The Proper Law of a Documentary Letter of Credit (Part 1)*

EESA A FREDERICKS**
University of South Africa
JAN L NEELS***
Rand Afrikaans University

1 Introduction

The objective of this set of two articles is to identify the legal system that under South African private international law should be applied to the different contractual relationships in respect of a documentary letter of credit.[1]

A documentary letter of credit involves at least two[2] but usually three[3] or four[4] contractual relationships:[5] *(a)* the contractual relationship between the applicant and the issuing bank; *(b)* the contractual relationship between the issuing bank and the correspondent (advising, nominated, or confirming) bank; *(c)* the contractual relationship between the confirming bank and the beneficiary; and *(d)* the contractual relationship between the issuing bank and the beneficiary.[6]

* This is the first of two articles based on sections in Eesa Allie Fredericks's *The Conflict of Laws in Respect of Documentary Letters of Credit in International Trade Financing* (unpublished LLM dissertation, Rand Afrikaans University 2001). The supervisor was Prof Jan L Neels and the co-supervisor Dr Sarel F du Toit.

** BA LLB LLM (RAU). Senior Lecturer, Department of Mercantile Law, University of South Africa.

*** BCom LLB LLM (RAU) LLD (Leiden). Professor of Private International Law, Rand Afrikaans University; Director of the Institute for Private International Law in Southern Africa at the Rand Afrikaans University.

[1] Also known as a 'letter of credit', 'documentary credit', 'credit', 'commercial letter of credit', 'commercial credit', or 'bankers' commercial credit'. On letters of credit, generally, see Charl François Hugo *Documentary Credits: The Law Relating to Documentary Credits from a South African Perspective with Special Reference to the Legal Position of the Issuing and Confirming Banks* (unpublished LLD thesis, University of Stellenbosch 1996); AN Oelofse *The Law of Documentary Letters of Credit in Comparative Perspective* (1997); JP van Niekerk & WG Schulze *The South African Law of International Trade: Selected Topics* (2000) 210–257.

[2] Contracts *(a)* and *(d)* below.

[3] Where an advising or a nominated bank is involved (contracts *(a)*, *(b)*, and *(d)* below).

[4] Where a confirming bank is involved (contracts *(a)*–*(d)* below).

[5] See, for example, *Dicey and Morris on the Conflict of Laws* vol 2 13 ed by L Collins (ed) (2000) 1425–1427.

[6] The issuing bank opens a letter of credit in favour of the beneficiary. The advising bank informs the beneficiary that a letter of credit has been opened in its favour. The nominated bank is obliged to the issuing bank (but not to the beneficiary) to pay the beneficiary on presentation of conforming documents. A confirming bank adds its confirmation to a credit and so is also bound vis-à-vis the beneficiary. See arts 2, 7, 9, and 10 of the Uniform Customs and Practice for Documentary Credits (UCP 500) (1993) issued by the International Chamber of Commerce (ICC). The advising, nominated, and confirming banks are collectively referred to as the 'correspondent banks'. The nominated bank is sometimes referred to as the 'advising bank' (see para 6.2; Jan L Neels 2002 *TSAR* 838). No correspondent bank is necessarily involved. The nominated or confirming bank is usually but not necessarily also the advising bank.

As an advising and a nominated bank do not assume liability on the letter of credit, no contracts between these banks and the beneficiary come into existence.[7]

An explanation of the liability of the parties on a documentary letter of credit may involve intricate questions of substantive law[8] that are not relevant in the current context. The existence of the different contractual relationships is merely assumed.

In this article, the general principles of the South African private international law of contract are investigated.[9] These principles are applied to documentary letters of credit as far as a relevant choice by the parties is concerned. In the second article, these principles will be applied to the different contractual relationships in respect of a documentary letter of credit in the absence of such a choice.

2 South African Private International Law of Contract

The law applicable to a contract is known as its proper law.[10] The parties may, in principle, freely, expressly,[11] or tacitly[12] choose the proper law of their contract. But there are limitations to this general principle, such as the mandatory rules of the lex fori or perhaps a third legal system.[13]

So the parties to a letter of credit contract are able to choose a legal system to govern the relevant relationship. The question arises in terms of South African private international law[14] — can they also, for example,

---

[7] See Van Niekerk & Schulze op cit note 1 at 213, 215, and 224.

[8] See, for example, Hugo op cit note 1; CF Hugo 'Documentary Credits: the Basis of the Bank's Obligation' (2000) 117 *SALJ* 224; Oelofse op cit note 1; Van Niekerk & Schulze op cit note 1 at 233–244.

[9] For English law — as it was on 31 October 1983, 'in so far as [it] can be applied' and including English private international law (see *Transol Bunker BV v MV Andrico Unity; Grecian-Mar SRL v MV Andrico Unity* 1989 (4) SA 325 (A) at 335–336; *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd* 1995 (3) SA 663 (A) at 667B–C; *MT Argun: in re: Sheriff of Cape Town v MT Argun, her owners and all persons interested in her* [2001] 4 All SA 302 (A) at 307h; J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* (1999) 22n103; cf Jan L Neels 'Die *lex causae* vir Eiendomsoordrag van *res in transitu*' 1991 *TSAR* 309 at 321; Jan L Neels 'Die Gedeeltelike Uitsluiting van *Renvoi* in Resente Wetgewing' 1992 *TSAR* 739) — to be applicable in terms of s 6(1)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983, a claim based on a documentary letter of credit should be a 'maritime claim' in terms of s 1 of the Act *and* should have fallen under the jurisdiction of the abolished admiralty courts as on 31 October 1983. We believe that neither of these requirements are met: see Fredericks op cit note * at 4–7; cf *Minesa Energy (Pty) Ltd v Stinnes International* 1988 (3) SA 903 (D); *Peros v Rose* 1990 (1) SA 420 (N); Hare op cit at 25–26. Still, the conclusions in this article coincide with the position in English law today and as it was on 31 October 1983 (see paras 3–7).

[10] CF Forsyth *Private International Law. The Modern Roman-Dutch Law Including the Jurisdiction of the Supreme Court* 3 ed (1996) 274. See 274n4 for other terms that may be used.

[11] Forsyth op cit note 10 at 284.

[12] *Ex Parte Spinazze* 1985 (3) SA 633 (A) at 665H; *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (A) at 863–865; Forsyth op cit note 10 at 282–284.

[13] See, generally, *Herbst v Surti* 1991 (2) SA 75 (Z); *Henry v Branfield* 1996 (1) SA 244 (D) at 249E–F; Forsyth op cit note 10 at 278–282; Jan L Neels 'Geoorloofdheid van 'n Kontrak en Openbare Beleid in die Internasionale Privaatreg' 1991 *TSAR* 694; Oelofse op cit note 1 at 533; J van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 145–175 and 218–219. Cf art 7 of the Convention on the Law Applicable to Contractual Obligations (1980) (the Rome Convention).

[14] Compare Oelofse op cit note 1 at 533–534.

make the Uniform Customs and Practice for Documentary Credits of 1993 ('the UCP 500') (issued by the International Chamber of Commerce in Paris) applicable to their contract?[15] And, if they can, on what basis? There are two possible views.[16]

In the first instance, one can view the attempted incorporation of the UCP as being similar to the choice of a legal system. The parties are then free to choose the UCP in the same way as they can, for example, choose French law. But not all aspects regarding documentary letters of credit are governed by the UCP. One still has to determine a legal system to govern the remaining aspects. The parties may choose this legal system expressly or tacitly, or it has to be assigned by law.

Secondly, a choice of the UCP can be viewed as dissimilar to the choice of a legal system. Then it is necessary to determine whether incorporation by reference is possible. Incorporation of the UCP has to be recognized according to the proper law of the contract. First, the proper law of the contract has to be determined. The proper law can be based on the express or tacit intention of the parties. If such an intention does not exist, the proper law has to be determined objectively.[17] It then has to be established in terms of the relevant legal system whether it is possible to incorporate the UCP by a mere reference to it.[18] This depends on the internal legal rules of that legal system.[19] In South African law, incorporation in this manner may readily be accommodated. The relevant test is whether one can reasonably assume from the client's conduct in continuing with the contract that s/he has either read the UCP and assented to its terms, or is prepared to be bound to the Code without reading it.[20]

---

[15] Van Niekerk & Schulze op cit note 1 at 218:

'The UCP is a body of rules that, by international banking practice and mutual agreement between international bankers, is incorporated into all contracts involving letters of credit. It thus governs the rights and duties of all the parties involved in the issuing of and payment on such contracts. The aim of the UCP is to create a framework of basic rules which is compatible with both international banking practice and the municipal laws of states, and so to avoid disputes and to facilitate the orderly and efficient conduct of international trade. It is currently incorporated in the vast majority of letters of credit issued worldwide.'

The parties can also choose the e-UCP of 2001 (the electronic UCP) to govern the contract. In terms of the e-UCP, a choice of it includes a choice of the UCP 500. A choice of the UCP 500, however, does not include the e-UCP.

[16] The same applies to the incorporation of another international commercial instrument, such as the United Nations Convention on the International Sale of Goods (CISG), the Vienna Sales Convention, the Unidroit Principles of International Commercial Contracts, or one of the Incoterms of the ICC.

[17] See the proposed legal systems in this regard summarized in para 7.

[18] Cf Oelofse op cit note 1 at 19–20.

[19] The parties can, of course, physically incorporate the UCP into their contract, for example, by attaching it to their original contract. They can also repeat its provisions in their contract. In both instances, the rules of incorporation by reference do not apply: the UCP becomes part of the terms of the contract directly.

[20] See *Home Fires Transvaal CC v Van Wyk* 2002 (2) SA 375 (W) at 381E–H; RH Christie *The Law of Contract in South Africa* 4 ed (2001) 205 read with 200. Cf *Hartland Implemente (Edms) Bpk v Enal Eiendomme Bpk* 2002 (3) SA 653 (NC) at 668–669. For alternative methods of incorporation (ex lege incorporation of trade custom, and ex lege incorporation on the basis of legal policy), see Juana Coetzee 'Incoterms: Development and Legal Nature — a Brief Overview' (2002) 13 *Stell LR* 115 at 127–132; Hugo op cit note 1 at 164–172. Cf s 232 of the Constitution of the Republic of South Africa Act 108 of 1996.

Although there is support for each of the approaches in a number of regional conventions,[21] we believe that the first model conforms to commercial expediency and so should be adopted.[22]

Parties to a letter of credit transaction do not always choose the UCP and usually do not choose a legal system to govern their contract. In these cases, the rules of private international law must be applied to determine which legal system would ex lege apply to their contract. A proper law has to be determined to govern any one or a combination of the following: the entire relationship between the parties; the relationship between the parties in so far as it is not governed by the UCP; the interpretation of the UCP; and the validity of incorporating the UCP.[23]

There are two views in South African law regarding the position where the parties to a contract have not chosen a legal system to govern their contract. The first is that the court presumes that the parties intended some legal system to apply to their contract. This is the approach of the Appellate Division in *Standard Bank of SA Ltd v Efroiken and Newman.*[24] Although the parties clearly had no intention in this regard, the court still presumed that they must have had some legal system in mind.[25] Forsyth correctly states that it is artificial to refer to the parties' presumed intention.[26] The second, and we believe correct, view is that the court determines the applicable legal system by establishing the law with which the contract has its closest and most real connection,[27] or the centre of gravity of the contract.[28] Support for this view is found in obiter dicta in *Improvair (Cape)(Pty) Ltd v Establissements Neu,*[29] and *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd.*[30] Although the judges favour the second view, they state that they are bound by *Efroiken and*

[21] Article 9(2) of the Inter-American Convention on the Law Applicable to International Contracts (Mexico City Convention) (1993) follows the first approach, and art 1(1) of the Rome Convention the second. See Michael Joachim Bonell 'The Unidroit Principles and Transnational Law' (2000) 5 *Uniform Law Review/Revue de droit uniforme* 199 at 201; Friedrich K Juenger 'The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons' (1994) 42 *The American J of Comparative Law* 381 at 383–384 and 392. Cf Coetzee op cit note 20; Ian F Turley '*"Lex" mercatoria: quo vadis*?' 1999 *TSAR* 454; JP van Niekerk 'Aspects of Proper Law, Curial Law and International Commercial Arbitration' (1990) 2 *SA Merc LJ* 117 at 141–149.

[22] No support for either approach can be found in any of these South African cases dealing with documentary letters of credit: *Phillips v Standard Bank of South Africa Ltd* 1985 (3) SA 301 (W) at 304H–I ('It is . . . unnecessary in this case to make any finding with regard to the terms, nature and effect of the Uniform Customs and Practice for Documentary Credits'); *Ex Parte Sapan Trading (Pty) Ltd* 1995 (1) SA 218 (W); *Loomcraft Fabrics CC v Nedbank Ltd* 1996 (1) SA 812 (A); *Union Carriage and Wagon Co Ltd v Nedcor Bank Ltd* 1996 CLR 724 (W); *Vereins- und Westbank AG v Veren Investments* 2000 (4) SA 238 (W); *Transcontinental Procurement Services CC v ZVL & ZKL International AS* 2000 CLR 67 (W); *Vereins- und Westbank AG v Veren Investments* 2002 (4) SA 421 (SCA).

[23] If the first approach to a choice of the UCP were followed, it will, of course, not be necessary to assign a proper law to determine the validity of incorporation of the UCP.

[24] 1924 AD 171 at 185. The case concerned a letter of credit. For a discussion of this case in respect of the relationship between the applicant and the issuing bank, see para 3.

[25] Supra note 24 at 185.

[26] Forsyth op cit note 10 at 283n62.

[27] Idem at 287. See also art 4(1) of the Rome Convention.

[28] Forsyth op cit note 10 at 288.

[29] 1983 (2) SA 138 (C) at 146–147.

[30] 1986 (3) SA 509 (D) at 526D–H and 530H–I.

Newman.[31] But they add that they would still have arrived at the same conclusion, because the same factors had to be considered under both the presumed intention and the closest connection tests.[32] Support for the second approach is also found in *Ex parte Spinazze*,[33] where Corbett CJ in passing refers to 'the system with which the contract had its closest and most real connection'.[34] Oelofse argues that '[a]lthough the approach in the *Standard Bank* case has not yet been overruled by the Appellate Division, the trend is clearly in favour of abandoning it, and of adopting the "closest and most real connection" test of the English common law'.[35]

It is suggested that, inter alia, the following factors may be considered to determine the presumed intention of the parties, or, rather, the legal system with the closest and most real connection:[36] *(a)* the locus solutionis (the place of performance);[37] *(b)* the locus contractus (the place of the conclusion of the contract);[38] *(c)* the place of the offer;[39] *(d)* the place of the acceptance;[40] *(e)* the place of agreed arbitration;[41]

[31] Supra note 24 at 185.

[32] See also Forsyth op cit note 10 at 287.

[33] Supra note 12.

[34] At 665H. The case concerned an ante-nuptial contract. See further *Herbst v Surti* supra note 13 at 79C: the court determines the legal system with the closest connection to the contract to establish the presumed intention of the parties. This seems like a combination of the two approaches but in the final analysis it supports the traditional approach of *Standard Bank v Efroiken and Newman* supra note 24 at 185. See Forsyth op cit note 10 at 287n81; Neels op cit note 13 at 694–696. Cf *Henry v Branfield* supra note 13 at 249E–F.

[35] Oelofse op cit note 1 at 532. See also E Kahn 'Ruminations of a quondam Would-Be South African Conflicts Lawyer' 2002 *TSAR* 125 at 128; Van Niekerk & Schulze op cit note 1 at 221.

[36] The content of the connecting factors must be determined according to the lex fori: see *Ex Parte Jones: In re Jones v Jones* 1984 (4) SA 725 (W); *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C) at 1093H. (But nationality as a connecting factor has to be determined 'by the law of the state whose nationality has been invoked' (Frank Vischer 'Connecting factors' in Kurt Lipstein (chief ed) *International Encyclopedia of Comparative Law* vol 3.4/5 *Private International Law* (1999) 22).) The same factors may be used to determine the tacit intention of the parties: see note 12.

[37] See, for example, *Hulscher v Voorschotkas voor Zuid-Afrika* 1908 TH 542 at 546; *Standard Bank v Efroiken and Newman* supra note 24 at 185–186; *Shacklock v Shacklock* 1948 (2) SA 40 (W) at 51; *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W) at 31A and C–D; *Improvair v Establissements Neu* supra note 29 at 151–152; *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528C–I, 529E–F, and 530H–I; *Blanchard, Krasner & French v Evans* 2002 (4) SA 144 (W) at 149n5. Cf *Spinazze* supra note 12 at 665G; *Henry v Branfield* supra note 13 at 249E. See, however, the minority judgment in *IGI v Shooter* supra note 12 at 864D–F.

[38] See *Standard Bank v Efroiken and Newman* supra note 24 at 185–186; *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528G–H; *Henry v Branfield* supra note 13 at 249F. Compare the minority judgment in *IGI v Shooter* supra note 12 at 864D–F; *Improvair v Establissements Neu* supra note 29 at 148E–H; and the text at note 73. Cf *Guggenheim v Rosenbaum* supra note 37 at 31D–E.

[39] See *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528B and E–F. One could add the place of negotiations (Van Rooyen op cit note 13 at 99).

[40] See *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528B–C and F–G. Again, one could add the place of negotiations (Van Rooyen op cit note 13 at 990). In *Laconian*, the judge also refers to the place where the charterparty was drawn (at 528B and E–F).

[41] See *Benidai Trading Co Ltd v Gouws and Gouws (Pty) Ltd* 1977 (3) SA 1020 (T); *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528D, 528G, and 529F–G. In *Laconian*, the judge also refers to the place where the arbitrators carry on business (at 528D). See Forsyth op cit note 10 at 285, who refers to the maxim qui eligit iudicem elegit ius. See also Van Niekerk op cit note 21 esp at 123–128.

(f) the choice of jurisdiction;[42] *(g)* the domicile of the parties;[43] *(h)* the place where the parties carry on business;[44] *(i)* the domicile of the agents or mandatories of the parties;[45] *(j)* the future domicile of the parties;[46] *(k)* the (habitual) residence of the parties;[47] *(l)* the nationality of the parties;[48] *(m)* the form, terminology,[49] and language of the contract;[50] *(n)* the locus rei sitae (the place where the property is situated);[51] *(o)* the locus libri siti (the place where the property is registered);[52] *(p)* the locus expeditionis (the place of despatch);[53] *(q)* the locus destinationis (the place of destination);[54] *(r)* the place of registration of the vehicle (means of conveyance) by which the res vendita is transported;[55] *(s)* the currency in which the contractual obligation of payment is expressed;[56] and *(t)* the incorporation of a statute in the contract.[57]

---

[42] Forsyth op cit note 10 at 285n73.

[43] See *Collisons (SW) Ltd v Kruger* 1923 PH A 78 (SWA); *Guggenheim v Rosenbaum* supra note 37 at 31D–E; *Spinazze* supra note 12 at 665F–G; *Improvair v Establissements Neu* supra note 29 at 151G–H; *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528A and E.

[44] See *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528A.

[45] See *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528A–B and E–F.

[46] See *Guggenheim v Rosenbaum* supra note 37 at 31E; *Spinazze* supra note 12 at 665G.

[47] See *Spinazze* supra note 12 at 665F–G; *Henry v Branfield* supra note 13 at 249F. See also factors *(g)*, *(i)* and *(j)*.

[48] Forsyth op cit note 10 at 288 and 291.

[49] Such as contractual terms used in a technical sense (see Van Niekerk & Schulze op cit note 1 at 157–158 and the cases they refer to). Cf *Improvair v Establissements Neu* supra note 29 at 145D–E ('concepts peculiar to a particular system').

[50] See *Spinazze* supra note 12 at 665F. See also the minority judgment in *IGI v Shooter* supra note 12 at 863–865. Determining the tacit intention of the parties in respect of the law applicable to a maritime insurance policy, the judge states:

> 'In the instant case the contract was entered into in this country and the payment of premiums was to have been effected in South African currency. This, in my view, however, is not important. What is important is the form of the policy under consideration and the language in which it has been couched' (864E–F).

See, however, *Improvair v Establissements Neu* supra note 29 at 148B–E. As the form and terminology of a documentary letter of credit are internationally standardized, mainly because of the existence of the UCP, the same weight cannot be attached to this connecting factor in the context of documentary letters of credit. Cf *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 2 SA 630 (T); JP van Niekerk 'The Proper Law of a Marine Insurance Contract: the *Al Wahab* case' (1984) 6 *Modern Business Law* 87 at 92–93.

[51] Especially with immovable property. See also factor *(o)*.

[52] With immovable property, and sometimes also with movable property.

[53] To determine the proper law of a contract for the sale of res in transitu, analogous to the position in the international law of things (see Neels op cit note 9 (1991); Jan L Neels 'Die Voorlopige Regsoordeel in die Internasionale Privaatreg' (1994) 5 *Stell LR* 288 at 292–295). Cf *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528I and 529E.

[54] See factor *(p)* and note 53, as well as *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528C, 528I, 529A, and 529E.

[55] See note 53. See also Forsyth op cit note 10 at 288 and 291 who refers to certain maritime contracts. Cf Hoge Raad 17 March 1989 *Nederlandse Jurisprudentie* 1990 427; Neels op cit note 9 (1991): the law of the flag of the ship may sometimes be the proper law for the transfer of property linked to the ship itself. But the weight of factor *(r)* has been reduced by the growth of flag-flying for convenience. See Forsyth op cit note 10 at 291; and, generally, Vesna Tomljenović 'Maritime Torts. New Conflicts Approach: Is it Necessary?' in Petar Šarčević & Paul Volken (eds) (1999) 1 *Yearbook of Private International Law* 249 at 262–270.

[56] See *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528C, 528F, and 529H–I. Cf *IGI v Shooter* supra note 12 at 865D–E (tacit agreement).

[57] See *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528C, 528F, and 529–530. Cf *Stretton v Union Steamship Company Ltd* (1881) 1 EDC 315 (reference to a foreign statute in a contract). Incorporation of an international commercial instrument (such as the UCP) does, of course, not automatically point to a particular country. But if a chosen instrument has the force of law in one state and not in another, its (attempted) incorporation may link the contract to the

The factors cannot merely be counted to determine the proper law — not all the factors have the same weight.[58] For example, factors *(s)* and *(t)* were held to be of no great importance in *Laconian Maritime Enterprises v Agromar Lineas*,[59] whilst factor *(e)* was awarded more significant consideration.[60]

The most important factor to determine the proper law is the locus solutionis (the place of performance). The principle that can be deduced from the relevant South African case law is that the lex loci solutionis constitutes the proper law of the contract unless specific circumstances indicate another legal system.[61] For example, in *Collisons (SW) Ltd v Kruger*,[62] the concurring lex domicilii of the parties to the contract was preferred to both the lex loci solutionis and the lex loci contractus.[63]

But the locus solutionis in respect of the characteristic performance[64] of the contract (such as delivery) may differ from the locus solutionis in respect of payment. If this happens, one of two principles may apply — the scission principle, or the unitary principle. There is authority for both principles in South African private international law.[65]

In terms of the scission principle, each obligation has its own proper law.[66] For example, if a party institutes an action for payment (delivery has taken place), the proper law will probably be the lex loci solutionis in respect of payment. But if payment has taken place but not delivery, the proper law will probably be the lex loci solutionis in respect of delivery. So the proper law of the contract will depend on the particular claim. In

former country. The UCP is incorporated in the law of Hungary by § 14(5) of Decree 6 of 1997 (RA Schütze & G Fontane *Documentary Credit Law Throughout the World: Annotated Legislation from more than 35 Countries* (2001) 76). Cf art 341(3) of the Egyptian Commercial Code (Law 17 of 1999) and 5-116(c) of the Uniform Commercial Code in the United States of America.

[58] See *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528G–H: 'Whilst counting contacts or factors favouring one or the other country's law is an unsatisfactory way of deciding legal iussues, a large number of *important* factors pointing one way is a strong indicator' (emphasis added).

[59] Supra note 30 at 529–530. Cf *IGI v Shooter* supra note 12 at 864D–F (tacit agreement).

[60] See *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528D, 528G, and 529F–G. See also *Benidai Trading v Gouws and Gouws* supra note 41.

[61] See *Hulscher v Voorschotkas voor Zuid-Afrika* supra note 37 at 546; *Shacklock v Shacklock* supra note 37 at 51; *Guggenheim v Rosenbaum* supra note 37 at 31A; Neels op cit note 53 at 289n5; *Standard Bank v Efroiken and Newman* supra note 24 at 185 (but see also 186); Van Rooyen op cit note 13 at 104. See also *Blanchard, Krasner & French v Evans* supra note 37 at 149n5; Coenraad Visser 'Choice of Law in Internet Copyright Disputes' (1999) 11 *SA Merc LJ* 268 at 277. Cf Neels op cit note 53 at 291.

[62] Supra note 43.

[63] See Forsyth op cit note 10 at 291. See also Van Rooyen op cit note 13 at 98–99 and 217–218.

[64] To use the terminology of art 4(2) of the Rome Convention. The characteristic performance is usually the performance for which payment is due (see, for example, *Cheshire and North's Private International Law* 13 ed by Peter North & JJ Fawcett (1999) 569). 'Payment' may, of course, take the form of the payment of commission (see K Takahashi *Claims for Contribution and Reimbursement in an International Context: Conflict-of-laws Dimensions of Third-party Procedure* (2000) 257).

[65] See the cases in note 66 (scission principle) and the case in note 67 (unitary principle).

[66] See *Standard Bank v Efroiken and Newman* supra note 24 at 188; *Laconian Maritime Enterprises v Agromar Lineas* supra note 30 at 528–529 and 530H–I. See also Forsyth op cit note 10 at 290.

terms of the unitary principle, by contrast, the same proper law governs both (or all) obligations.[67]

As the obligations of the parties are naturally always closely connected, their contractual relationship should be governed by *one* proper law.[68] The scission principle complicates matters by making more than one legal system applicable to the same contract. We prefer the unitary principle.

One question remains — what approach should be followed under the unitary principle if the locus solutionis for the characteristic performance differs from the locus solutionis for payment? We suggest that the choice between the two legal systems should be made in the light of all the other factors.[69] But if they do not convincingly indicate a choice, one of the following three approaches has to be adopted.

In the first instance, Van Rooyen supports the unitary principle but argues that in these circumstances the only option is to apply the scission principle.[70] We believe, however, that it is always desirable for one legal system to govern the whole contract.

Secondly, Forsyth states that in these circumstances the different loci solutionis would be of little use in assigning a governing law to the contract.[71] This will often mean that the lex loci contractus must play the role of proper law.[72] Two points of criticism have been levelled against this result:[73]

> 'Hierdie gevolg is in stryd met die algemene reël dat die *locus solutionis* voorkeur geniet bo die *locus contractus* en in die algemeen die belangrikste faktor is by die vasstelling van die *lex causae*. . . . (Forsyth is trouens self van mening dat die belang van die *locus contractus* as faktor by die bepaling van die *lex causae* in die moderne wêreld behoort af te neem. . . .)'

Thirdly, an approach has been proposed partly based on an obiter dictum in *Laconian Maritime Enterprises v Agromar Lineas*,[74] where Booysen J states:[75]

> 'Be that as it may, the lex loci solutionis of all payments is English law whereas the performance of applicant's obligations of carriage and delivery had to take place in Argentine, upon the high seas and in Columbia. If I have to strike a balance it seems to tilt towards English law from amongst the leges loci solutionis.'

---

[67] See *Improvair v Establissements Neu* supra note 29 at 147B–G; Forsyth op cit note 10 at 290–291.

[68] Forsyth op cit note 10 at 290.

[69] Jan L Neels 1990 *TSAR* 553 at 554–555. See the quotations at notes 76 and 77. For a list of twenty factors that can be considered, see the text at notes 37–57.

[70] Van Rooyen op cit note 13 at 200.

[71] Forsyth op cit note 10 at 291.

[72] See Forsyth op cit note 10 at 291: 'The *locus contractus* and *locus solutionis* are the most important factors weighing with the courts in assigning a governing law.' And at 287: 'The central rule generally followed in assigning the appropriate law is that the *lex loci contractus* governs unless the contract is to be performed elsewhere, in which case the *lex loci solutionis* applies.'

[73] Neels op cit note 69 at 554. In respect of the last sentence of the quotation, cf *IGI v Shooter* supra note 12 at 864D (tacit agreement); *Improvair v Establissements Neu* supra note 29 at 148E–H; *Guggenheim v Rosenbaum* supra note 37 at 31D–E. But see also the first three cases referred to in note 38.

[74] Supra note 30. It is possible, however, that the dictum was not intended to be obiter, and that the judge came to the conclusion on the basis of both the scission and the unitary principles, without choosing between them (see 528–529 and 530H–I).

[75] At 529E–F.

With reference to this dictum it is argued:[76]

'Die regter gee waarskynlik te kenne dat, sou hy die eenheidsbeginsel toegepas het, hy nogtans die Engelse reg as *proper law* sou kies. Hierdie uitleg kom juis voor ook in die lig van die konteks waarin die aanhaling verskyn: direk na 'n bespreking van die skeidings- en eenheidsbeginsels (528J–529E) en nadat die Engelse reg reeds uitdruklik as die *lex causae* gekies is (528H). Indien die afleiding korrek is, is dit die benadering van die regter dat — by die toepassing van die eenheidsbeginsel — die onderskeie *loci solutionis* steeds hulle belangrikheid as faktore by die bepaling van die *lex causae* behou. Daar moet egter 'n keuse tussen die *leges loci solutionis* gemaak word. Dit sal uiteraard met inagneming van die ander relevante faktore moet geskied. Dui die ander faktore nie 'n duidelike keuse vir een van die *leges loci solutionis* aan nie, wil dit uit die *dictum* van die regter voorkom of die reg van die plek waar betaling moet geskied, voorkeur geniet bo die reg van die plek van lewering.'

In contrast to Forsyth, it is then argued:[77]

'Dit sou beter wees om die *loci solutionis* tesame met al die ander relevante faktore wel in ag te neem en die gebruiklike gewig daaraan te heg, met 'n *ad hoc*-reël ten gunste van die *locus solutionis* van betaling by 'n uitbalansering van die genoemde faktore.'

This approach proposes that all the relevant factors must be considered, including the loci solutionis. The proper law will usually but not necessarily[78] be one of the leges loci solutionis. If the factors other than the loci solutionis do not convincingly indicate a choice between the leges loci solutionis, an ad hoc rule in favour of the lex loci solutionis in respect of payment must be applied.[79]

The third approach will often have the same result as the application of the Rome Convention. Payment usually has to take place (at a bank) in the country of habitual residence or business of the party who has to effect the characteristic performance. The law of this country is also presumed to be the applicable law in terms of article 4(2) of the Rome Convention.[80] We believe that this approach offers the opportunity to bring our legal system into conformity with that of our most important trading partner — the European Union.[81]

---

[76] Neels op cit note 69 at 554.

[77] Idem at 555.

[78] See the text at notes 61–63.

[79] Cf *Mendelson-Zeller Co Inc v T & C Providores Pty Ltd* (1981) 1 NSWLR 366, as discussed by Edward I Sykes & Michael C Pryles *Australian Private International Law* 3 ed (1991) 607.

[80] Article 4(1) states that '[t]o the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. . .'. Article 4(2) reads:

'Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or incorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.'

[81] The European Union is by far South Africa's largest trading partner. Exports to and imports from Europe account for about 40 per cent of South Africa's total foreign trade. The top ten

In the second article, the general principles of the South African private international law of contract will be applied to the different contractual relationships in respect of a documentary letter of credit where the parties did not expressly or tacitly choose a legal system to govern their contract. It is throughout accepted, with some confidence, that the closest and most real connection test and the unitary principle will in future be applied by the South African courts.

Ideas for formulating connecting factors in the context of documentary letters of credit were obtained from English,[82] Dutch,[83] Hungarian,[84] Australian,[85] Canadian,[86] American,[87] and South African[88] sources.[89]

Legal certainty is an important consideration in international commercial law,[90] especially in the field of documentary letters of credit

trading partners of South Africa are (in order of importance): Germany, the United States of America, the United Kingdom, Japan, Saudi Arabia, Italy, the Netherlands, China, France, and Belgium. (See Editors Inc *SA 2002–3: South Africa at a Glance* (2002) 139–140.) According to Forsyth (op cit note 10 at 60–61), uniformity of decision should be the guiding principle for the development of private international law (see also the authority referred to him at 60n250).

[82] Michael Brindle & Raymond Cox (eds) *Law of Bank Payments* (1996) 455–459; Charles Chatterjee 'The Concept of the Natural Forum and the Governing Law of a Transnational Letter of Credit Contract' (1995) 10 *J of International Banking Law* 407; Dicey & Morris op cit note 5 at 1425–1427; HC Gutteridge & Maurice Megrah *The Law of Bankers' Commercial Credits* (1984) 241–246; Raymond Jack, Ali Malek & David Quest *Documentary Credits: The Law and Practice of Documentary Credits including Standby Credits and Demand Guarantees* 3 ed (2001) 387–411; Ewan McKendrick (ed) *Sale of Goods* (2000) 714–717; CGJ Morse 'Letters of Credit and the Rome Convention' 1994 *Lloyd's Maritime and Commercial LQ* 560; Denis Petkovic 'The Proper Law of Letters of Credit' (1995) 10 *J of International Banking Law* 141; Richard Plender & Michael Wilderspin *The European Contracts Convention: The Rome Convention on the Choice of Law for Contracts* (2001) 125–126; Clive M Schmitthoff 'Conflict of Laws Issues Relating to Letters of Credit: an English Perspective' in Ho Peng Kee & Helena HM Chan (eds) *Current Problems of International Trade Financing* (Singapore Conferences on International Business Law) (1990) 103 (also published in CM Chinkin & PJM Ricquier (eds) *Current Problems of International Trade Financing* (1983) 145 and Chia-Jui Cheng (ed) *Clive M Schmitthoff's Select Essays on International Trade Law* (1988) 573); Paul Todd *Bills of Lading and Bankers' Documentary Credits* (1990) 205–211; FM Ventris *Bankers' Documentary Credits* (1983) 75–78. On English conflict of laws, see also Oelofse op cit note 1 at 508–519; AN Oelofse 'Developments in the Law of Documentary Letters of Credit' (1996) 8 *SA Merc LJ* 56 at 71–73.

[83] JL Smeehuijzen 'Ongeschiktheid van de Leer van de Karakteristieke Prestatie in een Meerpartijenverhouding; de *Letter of Credit* en Artikel 4 EVO' (2002) 20 *Nederlands Internationaal Privaatrecht* 9; THD Struycken 'Een *Letter of Credit* en Accessoire Aanknoping' (2001) 19 *Nederlands Internationaal Privaatrecht* 204; René van Rooij & Maurice V Polak *Private International Law in the Netherlands* (1987) 154–155.

[84] Ferenc Mádl & Lajos Vékás *The Law of Conflicts and of International Economic Relations* 2 ed (1998) 375; art 25(f), (g), and (j) of the Law-Decree 13 of 1979 on Private International Law (English translation in Mádl & Vékás op cit at 517–535).

[85] Rodney N Purvis & Robert Darvas *The Law and Practice of Commercial Letters of Credit, Shipping Documents and Termination of Disputes in International Trade* (1975) 152–153; Sykes & Pryles op cit note 79 at 609.

[86] Audi Y Gozlan *International Letters of Credit: Resolving Conflict of Law Disputes* 2 ed (1999); Lazar Sarna *Letters of Credit: the Law and Current Practice* (1986) 210–215.

[87] Burton V McCullough *Letters of Credit* (2000) para 2.03. On American conflict of laws, see also Oelofse op cit note 1 at 525–530.

[88] Oelofse op cit note 1 at 507–537; Oelofse op cit note 82 at 71–74. See also EC Schlemmer 'Conflict of Laws in International Trade Financing — a South African Perspective', paper delivered at the International Conference on Private International Law, 28–30 March 2001 at the Rand Afrikaans University; Van Niekerk & Schulze op cit note 1 at 220–222.

[89] See also Schütze & Fontane op cit note 57 at 25–28.

[90] On private international law in the field of international commerce, see Jan L Neels 'Substantiewe Geregtigheid, Herverdeling en Begunstiging in die Internasionale Familiereg' 2001 *TSAR* 692 at 709.

— they form 'the life-blood of international commerce'.[91] Save for a limited number of particular exceptions,[92] therefore, one specific legal system is proposed for each contractual relationship in respect of a documentary letter of credit,[93] irrespective of whether the connecting factors in a highly unusual case will indicate another system.[94] This coincides with the position under the Rome Convention.[95]

---

[91] *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1977] 2 All ER 862 at 870a–b in respect of the 'irrevocable obligations assumed by banks' (quoted with approval in *Loomcraft Fabrics v Nedbank* supra note 22 at 816E; *Union Carriage and Wagon v Nedcor Bank* supra note 22 at 732); a documentary letter of credit may of course be issued as a revocable credit (see art 6 of the UCP 500). The doctrine of the autonomy of letters of credit and the doctrine of strict compliance are further evidence of the importance of certainty in this field (see Van Niekerk & Schulze op cit note 1 at 244–249).

[92] See note 262. One could add here that public policy may dictate the application of the lex fori, or perhaps even the law of a third state, to certain aspects of liability under a documentary letter of credit. With reference to C Von Bar 'Kollisionsrechtliche Aspekte der Vereinbarung und Inanspruchnahme von Dokumentenakkreditiven' 1988 *Zeitschrift für das Gesamte Handels- und Wirtschaftsrecht* 38 at 54–55, Oelofse op cit note 1 at 525 states: 'It has been suggested that, in the case where the applicable law is more stringent than the *lex fori* in acknowledging an exception based on fraud or abuse of right, the *ordre public* of the *lex fori* might require the application of the *lex fori*.' See, generally, Forsyth op cit note 10 at 102–104 and 298–303; Neels op cit note 13; Van Rooyen op cit note 13 at 145–175 and 218–219. On fraud in this context, see Hugo op cit note 1 at 260–263, 272–293, 308–309, 315–317, and 322–331; Van Niekerk & Schulze op cit note 1 at 250–255. On abuse of right in this context, see Hugo op cit note 1 at 252–253, 256–257, 260–262 and 264–265; Oelofse op cit note 1 at 458–463. On abuse of right, generally, see Jan L Neels 'Tussen Regmatigheid en Onregmatigheid: die Leerstuk van Oorskryding van Regte en Bevoegdhede' 1999 *TSAR* 63; 2000 *TSAR* 317, 469, and 643; 'Die Aanvullende en Beperkende Werking van Redelikheid en Billikheid in die Kontraktereg' 1999 *TSAR* 684 at 704–705.

[93] In the case of the relationship between the beneficiary and the issuing bank, different legal systems are proposed depending on whether or not a nominated or confirming bank is involved: see para 6.

[94] See, for example, para 6.3. For a summary of the proposals, see para 7.

[95] See the relevant sources in notes 82 and 83. Even when art 4(5) is used to rebut the presumption in art 4(2) of the Rome Convention, a specific legal system of general applicability is still substituted (*The Bank of Baroda v The Vysya Bank Ltd* [1994] 2 Lloyd's Rep 87). See para 6.3.