

Michael Evan Avidon, Esq.

Partner

T: 212.554.7854

F: 917.206.4354

E: mavidon@mosessinger.com

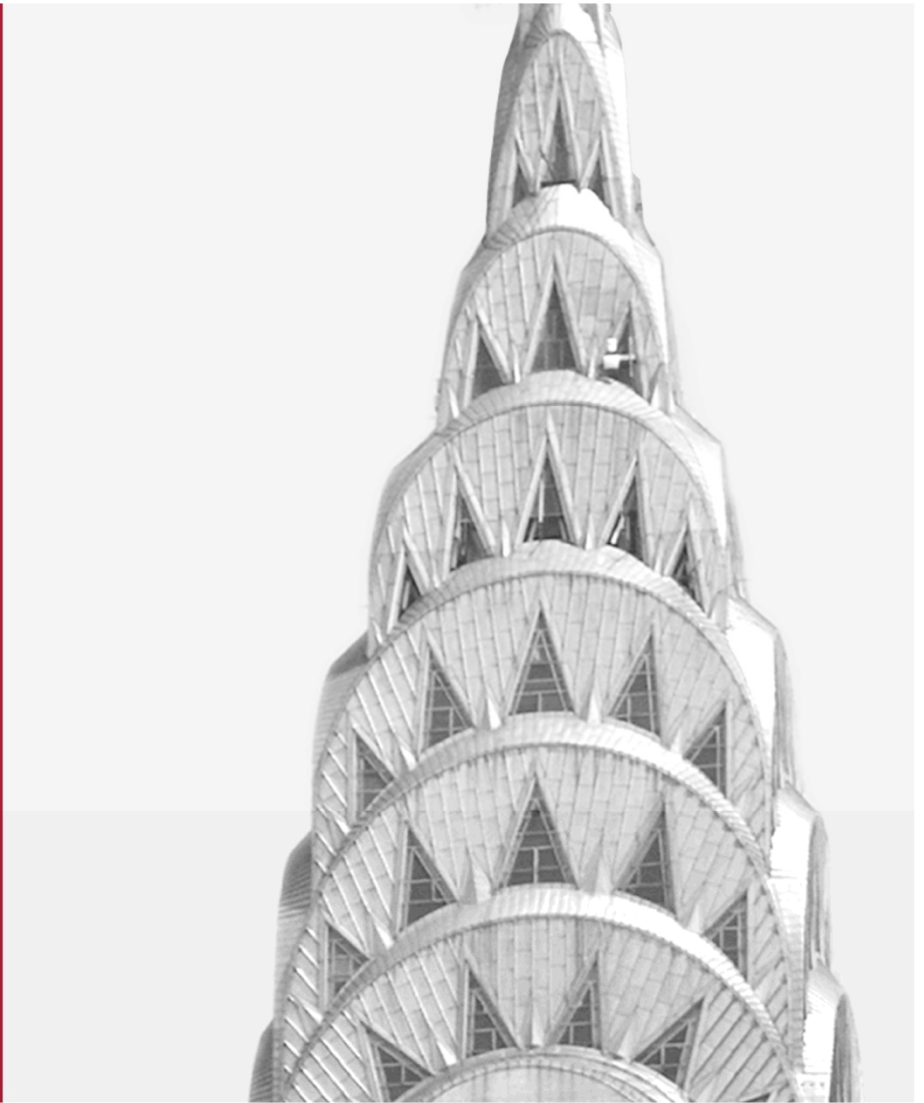
David Rabinowitz, Esq.

Partner

T: 212.554.7815

F: 917.206.4315

E: drabinowitz@mosessinger.com



MOSES & SINGER LLP

Response by Michael Evan Avidon and David Rabinowitz to:

Comments by Chang-Soon Thomas Song Concerning the Relative Advantages and Disadvantages of English Letter of Credit Law and Courts as Compared to New York Letter of Credit Law and Courts for International Letter of Credit Transactions

The Chrysler Building
405 Lexington Avenue
New York, NY 10174-1299
T: 212.554.7800
F: 212.554.7700
www.mosessinger.com



Documentary Credit

WORLD

In This Issue...

■ **3 UPDATES:** Impact of International Sanctions on Trade; ICC Releases Final Opinions from April 2014 Meeting; Protection When Presentation is Made Elsewhere; RBS Subsidiary Ordered to Stop Using Software; Andersson Honored with Book Dedication; FATCA's Facts Still Unfolding for Trade Finance at US-Based Banks; Iran Seeks to Use Euros to Pay Bills; Market Watchers: No Need to Fear Chinese Copper Loans; Technology Update; International Updates



Our article is on page 10

■ **10 THE READERS SPEAK:** No Nexus? No Problem: Why New York Law and Jurisdiction Offer Advantages for International Transactions

■ **13 LITIGATION DIGEST:**

- *Philippine Commercial International Bank v. Korea Exchange Bank*
- *Cimb Bank Berhad v. Norlia Binti Mohd Yusof*
- Newly Decided Cases
- *Henshue Construction, Inc. v. Terra Engineering & Construction Corp.*
- *Melli Bank PLC v. Holbud Ltd*

ShowCase



■ **34 TEXT:**
 ■ The Provisions of the Supreme People's Court on Certain Issues Concerning Trial of Cases Involving Independent Guarantee Disputes (Saibo JIN's Suggested Revisions to January 2014 Draft)

■ **42 SCAM SURVEY**

■ **45 INFORMATION DIGEST**

■ **46 LC TRADE NEWS**

20 FEATURE



■ **LC FORGERIES: INSIGHT FROM THE BANKING WORLD**

It is difficult to precisely measure to what extent losses occur due to letter of credit forgeries worldwide. Courts are concerned with the case at hand, seeking to satisfy themselves whether the instrument in question is fraudulent, and unlikely to delve deeper into the bigger picture and broader implications of LC forgery. To gain information from a banking community that would not otherwise provide it, Ryan Murphy surveyed 20 banking professionals anonymously on a series of questions to gain insight into the scope of the problem. His findings are presented here.

ARTICLES

■ **28: Branches of a Bank**

by Nicolai NIELSEN

■ **32: When a Copy is Not a Copy ...**

The Importance of Knowing ISBP

by Igor A. KUDINOV

Documentary Credit World, (DCW), is published monthly by Letter of Credit Survey, Inc. Opinions expressed in it do not necessarily reflect the official positions of the publishers of DCW, its Editorial Board, Editorial Advisory Board, or the organizations with which they are associated. Authors, editors, members of DCW's Editorial Board and Editorial Advisory Board, and the institutions with which they are associated often are actively involved in the field as lawyers, advisers, parties, consultants, or expert witnesses in many of the matters addressed in DCW. The publication often reflects and sometimes adopts their views. Notwithstanding positions expressed in DCW, every effort will be made to publish differing viewpoints and contributions expressing such views are welcomed.

The support of the George Mason University School of Law and its Law & Economics Center is gratefully acknowledged.

Documentary Credit World

20203 Goshen Road., No. 343

Gaithersburg, MD 20879 USA

phone: +1-301-330-1970

fax: +1-301-926-1265

e-mail: info@doccreditworld.com

website: www.doccreditworld.com

Publisher

Professor James E. Byrne

Contributing Editor

Vincent Maulella

Executive Editor

Christopher S. Byrnes

Correspondent Editor

Lisa V. Chin

Case Editors

Matthew J. Brown

Peter Traisak

Scam Survey Editor

Jacob A. Manning

Senior Student Editor

Gabriel L. Boisvert

Student Research Associates

Mark S. Abrajano

Kevin C. McNiff

Editorial Advisory Board

Hasan Apaydin (Turkey)

Sue E. Auerbach (DC)

Michael Evan Avidon, Partner
Moses & Singer LLP (NY)

James G. Barnes*
Baker & McKenzie (Chicago)

Alan Bloodgood, Consultant*
(retired, J.P. Morgan)

Harold Burman, Senior Counsel,
Office of Legal Adviser
US Department of State

Joseph Colleran, Consultant
(retired, Irving Trust)

Gary Collyer*
Collyer Consulting LLP

Dr. Alan Davidson, Senior Lecturer
TC Beirne School of Law
University of Queensland (Australia)

Philip J. De Chiara
(retired, Wells Fargo Bank)

Professor E.P. Ellinger
National University of Singapore

Haluk Erdemol, Advisor, Int'l Division
Akbank T.A.S. (Turkey)

Roger D. Fayers, LLB
Barrister (UK); Department of Trade
& Industry, Solicitor's Department
(retired)

Clyde Fletcher, Documentation Manager
Fonterra Limited

Dr. Gerold Herrmann
(retired, United Nations Commission
on International Trade Law)

Heinz Hertl
ICC-Austria (retired, Bank Austria/
Creditanstalt, Vienna)

George Hisert
(retired, Bingham McCutchen LLP)

Professor Katsuto Iida
(retired, Tezukayama University,
Japan)

Dean Rafael Illescas Ortiz
University Carlos III de Madrid (Spain)

Jin Saibo, Partner
Beijing Commerce & Finance
Law Offices (China)

Carter Klein, Partner
Jenner & Block (Chicago)

*Denotes Editorial Board member

Professor Boris Kozolchyk, Director*
National Law Center for Inter-
American Free Trade

Stanley L. Lane, Jr., Of Counsel
Otterbourg Steindler Houston
& Rosen, P.C. (NY)

Arthur Lloyd, Consultant*
(retired, Control Risks, Ltd.)

David Meynell
Owner, TradeLC Advisory

Neal Millard
Musick, Peeler & Garrett LLP
Adjunct Professor, USC Law School

K. Nizardeen
Head of Trade & Corporate Services
Al Hilal Bank (Abu Dhabi, UAE)

Dennis Noah*
(retired, M&T Bank)

Professor Yornng-Won Pae
The University of Seoul (Korea)

Janis S. Penton, Senior Counsel
Union Bank of California, N.A.

Jianbao Shan, Executive Vice President
China Everbright Bank (China)

Martin Shaw, Consultant
(retired from Barclays and Lloyds)
(London)

Angelo J. Schiraldi, Consultant
(retired, IntesaBci (NY)

Donald R. Smith*
President,
Global Trade Advisory, Ltd.

Soh Chee Seng, Technical Consultant,
Trade Finance Issues, the Association
of Banks in Singapore (Singapore)

Joseph Sommer (NY)

Chang-Soon Thomas Song, Manager
Korea Exchange Bank (Seoul)

Professor Jean Stoufflet
University of Clermont - Ferrand
(France)

Alexander Zelenov, Director
Bank for Foreign Economic Affairs
of the USSR (Moscow)

Published by Letter of Credit Survey, Inc. ISSN 1520-0221. Copyright © 2014 by Letter of Credit Survey, Inc. All rights reserved. No part of this journal may be reproduced in any form, including microfilm, xerography or otherwise, or incorporated into any information retrieval system, without the written permission of the publisher. Single subscription price: \$595 per year. Global license information available upon request. This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other professional services. If legal advice or other expert assistance is required, the service of a competent professional should be sought.



THE READERS SPEAK

NO NEXUS? NO PROBLEM

Why New York Law and Jurisdiction Offer Advantages for International Transactions

Chang-Soon Thomas Song, Attorney at Law (Arizona) and Senior Manager, International Dispute Resolution (Letters of Credit), Trade and Services Division, Korea Exchange Bank, Seoul, Korea, writes:

In a standby letter of credit text which is to be received by our customer from his counterpart in Bangladesh, I put English law and English court exclusive jurisdiction. Korean law or Bangladesh law will not do. And Korean court or Bangladesh court is not appropriate either.

In a Master Risk Participation Agreement which I am reviewing for our bank to be used in international transactions, I am putting English law and English court exclusive jurisdiction.

I was looking at the same form but with U.S. law in which the State of New York law was applicable law and either New York state court or federal court sitting in New York was the jurisdiction.

Commercial law is state law. Thus, disputes will be handled by New York state court which will not be able to understand international transactions that well.

Federal court will understand international transactions but they have to apply New York state law which they do not have the final authority.

U.S. state or federal courts do not welcome foreigners at the bar whose transaction has no nexus with the U.S.

Lord Denning in one of his judgments welcomed foreigners at the bar whose transaction has no nexus with the U.K. but solely on the basis of English proper law and English jurisdiction clause in the contract.

Lord Johan Steyn understood this situation very well. He was a South African born international commercial lawyer who became Lord of Appeal in Ordinary, the Law Lord in the House of Lords.

Response by **Michael Evan Avidon** (admitted to practice law in the State of New York, a partner in the law firm of Moses & Singer LLP, and Co-Chair of its Banking & Finance practice group) and **David Rabinowitz** (admitted to practice law in the State of New York, a partner in the law firm of Moses & Singer LLP, and Co-Chair of its Litigation practice group):

Mr. Song writes that he is selecting English law and court jurisdiction for a standby letter of credit to be received by a Korean beneficiary from a Bangladeshi counterparty and for a Master Risk Participation Agreement for his bank, the Korea Exchange Bank. He gives, as some of the reasons for preferring English law and jurisdiction to New York law and jurisdiction, his views that the federal nature of United States law and courts are disadvantageous and that New York courts do not welcome cases lacking any nexus with New York.

We believe that Mr. Song's comments are not an accurate view of either New York courts or New York law.

Both the New York state and federal courts routinely handle cases involving international transactions. New York State, by statute enacted in 1984, expressly opened its courts to international cases having no nexus with New York as long as the parties choose New York as their forum and New York law to govern their transaction. N.Y. General Obligations Law §§ 5-1401 (permitting N.Y. choice of law for transactions not less than \$250,000) and 5-1402 (permitting N.Y. choice of forum for transactions not less than \$1,000,000). In addition, New York maintains a specialized branch of its trial court of general jurisdiction, called the Commercial Division, which handles only commercial cases, including international cases, and which is expert in the adjudication of such cases.

Federal courts have routinely applied state law in the United States since its founding and a divergence between federal and state interpretation of New York law is uncommon. When there is real uncertainty about a point of New York law in a federal case, the federal appeals court for the region including New York may and does refer cases to the highest New York state court for conclusive guidance.

With respect to letter of credit law in particular, New York has the advantage of having enacted a well thought out code for letters of credit, whereas our understanding is that English letter of credit law has to be derived from court rulings. Among other things, N.Y. Uniform Commercial Code Article 5 on Letters of Credit: (i) allows the incorporation of rules of practice (such as the UCP or ISP); (ii) states the independence principle; (iii) provides rules for the issuance, amendment, cancellation and duration of a letter of credit; (iv) requires reimbursement of the issuer for a complying presentation; (v) provides rules for the extraordinary defenses of fraud and forgery and protections for third parties such as confirming banks and other nominated persons; (vi) provides clear remedies for wrongful dishonor and clarity that the beneficiary's damages are not reduced by its failure to mitigate damages; and (vii) establishes a one year statute of limitations. In addition, N.Y. U.C.C. § 5-116 provides clear choice of law and forum rules, including allowing the choice of N.Y. law and forum in letter of credit matters regardless of the size of the transaction and regardless of whether New York has any nexus to the transaction.

Finally, international trade involving the United States dwarfs international trade involving the United Kingdom and New York has been the preeminent United States commercial law jurisdiction for more than 150 years. A State of New York appellate court put it well: "As a primary financial center and a clearinghouse of international transactions, the State of New York has a strong interest in maintaining its preeminent financial position and in protecting the justifiable expectation of the parties who choose New York law as the governing law of a letter of credit." *Banco Nacional De Mexico, S.A. v. Societe Generale*, 34 A.D.3d 124, 130, 820 N.Y.S.2d 588, 592, 2006 N.Y. App. Div. LEXIS 10829 (First Dept. 2006).

For all of these reasons, New York law and jurisdiction offer considerable advantages for international transactions.

YOUR VIEWS WANTED

DCW invites readers to comment on the following questions:

Have you ever encountered the situation where a bank adds its confirmation only to the transferred commercial letter of credit (as opposed to a standby) but not the original credit?

Have you ever encountered this situation in the transfer of a standby (whole and not partial transfer)?

Responses can be sent via e-mail to info@doccreditworld.com or faxed to +1-301-926-1265.