INTRODUCTION

In International Sales, where the parties involved are located in different countries, is very common to find specials kinds of payments different form cash to assured the risky and expenses that this may create and most important, to avoid the loss of interest originated during the time of transit.

One of the special payment systems is the transfer of funds. This type of payment is very useful for the seller in the sense that he would be assured that the goods which he has agreed to sell will be pay for and for the buyer because he can ensured that his money will not be handed over until someone on his behalf has obtained documents which represent the goods he had agreed to buy.

Another method of payment commonly used in international transactions is de documentary credit, where the buyer substitutes his own promise to pay with that of his bank and the seller is able to have confidence that he will be paid by a bank in return for the provision of the documents

In the other hand, the traders also need to protect the goods on transaction from the risk of the marine adventure, therefore the party who has the insurable interest may arrange a marine insurance contract to shift the risk to another person (insurer).

BANKING

DOCUMENTARY CREDITS

The Article 2 of the Uniform Customs and Practice for Documentary Credits defines it as: "For the purpose of these articles, the expressions 'documentary credit(s)' and 'standby letter(s) of credits' used herein (hereinafter referred to as 'credit(s)', mean any arrangement, however named or described, whereby a bank (the issuing bank) acting at the request and on the instructions of a customer (the applicant for the credit).
(i) is to make a payment to or to the order of a third party (the beneficiary), or is to pay or accept bills of exchange (drafts) drawn by the beneficiary, or (ii) authorizes another bank to effect such payment, or to pay, accept or negotiate such bill of exchange (drafts), against stipulated documents, provided that the terms and conditions of the credit are complied with".

Regard this matter; David Warne and Nicholas Elliott[1] had said that at their simplest level documentary credits involve a tripartite relationship. The applicant for the documentary credit, typically the buyer, request the Issuing Bank to open the letter of credit in favour of the beneficiary, typically the seller. The seller presents documents to the Issuing Bank conforming to the requirements laid down and thereupon is paid by the Issuing Bank. Upon payment the Issuing Bank will debit the applicant's account, where is applicable, or will seed payment from the applicant by some other means.

In the case of an International sale, the beneficiary would present the documents to another bank called the Correspondent Bank which can either just transmit the documents to the Issuing Bank or add its own confirmation to the credit undertaking the obligation to pay. Acting the Correspondent Bank as a Confirming Bank, it can seek reimbursement from the Issuing Bank.

There are then four contractual relationships[2] derived from the above explanation: 1.) The contract of sale between the buyer and the seller; 2.) the contract between the buyer (applicant) and the Issuing Bank to opened a credit in favour of the seller; 3.) the

[1] David Warne and Nicholas Elliot, Banking Litigation (1999, p 202)
[2] This classification was given by Lord Diplock in the *United City Merchants Ltd v. Royal Bank of Canada* [1983] 1 A.C. 168 at 183

contract of agency between the Issuing Bank and the Confirming Bank where the Correspondent Bank agrees to confirm the credit; and, 4.) the contract between the Issuing Bank along with Confirming Bank and the seller (beneficiary) where both banks are liable to the beneficiary.

Now, under the UPC 500 (1993 Uniform Customs and Practice for Documentary Credits) Article 6, "(a) A Credit may be either i. Revocable, or ii. Irrevocable. (b) The Credit, therefore, should clearly indicate whether it is revocable or irrevocable. (c) In the absence of such indication the Credit shall be deemed to be irrevocable".

The credit is normally irrevocable which means that the issuing bank cannot cancel it without the consent of the seller even if the buyer required his bank to do so. If the bank in effect cancel the credit, it will be liable in damages to the beneficiary

The only way a credit can be revocable it is specifically indicated in the document and it carries a notification to the beneficiary that the bank reserves the right of modification or cancellation of the credit at any time without giving him a prior notice[3]. Even though the practice leads the bank to inform about the withdrawal of the credit, in *Cape Asbestos Co. Ltd v Lloyds Bank Ltd*[4] was sated that "there is no legal obligation on the defendants to give notice in the circumstances…the practice of the defendants to give notice in such cases is a most prudent, reasonable and business like practice".

CONCLUSION

In the case studied, Dorset Ltd is alleging fraud on the part of Paladium asking then for the cancellation of the documentary credit. The advise to D would be that it is not possible to expect any cancellation on the fallowing bases:

1. The principle of the autonomy of the credit established in Articles 3 and 4 of the UPC. LS Sealy & RJA (2003, p. 840) had said that "it is irrelevant to the performance of the credit that the buyer alleges, for example, that the shipped goods are not of satisfactory quality"

[3] Article 8 UCP. 8(b) impose the only duty to the issuing bank to reimburse any other bank which has already pay the credit.
[4] [1921] WN 274

2. The UCP does not deal with the problems about forged or fraudulent credits[5]. (See Gian Singh & Co. Ltd v. Banque de L'Indochine)[6]
3. The documentary credit has to be considered as an irrevocable credit because there were not indications of the contrary.
4. The credit is a separated transaction from any underlying contract of sale and banks deal in documents and not in the goods representing such documents, however, under English law the only established exception to The Issuing Bank's obligation to pay if conforming documents are presented in time under a credit is if there is clear evidence of fraud by the beneficiary[7] (Fraud Exception).

Once analyzed these facts it is clear that there is not possibility for Dorset to cancel the documentary credit opened in favour of Paladium, not even on the grounds of 'fraud exception' or 'fraudulent documents' because the fraud has to be clear and obvious and the bank needs to be aware of the fraud to retain the payment against the documents. In *Discount Record Ltd v Barclays Bank Ltd*[8], the judge said: "I would be slow to interfere with bankers' irrevocable credits… unless a sufficiently grave cause is shown; for interventions by the Court that are too ready, or to frequent might gravely impair the reliance which, quite properly, is placed on such credits"[9]

ELECTRONIC FUNDS TRANSFER

This is an essential facet of free trade. This basic facility is commonly used to pay in modern business of international sales and is usually made by the transfer of funds form the bank account of the payor to the bank account of the payee. Subject this matter, L.S Sealy & RJA Hooley[10] (2003, p. 685) "payment by funds transfer involves the adjustment of balances on the accounts of the payer and the payee. The payer's account is debited and the payee's account is credited. Thus, the debt owed to the payer by his

[5] Article 15 UCP
[6] [1974] 2 Lloyd's Rep 1.
[7] See United City Merchants Ltd v. Royal Bank of Canada [1983] 1 A.C. 168
[8] [1975] 1 Lloyd's Rep 444
[9] See also *United Trading Corporartion SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554
[10] LS Sealy & RJA Hooley, Commercial Law (2203)

bank is extinguished or reduced *pro tanto* (or, where the account is overdrawn, his liability to the bank increased) by the amount of the transfer to the payee, whilst the debt owed to the payee by his bank increased (or, where the account is overdrawn, his liability is reduced) by the same amount.

In practice, all international money transfers are effected through banking channels. There are four main methods are in use: the banker's drafts; the mail transfer; telegraphic transfer (telex messages) and SWIFT transfers.

According to the instructions given to the payer's bank regard the payment, the funds transfer can be credit transfer or debit transfer. If the payer instructs his bank to cause the bank of the beneficiary we are in the presence of a credit transfer, which can be either for an individual credit transfer[11], CHAPS[12] payment or for a recurring transfer of funds under a standing order[13]. Under this type of credit, the originator's bank, once receipt the instruction, will debit the originator's account and credit the beneficiary's account (held at the same bank or at another bank), forward instructions to the beneficiary's bank, which will credit the beneficiary's account.

By contrast, on a debit transfer is the beneficiary who gives the instructions to his bank to collect funds from the payer's account however, these instructions may be initiated by the payer and passed on to the beneficiary like occur with the direct debit where the beneficiary has the duty to attach his right of debit to the contract between him and the payer.

Is now important to answer the question whether the credit transfer are negotiable instrument or not. Section 3 of the Bills of Exchange Act 1882 establish some requirements for a document to be consider as a bill of exchange[14], which are not fulfill by the electronically conveyed messages. In the other hand, the bank giro credit is not a negotiable instrument either because it is not payable to the order of a specified person or to a bearer; instead, the form specified the payee to whose account would be credit. In

[11] Usually this transfer are made by bank giro credit that the customer delivers to his bank accompanied by a cheque or a withdrawal from

[12] CHAPs system are used for same day money transfers and, in due course, may replace the bankers payments systems altogether.

[13] This are instructions given to the bank to make regulars payments of a particular amount and to a particular beneficiary.

[14] It has to be an unconditional order in writing addressed by one person to another, instructing the addressee to pay a certain sum in money to the order of a specified payee or to the bearer.

Crouch v Credit Foncier of England[15] was sated that "an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it pro tempore, then it is entitle to the name of a *negotiable instrument*…but if it be either not accustomably transferable, or, though it be accustomably transferable, yet, if its nature be such as to render it incapable or being put in suit by the party holding it pro tempore, it is not a *negotiable instrument*"[16]

The obligations of the transferring bank, corresponding bank and recipient bank are different and derive from their own relationship with their customers. In this order, the transferring main duty is to keep strictly adhered to the instructions given by the payor who may transfers funds either to another beneficiary or to his own account on an overseas bank and to exercise such mandate with reasonable care. This principle was sated in Midland Bank Ltd v. Seymour[17] "it is a hard law sometimes which deprives an agent of the right to reimbursement if he has exceeded his authority, even though the excess does not damage his principal's interests…the instruction to the agent must be clear and ambiguous"[18].

The corresponding bank (employed only where the transferring bank is unable to transmit the funds directly to the recipient bank) would be acting as an agent of the originator's bank is it is employed by it and as an agent of the recipient bank if it is employed by the beneficiary's bank[19] and its duty is also refer to skill and care. Finally, the recipient bank (which credits the payee's account in reliance on an instruction given to it by the transferring bank) acts as an agent of the beneficiary in both cases, debit transfer and credit transfer.

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[15] [1873] LR 8 QB 374
[16] See also *The Brimnes* [1975] QB 929
[17] [1955] 2 Lloyd's Rep. 147, 168
[18] *See also Royal Products Ltd v Midland Bank Ltd* [1981] 2 Lloyd's Rep. 194 where the bank is not in breach of its mandate as long as it carried out its instruction with skill and in a manner sanctioned by current banking practice.
[19] LS Seally & RJA Hooley, Commercial Law (2003, p. 713) said that it is often important to ascertain on whose behalf an intermediary bank acts as this may determine such matters as whether the originator can revoke kis payment instruction and the time of completion of payment.

CONCLUSION

To answer the question whether Dorset Ltd can recover the forty thousand pounds transfer it is first necessary to explain the completion of payment. In general, payment by funds transfer will be deemed to be complete when the beneficiary is given an unfettered or unrestricted right against his own bank to the immediate use of the funds transferred. When the originator and beneficiary have accounts at separated banks, the beneficiary's bank will require to be put in funds by the originator's bank (or an intermediary bank acting on its behalf) before it will reach a decision to make an unconditional transfer[20].

In an electronic funds transfer, the rule of banking practice is that the sending bank becomes committed at the time the receiving bank accepts the payment order. In principle, therefore, the payer is not able to countermand his payment order to his bank once it is committed itself to the beneficiary's bank as the result of the latter taking delivery of a documentary payment order or accepting an electronic payment order.

Where intermediary banks are involved, countermand is no longer possible once the payment order has passed from the originator's side to the beneficiary's side of the payment chain and has been accepted by an intermediary bank acting on behalf of the beneficiary's bank[21]. However, in the case study, the intermediary bank (T) was holding the transfer in due course which means that neither the beneficiary (P) nor his agent (U) had receipt the funds, therefore, countermand could be made.

Regarding the liquidation of S, it has to be said that this does not affect the countermand in the sense that banks should have a special fund separated from the common funds reserved for the founds transfer.

[20] LS Sealy & RJA Hooley, Commercial Law (2003, p.724)

[21] See *Astro Amo Compania Naviera SA v Elf Union SA, The Zographia M* [1976] 2 Lloyd's Rep. 382.

INSURANCE

In *Castellain v Preston*[22] Brett L.J said that the "fundamental rule of insurance law is that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more that fully indemnified".

It is important to define two concepts before starting to analyze the case. Misrepresentation: declaration of the facts made by the proposer that were false in a material particular, whether the proposer acted negligently or quite innocently. In this case, the insurer can avoid the contract.

Non-disclosure: Section 18(1) of the Marine Insurance Act 1906 provides: "Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract"[23]

Now, section 18(2) of the same act provides that: "Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk". In *Container Transport International Inc v Oceans Mutual Underwriting Association Ltd*[24]*,* the Court of Appeal held that an insured is bound to disclose those material facts which might influence the judgment of a prudent insurer in deciding whether or not to accept the risk or in setting the premium. Lord Mustill gave similar speech in *Pan Atlantic Insurance Co Ltd b Pine Top Insurance Co.*[25]*:* "this expression [influence] clearly denotes an effect on the thought processes of the insurer in weighing up the risk"[26].

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[22] [1883] 11 Q.B.D 380
[23] This rule is applicable to general insurance law.
[24] [1984] 1 Lloyd's Rep 476
[25] [1995] 1 AC 501
[26]See also Mutual Life Insurance Co v Ontario Metal Products Co Ltd [125] AC 344 were Lord Salveson said that "the test was whether, if the fact concealed had been disclosed, the insurers would have acted differently"

Even though the majority decision in the latter cited case, was to reject the "decisive influence" test and subtend the position that the circumstance is material and must be disclose even though the prudent insurer, had it known of the fact, would have insured the risk on the same terms, Lord Lloyd dissented saying that "if the prudent insurer would have accepted the risk at the same premium on the same terms, it must be because, so far as he is concerned, the risk is the same risk. How, as a matter of ordinary language, can a circumstance be described as material, when it would not have mattered to the prudent insurer whether the circumstance was disclosed or not?

In the case studied it is said that the misrepresentation made by Arthur would not alter the risk nor would it cause Global Insurance to charge a different premium and I would have to agree with the opinion of the Lord Lloyd on this matter on the basis that the mistake was without any fraudulent intention, however it is necessary to analyze the insurance arrange by the parties before an advise can be given to Paladim.

The insurance was arranged to be on Institute Cargo Clauses A. This type of policy cover all risks of loss of or damage to the subject-matter insured except as provided in Clauses 4, 5, 6 and 7 of the Institute[27]. Now it is said that the damage of the animal was originated partly by the sweat of the cargo and partly by the natural composition on the feed. Regard the latter reason, Clause 4.4 includes to the exceptions the "loss damage or expense caused by inherent vice or nature of the subject-matter insured" therefore G would not be liable on the ground of this exclusion, however, in the other hand, the damage of the subject-matter insured thereof by the wrongful act of any person is cover by Clauses A[28], which means that G could be liable on these grounds and it also would be liable under the rule establish in section 55(2)(a) MIA[29]

Section 55(1) of the Marine Insurance Act 1906 says: "Subject to the provisions of this Act and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for

[27] Clause 1 of the Institute Cargo Clauses A.

[28] These kind of damages are not cover just by the Clauses B and C

[29] This section states: "The insurer is not liable for any loss attributable the willful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew". The doctrine also finds an insurer liable where the insured peril is the real cause but not the actual instrument of the loss as was shown in Symington v Union Insurance of Canton [1928] 97 L.J.K.B. 646

any loss which is not proximately caused by a peril insured against". The question now is: Is the insurer liable where there are two causes of damages, one covered bye the Institute Clauses A and the other excluded by it? This happened in *Wayne Tank and Pump Co Ltd v, Employers Liability Assurance Corporation Ltd*[30] where was stated that where there are two dominant causes of damage, one covered by the Institute Cargo Clauses used and the other excluded under the clauses, the insures can rely on the exclusion and hence avoid liability, but if there is no exclusion, the insures must indemnify the assured.

In the Casehandler's forum of 13th October 1999[31] was state that: **If there are two contributory causes, and one is an insured peril and the other is excluded, then the legal position is that the claim fails - but on the basis of what is "fair and reasonable", the IOB expects the insurer to offer a contribution which is proportionate to the contribution of the insured peril.** (See Clarke p 706 and Birds pp 231-2). Birds refers to dicta in the *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corporation Ltd* [1973] 2 Lloyd's LR 237 case as authority for this, and an example of these can be found in the judgment of Roskill LJ at p 245 (also quoted by Slade LJ in J J Lloyd at p40): *"I think the law in this respect is the same both for marine and non-marine, namely, that if the loss is caused by two causes operating at the same time and one is wholly expressly excluded from the policy, the policy does not pay".*

CONCLUSION

On the basis explained above, it would be not possible for Paladium to be indemnify by Global Insurance, however I would advise P to claim the half of the damage based on the principle of proportionality[32]. According to this the insurer should pay the part covered by the policy, which, in the case study, would be the fallowing amount:

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[30] [1974] Q.B. 57
[31] http://www.theiob.org.uk/bulletins/bulletin22/section3.html
[32] See Digest of Annual Reports and Bulletins Second Edition at http://www.theiob.org.uk/digest/p/proportionality.html

The total price of the feed was £100.000 of which £15.000 was recovered and the agreed contract was a £10.000 policy excess. Once these numbers have been established, it is then necessary to subtract the £15.000 that were recovered from the total amount; that gives us a result of £85.000, which is the evil. We should then divide this number by two, regarding the fact that the damage was partly due as a consequence of an event covered by the policy and partly due to a cause excluded from it. Finally, from this quantity (£42.500) we then need to subtract the £10.000 excess, which would give us a final amount of £32.500 the insurer is liable for under this proportionality idea.

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