect to the non-documentary condition.⁴³

Finally, the fact that a sanctions clause may confer upon the issuing bank the right to reject a complying presentation necessarily brings into question the irrevocable nature of the documentary credit. It is trite that the bank's promise to pay is intended to be absolute, final and irreversible, subject only to the presentation of conforming documents.⁴⁴ Refusing to honour a complying presentation on the basis of internal sanctions policies or a discretion therefore defeats the very nature and utility of these instruments. The consequent "trend"⁴⁵ of returning (conforming) documents to the beneficiary further undermines conventional documentary credit law, which requires the return of documents only if they are *not* in conformity with the requirements of the credit.⁴⁶

4 Contractual validity of the mandate given by the issuing bank to the nominated bank relating to a letter of credit containing a sanctions clause

Another important issue to consider is whether the mandate given by the issuing bank to the nominated bank relating to a letter of credit containing sanctions clauses meets the requirements of a valid contract. This issue is considered below from a South African perspective.

⁴³ See, for instance, *Wichita Eagle and Beacon Publishing Co Inc v Pacific National Bank of San Francisco* 493 F 2d 1285 (9th Cir 1974), where the instrument that was termed a "letter of credit" was deemed a traditional or accessory guarantee by the court due to its non-documentary conditions.

⁴⁴ In fact, arts 2 and 3 of the UCP 600 define the letter of credit in relation to its irrevocable nature.

⁴⁵ See ICC *Document 470/1280* (9 August 2018) 2.

⁴⁶ See art 15 of the UCP 600 read with arts 7, 14 and 16. Also see Hugo and Strydom "Sanctions, Ships, International Sales and Security of Payment" 129.

4.1 Requirements of a valid contract

South African law recognises six requirements for a contract⁴⁷ to be valid and enforceable. The requirements can be summarised as follows:⁴⁸

- (i) **Consensus:** the parties who wish to enter into an agreement must have a serious intention to create rights and duties to which each of them will be legally bound. The parties must make this intention known to one another.
- (ii) **Contractual capacity:** the parties must have the necessary capacity to contract.
- (iii) **Formalities:** if formalities are prescribed for the formation of the contract, either by the parties themselves or by law, they must be observed.
- (iv) **Legality:** the contract must be lawful and not prohibited by legislation.
- (v) **Possibility:** the obligations the parties wish to create must be capable of being met when the contract is entered into.
- (vi) **Certainty:** the obligations set out in the contract must be clear and determinable so that the parties to the contract know exactly what is expected of them.

A valid contract will arise only if all these requirements are met. There may still be an agreement should any of these requirements not be met, but the agreement will not constitute a contract. Each requirement is examined in more detail below, before applying it to the issue under consideration.

⁴⁷ A precise definition of the term "contract" under South African law remains elusive. Hutchison *et al Law of Contract* 6, for example, define a contract as an agreement entered into between two or more persons with the purpose of creating one or more legal obligations that are enforceable in law. Nagel *Commercial Law* 42, moreover, describes a contract as an agreement that is reached with the intention of creating legal obligations between the parties who have entered into this agreement that give rise to rights and duties. Van Huyssteen *et al Contract* 9, finally, describe a contract as an obligatory agreement, which implies that it is an agreement that creates legal obligations, that the parties intended for there to be obligations created and should all the requirements for a valid contract be met, a contract will be created. Despite the absence of a precise definition, a common theme is apparent in these definitions: namely, that a contract is an agreement that creates enforceable obligations between two or more persons.

⁴⁸ Hutchison *et al Law of Contract* 6.

Consensus

Consensus (also known as true agreement) is the very basis of a valid contract. It refers to the common intention of the parties to be bound by the terms and conditions of the contract. As a general rule, a contract is deemed to have been concluded at the time and place when consensus has been reached.⁴⁹ The reaching of consensus requires that the parties must exchange declarations which express their respective intentions to create enforceable rights and obligations. Typically, this is achieved through offer and acceptance.⁵⁰ In order to ascertain whether consensus has truly been reached by the parties it is necessary to establish whether a valid offer and acceptance was made: one party must have made an offer (the "offeror") and the other party must have accepted the offer (the "offeree").

To constitute a valid contract, however, the offer must in the first place be made with the intention that the offeror will be (legally) bound upon the offeree's acceptance of the offer. This express or implied intention of the offeror distinguishes a true offer from a proposal or an "offer" made in jest.⁵¹ Secondly, the offer must be complete, clear and certain.⁵² Not only must it contain all the terms by which the offeror is willing to abide and all the terms to which it wants to bind the offeree, but the obligations must also be stated unequivocally and unconditionally so that the rights and duties of the offeror are determinable or ascertainable. Consequently, no contract can arise if the offer is vague or ambiguous.⁵³ So, too, must the offeree's acceptance be complete, clear and certain. Finally, the offer and acceptance must be communicated. Accordingly, an offer is completed only once it has been communicated to the offeree and an acceptance is completed only when it has been communicated to the offeror.⁵⁴

Contractual capacity

Contractual capacity refers to the ability to perform a juristic act, to participate in legal dealings and to create duties and receive rights.⁵⁵ Although every legal subject (whether a natural or juristic person) is

⁴⁹ Van Huyssteen *et al Contract* 6.

⁵⁰ See Van Huyssteen *et al Contract* 60, who state: "In its simplest form, a contract consists of an invitation to consent to the creation of obligations between two or more parties (called an 'offer'), and an affirmative response (called an 'acceptance')."

⁵¹ Schulze *et al General Principles of Commercial Law* 55.

⁵² Hutchison *et al Law of Contract* 47.

⁵³ Schulze *et al General Principles of Commercial Law* 56. Also see Van Huyssteen *et al Contract* 262-263.

⁵⁴ Schulze *et al General Principles of Commercial Law* 57.

⁵⁵ Hutchison *et al Law of Contract* 150.

presumed to have the legal capacity to enter into a contract, certain attributes or circumstances of a contracting party may impact upon its ability to create duties and to receive rights. Marital status, age and mental instability are common attributes that can affect a party's ability to act in accordance with its will and to appreciate the consequences of such an act. An often-encountered circumstance that may impede one's ability to create duties and receive rights is insolvency.⁵⁶ The above has led to the development of three categories of contractual capacity: namely, full contractual capacity, limited contractual capacity and no contractual capacity.

Formalities

The question whether or not a valid contract has come into existence must also be determined with reference to whether or not there is compliance with any formalities prescribed for the formation of that specific type of contract. Formalities are those requirements relating to the outward form in which the agreement must be cast to constitute a contract.⁵⁷ These requirements may be stipulated either by law⁵⁸ or by the contracting parties themselves. The most common formalities include reducing the contract to writing and the signatures of the parties.⁵⁹

Legality

In order for a contract to be valid it must be legal and capable of being enforced.⁶⁰ Unlawful agreements will accordingly not be enforced and can either be void or unenforceable, depending on the seriousness of the illegality and whether such unlawfulness goes to the root of the contract.⁶¹ The notion that legality is a requirement for constituting a valid contract gives effect to the maxim *pacta servanda sunt*, which requires that the provisions of a freely-concluded agreement must be enforced.⁶² This

⁵⁶ Bradfield *Christie's Law of Contract* 291.

⁵⁷ Schulze *et al General Principles of Commercial Law* 99.

⁵⁸ Formalities laid down by statute are necessitated by public policy. As to the effect and purpose of such formalities, Van Huyssteen *et al Contract* 166 ft 3 write: "Formalities contribute to legal certainty, prevent malpractices and serve as a cautionary and protective function by drawing the line between negotiations and liability, and may be utilised to afford protection to those in danger of exploitation and to assist in the identification of the type of contract entered into by the parties."

⁵⁹ However, a contract reduced to writing does not necessarily imply a formality. Parties who resort to writing may do so for evidential reasons. See Van Huyssteen *et al Contract* 167.

⁶⁰ Hutchison *et al Law of Contract* 175.

⁶¹ *Sasfin (Pty) Ltd v Beukes* 1989 1 All SA 347 (A) para 8.

⁶² Van Huyssteen *et al Contract* 210; and Hutchison *et al Law of Contract* 500.

principle must, however, be balanced against constitutional values, good faith, and public policy.⁶³

The practical implication of this balance is that the question as to whether a court may refuse to enforce valid contractual terms if a contracting party avers that the enforcement of these terms would be unreasonable and unfair to them, must be considered with reference to the constitutional values and not only to the terms of the contract itself. These values do not provide a basis upon which a court may interfere in a contractual relationship,⁶⁴ but are worked into the rules of contract law, including the rule that a court may not enforce a contractual term where the term or its enforcement would be contrary to public policy. Hence, it is only where a contractual term, or its enforcement, is so unfair or unreasonable that it is contrary to public policy that a court may refuse to enforce it.⁶⁵ This was confirmed in the well-known Constitutional Court judgement of *Barkhuizen v Napier*.⁶⁶ It is noteworthy that the judgement emphasised the importance of the maxim *pacta servanda sunt*, particularly in relation to the fact that it gives effect to the constitutional values of freedom and dignity.⁶⁷

Possibility

A further requirement for the formation of a valid contract is that the obligation created by the contract must be possible for the other party to fulfil or for the other party to be able to perform.⁶⁸ Where it is not possible for a party to a contract to perform in accordance with the terms of the contract, no obligation is created.⁶⁹ In order for performance under the contract to be impossible, the impossibility must be so serious that no one can perform – in other words, there must be absolute or objective impossibility. In the case of a contract struck by an event of objective impossibility, the contractual obligations may be extinguished upon the happening of such event. In contrast, an event of subjective impossibility, which renders a specific person unable to perform, is not enough to escape liability.

⁶³ *Brisley v Drotsky* 2002 4 SA 1 (SCA) 95.

⁶⁴ *Beadica 231 CC v Trustees for the Time Being of the Oregon Trust* [2020] JOL 47440 (CC) para 80.

⁶⁵ *Beadica 231 CC v Trustees for the Time Being of the Oregon Trust* [2020] JOL 47440 (CC) para 80.

⁶⁶ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 56, 69.

⁶⁷ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 57.

⁶⁸ Hutchison *et al Law of Contract* 205.

⁶⁹ Hutchison *et al Law of Contract* 205

Certainty

Despite its close connection to the requirement of possibility, certainty of performance is a distinct requirement of a valid contract. The test for certainty is objective.⁷⁰ This means that in determining whether there is certainty of performance, the conduct or belief of the parties in relation to the conclusion of the contract or fulfilment of any of their obligations is irrelevant. The question, rather, is whether the meaning of the contract is clear and ascertainable from the wording of the contract. The process of ascertaining the meaning of the contract is facilitated through processes of interpretation, guided by admissible evidence and canons of construction.⁷¹ The certainty requirement enables a court to nullify an agreement where the parties have failed to express clearly the performances undertaken by them or where they have failed to set out material aspects relating to the operation of the obligations.⁷² Ultimately, a court cannot enforce uncertain terms.⁷³

Uncertainty in a contract can manifest in several ways. It could, for instance, take the form of (i) ambiguity; (ii) undue generality; (iii) inconsistency of words; (iv) redundancy and gaps; (v) vagueness; and (vi) the discretion of a party to the contract.⁷⁴ Specifically in relation to (vi), which is of special interest to this article, there is support for the view that a discretion in relation to the performance of the other party may be acceptable and enforceable where such discretion must be exercised against some or other standard or criteria, provided a level of objectivity is maintained and the discretion is exercised reasonably.⁷⁵ A discretion exercised by an independent third party may also be acceptable and enforceable as long as the third party is identifiable and exercises the discretion objectively and reasonably.⁷⁶ However, a discretion to determine one's own performance or when one wishes to perform is invalid.⁷⁷

⁷⁰ Van Huyssteen *et al Contract* 260.

⁷¹ For a comprehensive treatise on the interpretation of contracts in South Africa, see Cornelius *Principles of the Interpretation of Contracts*.

⁷² Van Huyssteen *et al Contract* 260.

⁷³ Hutchison *et al Law of Contract* 215.

⁷⁴ See Adams *Contract Drafting* 127.

⁷⁵ Sharrock *Business Transactions Law* 92.

⁷⁶ *Letaba Sawmills (Edms) Bpk v Majovi Bpk* 1993 1 SA 768 (A); and *Southernport Developments v Transnet* 2005 2 All SA 16 (SCA).

⁷⁷ *Murray and Murray* 1959 2 All SA 291 (W). Also see *Williams and Taylor v Hitchcock* 1915 WLD 51.

4.2 Application of requirements

Consensus: It is questionable whether a true meeting of the minds occurs when the nominated bank accepts the mandate of the issuing bank. A fundamental element of the consensus requirement is that the offer, or the mandate in this case, must be complete, clear and certain. A nominated bank is not privy to the internal sanctions policies of the issuing bank and as such is not entirely certain that it will be reimbursed upon payment of a complying presentation. Indeed, the extent of the issuing bank's reimbursement obligations towards the nominated bank are rendered uncertain by the internal policies. This is also the case in respect of a sanctions clause affording the issuing bank a discretion relating to payment. Against this background it is submitted that the mandate of the issuing bank given to the nominated bank may fail to meet this requirement.

Contractual capacity: The issue of the sanctions clause does not affect this requirement. Therefore, this requirement remains intact for the purposes of this analysis.

Formalities: Sanctions clauses are also unlikely to have an impact on this requirement.

Legality: While the sanctions clause is not illegal in that it does not contravene the common law or any legislation, it – or its enforcement – may be construed as being so unfair or unreasonable that it contradicts public policy. Bearing in mind that the nominated bank would have already performed in terms of the letter of credit (i.e. paid the complying presentation) and is merely seeking reimbursement in respect of its performance, it is conceivable that a sanctions clause referencing internal policies or a discretion that has led the issuing bank to refuse reimbursement may be treated as a grossly unfair or an unreasonable term.

Possibility: Reimbursement by the issuing bank is possible. The issuing bank's internal policies or discretion does not physically or legally prevent it from reimbursing the nominated bank, especially when no sanctions violations are apparent in respect of the transaction. Hence, for the purposes of this analysis, this requirement will generally be fulfilled.

Certainty: A sanctions clause drawing attention to internal sanctions policies or a discretion will undoubtedly introduce uncertainty to the documentary credit transaction. It is a well-established principle of South African contract law that a court will not enforce uncertain terms. The discretion of the issuing bank constitutes one which relates to the performance of its own obligations.

In accordance with South African law such discretions give rise to uncertainty and may conceivably be regarded as invalid and unenforceable. Furthermore, in some ways the issuing bank's obligation could be seen as subject to a potestative condition ("I will perform if I want to"),⁷⁸ in which case the requirement of certainty, and to an extent consensus, will not be satisfied. It is appropriate to quote the court in *Shell SA (Pty) Ltd v Corbitt*:⁷⁹ "No contract is legally enforceable if it is made to depend solely upon the will of one of the parties what part he should perform".⁸⁰

Against this background it is obvious that the mandate given by the issuing bank to the nominated bank may, on account of a sanctions clause, fail to satisfy the requirements of a valid contract under South African law, in which case the mandate cannot be enforced as against the nominated bank.

A brief analysis of the position in English law is appropriate. In English law, there are essentially three requirements for the creation of a valid contract:⁸¹ (i) agreement (i.e., offer and acceptance); (ii) contractual intention; and (iii) consideration. Firstly, in relation to the first requirement, an agreement is not a binding contract if it lacks certainty, either because it is incomplete or because it is too vague.⁸² English courts have held agreements to be vague where, for instance, the nature of the agreement was unclear;⁸³ the agreement contained a "subject to war clause";⁸⁴ the agreement was "subject to force majeure conditions";⁸⁵ and the agreement was made subject to the "satisfaction" of one party.⁸⁶ A case could be made to the effect that a sanctions clause indicating a reference to internal policies will render the mandate given by the issuing bank to the nominated bank uncertain and vague. Such a case, however, is likely to be met with resistance since English courts do not readily strike down contracts on the

⁷⁸ Van Huyssteen *et al Contract* 335 state that a condition is potestative "if its fulfillment depends on the will and corresponding act of one contractant who, upon fulfillment, becomes an unconditional debtor ...".

⁷⁹ *Shell SA (Pty) Ltd v Corbitt* 1986 4 SA 523 (C).

⁸⁰ *Shell SA (Pty) Ltd v Corbitt* 1986 4 SA 523 (C) 525.

⁸¹ For a comprehensive treatise on these requirements see Peel *Law of Contract* 9-75 ("Agreement"), 77-185 ("Consideration"); and 187-203 ("Contractual Intention").

⁸² Peel *Law of Contract* 54.

⁸³ See, for example, the case of *Scammell & Nephew Ltd v Ouston* [1941] AC 251, where the House of Lords held that an agreement to buy goods "on hire-purchase" was too vague since many different types of hire-purchase agreements exist and have widely different implications.

⁸⁴ *Bishop & Baxter Ltd v Anglo-Eastern Trading Co* [1944] KB 12.

⁸⁵ *British Electrical Industries Ltd v Patley Pressings Ltd* [1953] 1 WLR 280.

⁸⁶ *Stabilad Ltd v Stephens & Carter Ltd (No 2)* [1999] 2 All ER (Comm) 651.

ground of vagueness,⁸⁷ especially in cases where the parties have acted on the agreement.⁸⁸

Secondly, a discretion afforded in relation to one's own performance does not necessarily invalidate the agreement or negate the requirement of contractual intention. Provided it is clear that the agreement is intended to have contractual effect, there is case law to support the view that such discretions may be acceptable and are made subject to an implied term to the effect that the discretion will not be exercised "dishonestly, for an improper purpose, capriciously or arbitrarily".⁸⁹ Thus a sanctions clause indicating a discretion of the issuing bank may well be held to be acceptable in an English court.

The above analysis suggests that the position under English law is that a sanctions clause is unlikely to affect the contractual validity of the mandate given by the issuing bank to the nominated bank. This stands in contrast to the position under South African law.

5 Conclusion

Considering the above it is fair to say that sanctions clauses that reference the issuing bank's internal policies or discretion run counter to legal certainty and predictability, both of which are incredibly important to the success of letters of credit.⁹⁰ For beneficiaries and nominated and confirming banks, such sanctions clauses imply a disproportionate risk of non-compliance by issuing banks. Underscored by some of the issues discussed above, the ICC has discouraged the practice of including sanctions clauses in trade finance instruments, the most significant of which are letters of credit and demand guarantees:

It is recommended that banks refrain from issuing or accepting trade finance instruments that include Sanctions clauses that purport to impose restrictions beyond those applicable to the performance of the obligation under the trade finance instruments as a matter of law. Broader sanctions clauses defeat the

⁸⁷ *Shaw v Lighthouseexpress Ltd* [2010] EWCA Civ 161; *Durham Tees Valley Airport Ltd v Bmibaby Ltd* [2010] EWCA Civ 485; and *Schweppes v Harper* [2008] EWCA Civ 442.

⁸⁸ *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444; and *The Mercedes Envoy* [1995] 2 Lloyd's 559.

⁸⁹ *The Product Star (No. 2)* [1993] 1 Lloyd's Rep 397. See also *Cantor Fitzgerald International v Horkulak* [2004] EWCA Civ 1287; and *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116.

⁹⁰ *Gao Fraud Rule 57*; Johns and Blodgett 2001 *N III U L Rev* 297; and Marxen *Demand Guarantees* 73.

independence principle in letters of credit and demand guarantees, the exclusively documentary nature of the instrument, and create uncertainty.⁹¹

This position is to be welcomed and accepted as authoritative on the matter.

There may, however, be instances in which a bank determines that it should include a sanctions clause. In such instances it is suggested that references to internal policies or a discretion must be avoided at all costs and that the recommended sanctions clauses of the ICC and IIBLP⁹² must be taken into consideration when drafting the clause. The ICC's sanctions clause reads as follows:

[notwithstanding anything to the contrary in the applicable ICC Rules or in this undertaking,] We disclaim liability for delay, non-return of documents, non-payment, or other action or inaction compelled by restrictive measures, counter-measures or sanctions laws or regulations mandatorily applicable to us or to [our correspondent banks in] the relevant transaction.⁹³

The IIBLP's sanctions clause reads as follows:

We disclaim liability for delay, non-return of documents, non-payment, or other action or inaction compelled by a judicial order or government regulation applicable to us [or our service providers].⁹⁴

Both clauses fall squarely within the scope of clause (a)-type clauses,⁹⁵ which draw attention to applicable sanctions laws and regulations and do not include a reference to internal policies or a discretion. They also do not include vague and generalised terms which increase the danger of incoherence.⁹⁶ Therefore, if the inclusion of a sanctions clause is deemed necessary, it is suggested that these or similar clauses should be utilised

⁹¹ ICC 2014 <https://iccwbo.org/content/uploads/sites/3/2014/08/Guidance-Paper-on-The-Use-Of-Sanctions-Clauses-In-Trade-Finance-Related-Instruments-Subject-To-ICC-Rules.pdf> 1-2.

⁹² The IIBLP is a not-for-profit educational and research organisation dedicated to the harmonisation of documentary credit law and practice. For background on the IIBLP and its contribution to the trade finance industry, see IIBLP Date unknown <https://iiblp.org/about-us/>.

⁹³ ICC 2020 <https://iccwbo.org/content/uploads/sites/3/2020/05/20200504-addendum-to-sanction-clauses-paper.pdf> 2.

⁹⁴ See IIBLP "IIBLP Sanctions Clause" 57.

⁹⁵ See para 3.1 above.

⁹⁶ It is nevertheless conceivable that the phrase "applicable to us" quoted in both clauses may be susceptible to different interpretations. The question whether the phrase refers only to domestic sanctions or also to foreign sanctions may in practice emerge as a source of contention. See, for instance, ICC Banking Commission *Document 470/TA920rev* (October 2021) 4, with reference to the term "indirectly".

since they do not give rise to the issues and challenges outlined in this article.

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List of Abbreviations

ICC	International Chamber of Commerce
ICLR	International Construction Law Review
IIBLP	Institute of International Banking Law and Practice

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TSAR

Northern Illinois University Law Review
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