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## Destructive Rules of Certainty and Efficiency: A Study in the Context of Summary Judgment Procedure and the Uniform Customs and Practice for Documentary Credits

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**DESTRUCTIVE RULES OF CERTAINTY AND  
EFFICIENCY: A STUDY IN THE CONTEXT  
OF SUMMARY JUDGMENT  
PROCEDURE AND THE UNIFORM  
CUSTOMS AND PRACTICE FOR  
DOCUMENTARY CREDITS**

*Amy D. Ronner\**

I. INTRODUCTION

John Keats, the nineteenth-century British poet, once described achievement as follows:

[S]everal things dove-tailed in my mind, and at once it struck me what quality went to form a Man of Achievement, especially in Literature, and which Shakespeare possessed so enormously—I mean *Negative Capability*, that is, when a man is capable of being in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason.<sup>1</sup>

Keats' epiphany about literary attainment and the equation of greatness with "negative capability" or the capacity "of being in uncertainties" appears almost antipodal to what has become a predominant jurisprudential pursuit—the quest for certainty. In many areas of the law there is a resolve to accomplish what is, of course, virtually impossible—namely the eradication of mystery and doubt and instead, create rules of ostensible certainty, ones which are supposed to foster the swift and efficient resolution of disputes. As such, the negative capability that Keats worshipped is precisely what the law abhors.

Although the quest for certainty and efficiency manifests itself in many different areas of the law, it is strikingly apparent in the more frequent use of summary judgment procedure. Before the trilogy in 1986 of *Celotex Corp. v. Catrett*,<sup>2</sup> *Anderson v. Liberty Lobby, Inc.*,<sup>3</sup>

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1. Letter from John Keats to George and Thomas Keats (Dec. 22, 1817), in *THE COMPLETE POETICAL WORKS AND LETTERS OF JOHN KEATS* 277 (Horace E. Scudder ed. 1899).

2. 477 U.S. 317 (1986).

3. 477 U.S. 242 (1986).

and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,<sup>4</sup> federal courts were disinclined to grant summary judgment. The remarks of one federal district judge in Louisiana who said, "it is only with great caution and much soul-searching that such motions will be granted[.]" are among many portraying summary judgment as a creature of dispute.<sup>5</sup> More specifically, before the *Celotex* cases, courts tended to regard summary judgment as a harsh and terminal remedy and also feared that litigants would abuse the motion to delay the proceedings and harass their opponents.<sup>6</sup> Also, courts viewed the Seventh Amendment to the United States Constitution, which protects the jury trial in civil actions, as one of the most potent obstacles to the use of such a procedural device, which could dispense with trial.<sup>7</sup>

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4. 475 U.S. 574 (1986).

5. *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 543 F. Supp. 1255, 1261 (W.D. La. 1982), *aff'd*, 725 F.2d 300 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984). *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), is often treated as the seminal case on the restricted use of Rule 56. Other courts have openly criticized the summary judgment device. See *Avrick v. Rockmont Envelope Co.*, 155 F.2d 568, 571 (10th Cir. 1946) ("The power to pierce the flimsy and transparent factual veil should be temperately and cautiously used lest abuse reap nullification."); *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940) (cautioning against using summary judgment as "a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial"). See generally Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 760-62 (1974) (describing "slightest doubt" approach to summary judgment).

6. See, e.g., *Professional Managers, Inc. v. Fawer*, 799 F.2d 218 (5th Cir. 1986); *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884 (Fed. Cir. 1983). See generally Max Gitter, *Summary Judgment*, in FEDERAL CIVIL PRACTICE 1988, at 441 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5058, 1988) (recognizing potentially harmful uses and effects of summary judgment mechanism). For a discussion of the history of summary judgment, see Gary T. Foremaster, Comment, *The Movant's Burden in a Motion for Summary Judgment*, 1987 UTAH L. REV. 731, 731-34 (1987).

7. See, e.g., *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962) ("Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"); *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975) (noting summary judgment "is a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury"); see also William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441 (1992) (viewing summary judgment as shortcut depriving litigants of right to jury trial). For discussions of the Seventh Amendment and civil jury trials, see Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Morris S. Arnold, *A Modest Replication to a Lengthy Discourse*, 128 U. PA. L. REV. 986 (1980); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 162-70 (1988); Stephen A. Bullington, Comment, *Justice Delayed Is Justice Denied: Summary Judgment Following Anderson v. Liberty Lobby, Inc.*, 30 ARIZ. L. REV. 171, 177-78 (1988).

In 1986 the United States Supreme Court inaugurated a new era by emphasizing that summary judgment was not a “disfavored procedural shortcut, but rather . . . an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’”<sup>8</sup> Thus, the once mistrusted summary judgment device became apotheosized into the deity of certainty, one which could vanquish mystery and doubt and engender efficiency. As several commentators stated in their post-*Celotex* monograph:

Summary judgment has become recognized not only as a procedure for avoiding unnecessary trials on insufficient claims or defenses but also as an effective case management device to identify and narrow issues. The Supreme Court had it right almost ninety years ago when it said summary judgment “prescribes the means of making an issue.” Properly used, summary judgment helps strip away the underbrush and lay bare the heart of the controversy between the parties. It can offer a fast track to a decision or at least substantially shorten the track.<sup>9</sup>

Such praise was not anomalous after *Celotex*. Summary judgment was lauded as “a bench trial on paper”<sup>10</sup> and likened to a “procedural bullet in the litigator’s gun[,]” which could obliterate a “claim or affirmative defense” and thus, “sav[e] the expense of further trial preparation and the uncertainty of trial.”<sup>11</sup> In fact, commentators dubbed the year 1986 as the “turning point for Rule 56” and the Supreme Court’s promotion of the use of summary judgment not only “as an effective means of disposing of unmeritorious litigation in a system . . . already overwhelmed with business[,]” but also as “being a cause for celebration among most federal practitioners.”<sup>12</sup> A United States District Judge, who had been a proponent of Rule 56 reform and had once lamented that summary judgment was “plagued by confusion and uncertainty[,]”<sup>13</sup> rejoiced in what the judge saw as the be-

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8. *Celotex*, 477 U.S. at 327 (citing FED. R. CIV. P. 1).

9. Schwarzer et al., *supra* note 7, at 451-52.

10. Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 184 (1987).

11. Robert Holmes Bell, *Summary Judgment in the Federal Courts*, 69 MICH. B.J. 1038, 1038 (1990).

12. Robert M. Bratton, *Summary Judgment Practice in the 1990s: A New Day Has Begun—Hopefully*, 14 AM. J. TRIAL ADVOC. 441, 443 (1991).

13. William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 465 (1984).

gining of the Rule's vindication.<sup>14</sup> Also, after the *Celotex* decisions, one professor's comment that "the law waxes eloquent on the laudatory goal of judicial economy[,]" expressed what had become a penchant for touting summary judgment as the great panacea.<sup>15</sup> Commentators believed that the summary device could bring about certainty and efficiency in all sorts of complex disputes, like those involving patent infringement,<sup>16</sup> employment discrimination,<sup>17</sup> products liability,<sup>18</sup> antitrust conspiracy,<sup>19</sup> and trademark and unfair competition.<sup>20</sup>

The quest for certainty and efficiency also surfaces in a substantive area of the law, which governs particular disputes that arise out of letter of credit transactions. A letter of credit is an engagement by a bank or other issuer to pay a sum of money upon presentation of documents that comply with its terms.<sup>21</sup> Letter of credit transactions are often triangular and thus involve an issuer, a customer, and a benefici-

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14. William W. Schwarzer, *Summary Judgment: A Proposed Revision of Rule 56*, 110 F.R.D. 213, 213-14 (1986).

15. Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 433, 433 (1987).

16. See, e.g., Kenneth R. Adamo, *Basic Motion Practice for the Accused Infringer*, 15 AM. INTELL. PROP. L. ASS'N Q.J. 124, 153-74 (1987); see also Schwarzer et al., *supra* note 7, at 468-69 (discussing application of summary judgment to patent claims presenting mixed question of law and fact).

17. See, e.g., John V. Jansonius, *The Role of Summary Judgment in Employment Discrimination Litigation*, 4 LAB. LAW. 747 (1988).

18. See, e.g., Schwarzer et al., *supra* note 7, at 471.

19. See, e.g., Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986); Schwarzer et al., *supra* note 7, at 462-64; John R. Heninger, Note, *The Evolving Summary Judgment Standard for Antitrust Conspiracy Cases*, 12 J. CORP. L. 503 (1987).

20. See, e.g., Ronald S. Rosen & Douglas C. Fairhurst, *Summary Judgment in Copyright, Trademark & Unfair Competition Litigation*, in LITIGATING COPYRIGHT TRADEMARK, AND UNFAIR COMPETITION CASES 1992, at 525-33 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. G4-3893, 1992).

21. See generally definitions of letters of credit in Tennyson W. Grebenar & Thomas H. Young, *Letters of Credit in Limited Partnership Financing—A Legal Time Bomb?*, 13 COLO. LAW. 1989, 1990 (1984) (definitions and origins of letters of credit); Henry Harfield, *Are Letters of Credit an Endangered Species?*, 64 N.Y. ST. B.J. 38, 38 (1992) (discussing differences between letters of credit and other financial instruments); David C. Howard, *The Application of Compulsory Joinder, Intervention, Impleader and Attachment to Letter of Credit Litigation*, 52 FORDHAM L. REV. 957, 957 (1984) (how letters of credit operate); Victor F. Ptasznik, *The Letter of Credit Under Article 5*, 70 MICH. B.J. 299, 299 (1991) (how letters of credit operate). For leading works on letters of credit, see JOHN F. DOLAN, *THE LAW OF LETTERS OF CREDIT* (2d ed. 1991); J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* (3d ed. practitioners ed. 1988) (see App. B for sample forms for standby letters of credit).

ary.<sup>22</sup> The issuer is typically a bank to whom the customer has applied for credit and the customer is usually a buyer of goods.<sup>23</sup> The beneficiary, most often the seller, is the party that receives payment under the letter of credit.<sup>24</sup>

Letters of credit, inveterate commercial tools, which some legal historians have traced back about more than 3000 years,<sup>25</sup> were designed to provide sellers of goods in international transactions with assurance of payment when they properly delivered the goods.<sup>26</sup> That is, the letter of credit enabled the seller or beneficiary, who took the risk of shipping goods long distances, to count on being paid by a dependable financial institution. The letter of credit also bestowed upon the buyer or customer a modicum of protection because the buyer knew that the seller would not get paid until it transferred documents evidencing actual delivery of the goods.<sup>27</sup>

22. See Edgardo E. Colon, *Letters of Credit in Times of Business and Bank Failures*, 107 *BANKING L.J.* 6, 7 (1990); John F. Dolan, *The Correspondent Bank in the Letter-of-Credit Transaction*, 109 *BANKING L.J.* 396, 396 (1992) [hereinafter Dolan, *The Correspondent Bank*]; Howard, *supra* note 21, at 957-60; Jonathan D. Thier, Note, *Letters of Credit: A Solution to the Problem of Documentary Compliance*, 50 *FORDHAM L. REV.* 848, 848-49 (1982).

23. Colon, *supra* note 22, at 7; Howard, *supra* note 21, at 957-60; Thier, *supra* note 22, at 848-49.

24. Colon, *supra* note 22, at 7; Dolan, *The Correspondent Bank*, *supra* note 22, at 396; John F. Dolan, *Strict Compliance With Letters of Credit: Striking A Fair Balance*, 102 *BANKING L.J.* 18, 18 (1985) [hereinafter Dolan, *Strict Compliance*]; Howard, *supra* note 21, at 958-59; Thier, *supra* note 22, at 849.

25. For a discussion of the history of letters of credit, see generally Voest-Alpine Int'l Corp. v. Chase Manhattan Bank, N.A., 707 F.2d 680, 682 (2d Cir. 1983) (noting nearly 3000-year-old lineage of letter of credit). See also Boris Kozolchyk, *The Legal Nature of the Irrevocable Commercial Letter of Credit*, 14 *AM. J. COMP. L.* 395, 395-400 (1965-1966) (reviewing history of letters of credit); G. MALYNES, *THE ANCIENT LAW MERCHANT* ch. 14 (1686) (discussing history of letters of credit).

26. Diane Furman Dann, *Confirming Bank Liability in Letter of Credit Transactions: Whose Bank Is It Anyway?*, 51 *FORDHAM L. REV.* 1219, 1219-21 (1983); Grebenar & Young, *supra* note 21, at 1990; Thier, *supra* note 22, at 848-51.

27. Letters of credit are categorized as either "commercial" or "standby." As one commentator has succinctly explained:

A commercial letter of credit operates as a payment mechanism. It has its origin and primary use in the international sale of goods. The parties to a commercial credit open it with the understanding that the credit will be drawn upon in the ordinary course. On the other hand, the opposite expectation is associated with the issuance of a standby credit. It acts as a guaranty mechanism for the beneficiary in the event the account party defaults in a payment or performance obligation.

Ptasznik, *supra* note 21, at 299; see also Colon, *supra* note 22, at 8 (noting that letters of credit function like guarantees); Richard B. Potter, *The Drafting and Enforcement of Canada/United States Contracts: A Canadian Lawyer's Perspective*, 20 *INT'L LAW.* 3, 6-9 (1986) (explaining use of letters of credit to gain stronger position against general creditors).

One of the most fundamental doctrines in the law of letters of credit is the so-called independence principle.<sup>28</sup> Because the letter issues for the benefit of the seller, the "independence principle" obligates the issuer to pay when the seller presents the proper documents. The issuer cannot be relieved of this obligation even if the customer complains of problems with the underlying transaction. As courts and commentators have put it, "a letter of credit is independent of the primary contract of sale between the buyer and the seller."<sup>29</sup>

The independence principle is, of course, another rule of certainty and efficiency. As one noted expert in the field has explained, "the independence principle insulates the letter of credit from disputes over the performance of collateral agreements and allows the letter of credit to function as a swift and certain payment mechanism."<sup>30</sup> As another expert has summed it up, "[p]rompt and certain payment is the [very] feature of the credit that motivates the beneficiary to insist that his obligor (the account party) [bank's customer] in the underlying transaction cause the bank to open the credit in the first place."<sup>31</sup>

There is another fundamental doctrine in the law of letters of credit—that of strict compliance.<sup>32</sup> The rule of strict compliance

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28. See generally Colon, *supra* note 22, at 7 (honoring of drafts required upon presentation of documents despite conditions of underlying contract); Grebenar & Young, *supra* note 21, at 1990 (noting letters of credit are independent from primary contract between buyer and seller); Henry Harfield, *Identity Crises in Letter of Credit Law*, 24 ARIZ. L. REV. 239, 240 (1982) (noting strict construction implies letter of credit terms are consulted but not terms or considerations relevant to other relationships); Gerald T. McLaughlin, *Letters of Credit and Illegal Contracts: The Limits of the Independence Principle*, 49 OHIO ST. L.J. 1197, 1197 (1989) (asserting independence principle insulates letter of credit from disputes arising out of collateral agreements); Dean Pawlowic, *Letters of Credit: A Framework for Analysis of Transfer, Assignment, Negotiation and Transfer by Operation of Law*, 39 WAYNE L. REV. 1, 5 (1992) (noting that independence principle distinguishes between guarantees and other similar terms); Ptasznik, *supra* note 21, at 300 (listing independence principle as second of three governing principles); Thier, *supra* note 22, at 851-52 (noting letter of credit is engagement to support agreement to pay money under contract).

29. *Sztejn v. J. Henry Schroder Banking Corp.*, 31 N.Y.S.2d 631, 633 (Sup. Ct. 1941); see *Colo. Nat'l Bank v. Board of County Comm'rs*, 634 P.2d 32, 36 (Colo. 1981); see also *supra* note 28 and accompanying text (providing examples of how independence principle obligates issuer).

30. McLaughlin, *supra* note 28, at 1197.

31. Dolan, *Strict Compliance*, *supra* note 24, at 18 (emphasis added) (citations omitted).

32. For articles containing discussions of strict compliance in letter of credit transactions, see *Financing: Letter of Credit Requires Strict Compliance*, REAL EST. L. REP., Sept. 1992, at 6; P. Georgia Bullitt & Laura I. Lagomarsino, *Protecting Intellectual Property Rights Abroad: New Uses for Political Risk Insurance and Standby Letters of Credit*, 5 INT'L TAX & BUS. LAW. 283, 315-16 (1987); Dolan, *The Correspondent Bank*, *supra* note

cooperates with the independence principle in aiming to accomplish certainty and efficiency. Under the rule of strict compliance, the bank reviewing the documents must determine whether they strictly comply with the requirements of the letter of credit. If the documents do not comply with the letter in *any* respect, the bank *must* dishonor them. In this way, the rule of strict compliance aims to make the bank's task purely ministerial and frees the bank from the exercise of discretion.

In essence, the strict-compliance rule precludes the bank from looking beyond the face of the documents to the underlying transaction. As such, the rule serves to ensure adherence to the independence principle by keeping the letter of credit separate from the business deal and in so doing helps to advance the goal of certainty and efficiency. Most significantly, one of the only real exceptions to the independence principle is for fraud.<sup>33</sup> That is, in some instances, fraud will excuse a bank from honoring documents even though they appear on their face to comply with the letter.

Because letters of credit are part of so many commercial transactions and because additional parties become involved in and thus complicate the configuration, many disputes can and do arise in the letter of credit context.<sup>34</sup> Consequently, the promotion of a certain

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22, at 398-99; Dolan, *Strict Compliance*, *supra* note 24; John F. Dolan, *Letter-of-Credit Disputes Between the Issuer and Its Customer: The Issuer's Rights Under the Misnamed "Bifurcated Standard."* 105 *BANKING L.J.* 380, 380-81 (1988) [hereinafter Dolan, *Letter-of-Credit Disputes*]; Stanley F. Farrar & Henry Landau, *U.C.C. Survey: Letters of Credit*, 40 *BUS. LAW.* 1177, 1177 (1985); Albert J. Givray et al., *Letters of Credit*, 46 *BUS. LAW.* 1581, 1588-90 (1991) [hereinafter Givray et al., *Letters of Credit* (1991)]; Albert J. Givray, *Letters of Credit*, 45 *BUS. LAW.* 2381, 2383-93 (1990) [hereinafter Givray, *Letters of Credit* (1990)]; Albert J. Givray, *Letters of Credit*, 44 *BUS. LAW.* 1567, 1571-76 (1989) [hereinafter Givray, *Letters of Credit* (1989)]; Harfield, *supra* note 21 at 39; Gerald T. McLaughlin, *On the Periphery of Letter-of-Credit Law: Softening the Rigors of Strict Compliance*, 106 *BANKING L.J.* 4 at 4-41 (1989) [hereinafter McLaughlin, *On the Periphery*]; Tracy L. Howard, Note, *Gulf South Bank & Trust Company v. Holden: A Warning to Bankers Honoring Letters of Credit*, 52 *LA. L. REV.* 437, 445 (1991); Thier, *supra* note 22 at 861-76.

33. See James G. Barnes & James E. Byrne, *Letters of Credit*, 48 *BUS. LAW.* 1635, 1639-40 (1993); James E. Byrne, *Letters of Credit*, 43 *BUS. LAW.* 1353, 1374-77 (1988); Dolan, *The Correspondent Bank*, *supra* note 22, at 399-400; Stanley F. Farrar, *Letters of Credit*, 42 *BUS. LAW.* 1307, 1311-12 (1987) [hereinafter Farrar, *Letters of Credit* (1987)]; Stanley F. Farrar, *Letters of Credit*, 39 *BUS. LAW.* 1319, 1321-25 (1984) [hereinafter Farrar, *Letters of Credit* (1984)]; Farrar & Landau, *supra* note 32, at 1181-84; Givray et al., *Letters of Credit* (1991), *supra* note 32, at 1641-49; Givray, *Letters of Credit* (1989), *supra* note 32, at 1628-31; McLaughlin, *supra* note 28 at 1197-1217, 1235.

34. See Byrne, *supra* note 33, at 1353, stating that [m]ore significant than any one development affecting the law of letters of credit in 1987 was the increase in the amount of litigation. More letter of credit opinions were reported in the last twelve months than appeared in the first seventy-five years of this century, and there is no indication that this trend is slowing down.



and efficient resolution of such disputes has been the subject of much scholarship and an issue with which courts and legislatures have seriously grappled.

The Uniform Commercial Code (UCC), as enacted in many states, and the Uniform Customs and Practice for Documentary Credits (UCP) are two main sources of law governing letters of credit.<sup>35</sup> Most courts treat the UCP, a product of the Commission on Banking Technique and Practice of the International Chamber of Commerce, as if it were legislation. The UCP, however, does not automatically apply to a transaction. Instead, it almost always comes into play when the parties to the transaction agree that the UCP will govern them, and the parties actually put a statement to that effect in the letter of credit itself.<sup>36</sup> The provisions of the UCP, which deal only with letters of credit issued by banks, aim to promote certainty and efficiency not just with respect to the letter of credit as a payment mechanism, but also in connection with the resolution of disputes that arise when letter of credit transactions do in fact go awry.

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*See also* Colon, *supra* note 22, at 6 ("To some extent, the increased litigation in this area comes as a result of the increase in the number of players and their learning the rules of the game."); Farrar & Landau, *supra* note 32, at 1177 ("[T]he cases tended to deal largely with issues of nonconforming documents or fraud in the transaction. Recent bank failures have given rise to further litigation involving letters of credit . . ."); Givray, *Letters of Credit* (1990), *supra* note 32, at 2381 ("Unbelievably, letters of credit saw more action in court during 1989 than 1988, itself a peak year. Much of this action poses deeper and darker questions for lawyers and judges than in past years." (citation omitted)); Givray, *Letters of Credit* (1989), *supra* note 32, at 1567 ("The cases poured ever forth in 1988."). For a discussion of multiparty letter of credit litigation, see Howard, *supra* note 21, at 964. *See also infra* notes 69-73 (fraud as exception to independence principle).

35. Article 5 of the UCC usually governs the letter of credit in domestic transactions. The first version of the International Chamber of Commerce, Uniform Customs and Practice for Documentary Credits came out in 1933. The International Chamber of Commerce had it revised in 1951, 1962, 1974, and 1983. *See* Givray et al., *Letters of Credit* (1991), *supra* note 32, at 1581-83. The International Chamber of Commerce had it revised again in 1993 and that version is in force as of January 1, 1994. UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (Int'l Chamber of Commerce 1993) [hereinafter UCP]. Section 1-1-2(3), UCC allows parties to a letter of credit to give the UCP priority over the UCC where the latter does not provide otherwise. *See* N.Y. U.C.C. § 5-102(4) (McKinney 1991 & Supp. 1994) (allowing parties to choose coverage by UCP in lieu of UCC); *see also* ALA. CODE § 7-5-102(4) (1993); ARIZ. REV. STAT. ANN. § 44-2702(D) (1994) (repealed 1984) (renumbered § 47-5102(D) allowing parties to govern their transaction according to the UCP); MO. ANN. STAT. § 400.5-102(4) (Vernon 1994) (subjecting letters of credit to UCP unless otherwise agreed). *See generally* discussion in Bullitt & Lagomarsino, *supra* note 32, at 316 n.256 (citing U.C.C. § 1-102(3) as allowing parties to choose UCP over UCC where UCC does not otherwise stipulate).

36. *See* Farrar, *Letters of Credit* (1984), *supra* note 33, at 1328-30 (discussing problems with invoking UCP's election).

With respect to the present Article, the substantive law of letters of credit and the procedural device of summary judgment are only exponents of this Author's broader thesis about the potentially deadly and self-defeating proclivities of rules of certainty and efficiency. Concededly, the problems and limitations associated with rules that minister to certainty and efficiency, of course, surface in so many areas of the law. The focus of this Article, however, which is designed to be manageably narrow, is on only two separate provisions of the UCP, ones that come into play in particular letter of credit disputes.

In Part I, I analyze two doctrines which are built into the UCP—strict compliance and automatic preclusion. As discussed above, the rule of strict compliance precludes a bank from honoring a letter of credit where there is even the slightest discrepancy between the documents and the letter. Most courts that have construed the UCP have determined that it incorporates the strict-compliance rule.<sup>37</sup>

The rule of preclusion, another component of the UCP, which I also address in Part I, is essentially a sanction provision. The UCP gives a bank "a reasonable time" to examine documents and decide whether to accept or reject them.<sup>38</sup> The UCP also requires that the bank that decides to reject the documents provide its rejection notification "by telecommunication or . . . by other expeditious means."<sup>39</sup> That notification of rejection must also delineate the fatal discrepancies and describe the fate of the rejected documents.<sup>40</sup> The UCP, moreover, bars the bank that fails to comply with the timeliness or rejection notification requirements from dishonoring the documents.<sup>41</sup>

Also in Part I, I explain how the rule of strict compliance and the sanction of automatic preclusion, both of which serve the same goal of certainty and efficiency in letter of credit transactions, can and sometimes do become fierce combatants. At that juncture, I introduce what is denominated the "rectangular" transaction, which occurs when an additional party, usually a second bank, steps into the letter of credit triangle.<sup>42</sup> Although transactions can become rectangular for

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37. See *infra* note 49 and accompanying text.

38. UCP, art. 13(b) (1993). The 1993 revision of the UCP clarifies that the time frame is "not to exceed seven banking days following the day of receipt of the documents." *Id.*

39. UCP, art. 14(d)(i) (1993). The 1993 revision of the UCP clarifies that the rejection notification must be "no later than the close of the seventh banking day following the day of receipt of the documents." *Id.*

40. *Id.* art. 14(d)(ii).

41. *Id.* art. 14(e).

42. See Dolan, *The Correspondent Bank*, *supra* note 22, at 396 ("In international practice, the transaction is usually rectangular, for a fourth party, the correspondent bank, a U.S. bank in this model, enters the transaction between the issuer and the seller."); see also

many different reasons, the rectangle is usually the product of a deal involving an issuer and beneficiary, which reside in different countries; or one in which a beneficiary simply does not trust the credit worthiness of the issuer.<sup>43</sup> In either instance, the beneficiary will often insist that a bank in its own locale serve as a confirming bank, which will be the one to actually pay out on the letter of credit.

Part I of this Article closes with a description of a dispute that arises in the context of a rectangular letter of credit transaction: namely, one between the issuing bank and confirming bank. The dispute involves a confirming bank that violates the rule of strict compliance by wrongfully paying out on nonconforming documents as well as an issuing bank that triggers the preclusion sanction by failing to notify the confirming bank of its rejection of the same documents in a timely and proper fashion. One of the things that make such disputes so interesting is that they typically involve an ostensibly villainous beneficiary that perpetrates a fraud on both banks and absconds with the money. Thus, when the problem actually reaches the court, the issue becomes which of the two banks—both of them victims—will have to bear the loss. But what really makes this battle between the banks so significant is that it is an illustrative fray in the larger war, which is really one between two rules of certainty and efficiency.

In Part II, I address a seminal Second Circuit decision in the rectangular dispute of *Bank of Cochín, Ltd. v. Manufacturers Hanover Trust Co.*,<sup>44</sup> in which the court had to decide which bank must bear the loss. The *Cochín* case, decided under the UCP, involved a confirming bank that violated the rule of strict compliance as well as an issuing bank that triggered the preclusion sanction.

It is here, however, in connection with my analysis of *Cochín* that I return to my focus on the supposedly certain and efficient mechanism of summary judgment and try to expose what is really the internal repugnancy of *Cochín*. That is, both the federal district court and appellate court in *Cochín* appear to kowtow to summary judgment as

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Colon, *supra* note 22, at 7 (referring to second bank as "confirming" bank); Dann, *supra* note 26 and accompanying text (defining "confirming" bank as second bank in a rectangular transaction).

43. See *infra* notes 63-64 and accompanying text (providing examples of circumstances which lead to rectangular transactions).

44. 612 F. Supp. 1533 (S.D.N.Y. 1985), *aff'd*, 808 F.2d 209 (2d Cir. 1986). Where specifically referring to the trial or appellate court decisions, subsequent referrals and citations to the opinion of the District Court for the Southern District of New York will be to *Cochín I*, and references to the opinion of the Second Circuit Court of Appeal will be to *Cochín II*.

the shaman that can lead to the expeditious resolution of such letter of credit cases. The Second Circuit, however, at least implicitly, contemplates a whole sphere of mystery and doubt. In its reasoning, the Second Circuit envisions a rectangular letter of credit dispute, which, hypothetically presenting enough uncertainty, will—and perhaps should—inexpeditiously go to trial. Stated otherwise, in *Cochin II*, the Second Circuit enumerates specific factors, which had they existed in the *Cochin* case itself, would have made the particular dispute a *factual* one, one not suited for summary resolution. At the close of Part II, I propose that the approach, which the Second Circuit implicitly endorsed, is the proper one. That is, the Second Circuit considers not just fairness but also the salutary objective of preventing fraud upon banks and allows both policies to temper the goal of certainty and efficiency.

In Part III, I analyze an Eleventh Circuit case, *Banque de l'Union Haitienne, S.A. v. Manufacturers Hanover International Banking Corp.*,<sup>45</sup> which followed *Cochin*. What makes the *Banque* decision both interesting and disturbing is that although it presents the precise circumstance that the Second Circuit in *Cochin II* indicated might and should at the very least survive summary judgment and although it purports to adhere to *Cochin*, *Banque* actually defies *Cochin* by resolving such a letter of credit dispute on a motion for summary judgment.

At the end of Part III, I explain how in *Banque*, both the district court and the Eleventh Circuit, in seeking to advance what had become mere abstractions—certainty and efficiency—undermined what is, in essence, the whole basis behind the judicial process. Specifically, in *Banque*, the blind reverence for certain and efficient results engendered not only an unfair result of forcing a less culpable party to bear a substantial loss, but also created a precedent which could effectually facilitate bank fraud.

In the conclusion of this Article, borrowing the reasoning of the Second Circuit in *Cochin II*, I suggest how cases like *Banque* should be decided. In so doing, I return to my broader thesis that rules of certainty and efficiency can be as self-defeating as scorpions that turn their stingers upon themselves. I also, reinvoking Keats' concept of "negative capability," suggest that there need not be such a clear demarcation between literary and legal aspirations.<sup>46</sup> Specifically, law

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45. 787 F. Supp. 1416 (S.D. Fla. 1991), *aff'd per curiam*, 959 F.2d 971 (11th Cir. 1992) (opinion on file with *Loyola of Los Angeles Law Review*).

46. KEATS, *supra* note 1, at 277.

can and should, at least on occasion, aspire toward what poets, like Keats, have ascribed to great literary achievement—that is, the cultivation of some capacity of “being in uncertainties.”<sup>47</sup>

## II. POTENTIALLY COMBATANT RULES OF CERTAINTY AND EFFICIENCY: STRICT COMPLIANCE AND AUTOMATIC PRECLUSION

The rules of strict compliance and preclusion are part of the UCP. Most of the time, they coexist quite peacefully.

Under what was Article 15, “[b]anks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit.”<sup>48</sup> Most courts apply the doctrine of strict compliance to Article 15.<sup>49</sup> As one federal appellate court put it:

[L]etters of credit are subject to a rule of “strict compliance.” Documents presented for payment must precisely meet the requirements set forth in the credit. Any discrepancy entitles the bank to refuse payment, and the bank bases its decision on the documents alone.<sup>50</sup>

Strict compliance means precisely that.<sup>51</sup> As one court has explained it, “[c]ompliance with the terms of a letter of credit is not like

47. *Id.*

48. UCP art. 15 (1983). The above-quoted language in Article 15 is essentially the same in Article 13(a) of the 1993 revision. See UCP art. 13(a) (1993).

49. See generally *Kerr-McGee Chem. Corp. v. FDIC*, 872 F.2d 971 (11th Cir. 1989) (issuing bank required to state all reasons for dishonoring credit when first presented); *Bank of Cochín, Ltd. v. Manufacturers Hanover Trust Co.*, 808 F.2d 209 (2d Cir. 1986) (holding twelve to thirteen days insufficient for meeting requirement of notification without delay). For a list of cases holding that documents must conform to the terms of the letter of credit, see Bullitt & Lagomarsino, *supra* note 32, at 315-16 n.252. Under the 1983 UCP, the parties may “instruct the bank beforehand to pay the beneficiary upon presentation of any number of documents indicating that goods to be paid for under a letter of credit had been shipped.” *Id.* at 316 (footnote omitted); see also Clive M. Schmitthoff, *The New Uniform Customs for Letters of Credit*, 1983 J. Bus. L. 193, 195 (stating that under 1983 UCP “obligation of the bank depends on certain conditions, such as the presentation of specified documents”).

50. *Kerr-McGee Chem. Corp.*, 872 F.2d at 973 (citing *Fidelity Nat'l Bank v. Dade County*, 371 So. 2d 545, 548 (Fla. Dist. Ct. App. 1979)). Because neither the UCC nor the UCP supplies a test for judging document compliance, the standard has been left to state law. *Integrated Measurement Sys., Inc. v. International Commercial Bank of China*, 757 F. Supp. 938, 943 (N.D. Ill. 1991).

51. A few courts, although purporting to follow the doctrine of strict compliance, have construed it as “encompassing an allowance for arguable discrepancies that are minuscule and not misleading.” *Integrated Measurement Sys.*, 757 F. Supp. at 944; see also *Flagship Cruises, Ltd. v. New England Merchants Nat'l Bank*, 569 F.2d 699, 705 (1st Cir. 1978)

pitching horseshoes. No points are awarded for being close."<sup>52</sup> Thus, "[i]f the documents do not on their face meet the requirements of the credit, the fact that a defect is a mere 'technicality' does not matter[.]"<sup>53</sup> and even the slightest discrepancy precludes the bank from honoring the letter.<sup>54</sup>

There is nothing especially philosophical about the doctrine of strict compliance.<sup>55</sup> It is a rule firmly rooted in commercial reality and serves the goals of certainty and efficiency. First, the rule "provide[s] the beneficiary a source certain of payment in the event the issuer's

(holding "a variance . . . is not fatal if there is no possibility that the documents could mislead the paying bank to its detriment"). For a discussion of the relaxation of the strict compliance standard, see Bullitt & Lagomarsino, *supra* note 32, at 316; Dolan, *Strict Compliance*, *supra* note 24, *passim*; Dolan, *Letter-of-Credit Disputes*, *supra* note 32, at 386 & n.7; McLaughlin, *On the Periphery*, *supra* note 32, *passim*.

52. *Fidelity Nat'l Bank*, 371 So. 2d at 546; see also *Voest-Alpine Int'l Corp. v. Chase Manhattan Bank, N.A.*, 707 F.2d 680, 683 (2d Cir. 1983) ("Documents nearly the same as those required are not good enough."); *Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank*, 528 F.2d 802, 806 (4th Cir. 1975) ("There is no room for documents which are almost the same, or which will do just as well." (citing *Equitable Trust Co. v. Dawson Partners, Ltd.*, 27 Lloyd's List Law Rpts. 49, 52 (1926))).

53. *Kerr-McGee Chem. Corp.*, 872 F.2d at 973.

54. See, e.g., *Beyene v. Irving Trust Co.*, 762 F.2d 4 (2d Cir. 1985) (holding misspelled name on bill of lading entitled bank to refuse to honor letter); *Voest-Alpine Int'l Corp.*, 707 F.2d at 683, 686 (stating there is ground for dishonor where bills of lading indicating receipt on board of scrap metal were dated Jan. 31 and inspection certificates revealed that cargo was loaded between Feb. 2 and 6); *Courtaulds N. Am., Inc.*, 528 F.2d at 803, 806 (stating discrepancy between terms "100% acrylic yarn" and "imported acrylic yarn" was ground for dishonor); *Texpor Traders, Inc. v. Trust Co. Bank*, 720 F. Supp. 1100, 1115 (S.D.N.Y. 1989) (holding missing room number, misdescription of address on invoice, and omission of word "Oxford" as grounds for dishonor).

55. There are supporters of the doctrine of strict compliance that have launched an attack on the less rigorous substantial compliance standard. By way of example, one opinion is that:

Strict compliance invites certainty by setting a standard by which all parties to the transaction can gauge conforming performance. Substantial compliance, on the other hand, invites discretion by the issuer, who must determine whether compliance under the vague standard of "almost as good" is good enough. By diluting the traditional literal standard of compliance, courts have forced issuers to assume the role of judges of first impression who must calculate, in a short period of time, whether the beneficiary would have an action for wrongful dishonor or, conversely, whether honor would be a bar to reimbursement. Such uncertainty guarantees lawsuits, not payment, and therefore, frustrates the basic purpose of the letter of credit.

Thier, *supra* note 22, at 866-67 (footnotes omitted); see also Dolan, *Strict Compliance*, *supra* note 24, at 26-32 (criticizing substantial-compliance test as vague and unfair, but essentially viewing estoppel law as healthy alternative, mitigating potential harshness of strict-compliance standard); McLaughlin, *On the Periphery*, *supra* note 32, at 5 (asserting effect of courts applying strict compliance in conjunction with other doctrines derived from contract law, equity, and banking, results in softening of "the rigors of strict compliance" and application of standard "more akin to substantial compliance").

customer refuses to pay,"<sup>56</sup> and helps the beneficiary by "ensur[ing] that banks . . . will be able to act quickly, enhancing the letter of credit's fluidity."<sup>57</sup>

Second, the doctrine is designed to protect banks. Because of the independence principle,<sup>58</sup> which means that banks deal "only with documents, not with merchandise[,]"<sup>59</sup> the doctrine, which forces the beneficiary to strictly comply with the terms of the letter of credit, aims to keep banks from becoming "embroiled in disputes between the buyer and the seller."<sup>60</sup> Further, since the "issuing bank, or a bank that acts as [a] confirming bank for the issuer, takes on an absolute duty to pay the amount of the credit to the beneficiary,"<sup>61</sup> strict compliance with the letter is "essential so as not to impose an obligation upon the bank that it did not undertake and so as not to jeopardize the bank's right to indemnity from its customer."<sup>62</sup>

There are, however, letter of credit transactions which have a rectangular configuration.<sup>63</sup> These involve both an issuing bank and a

56. *Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230, 235 (5th Cir. 1983).

57. *Voest-Alpine Int'l Corp.*, 707 F.2d at 682-83; see also Dolan, *Strict Compliance*, *supra* note 24, at 18-19 (stating that most courts recognize beneficiary's expectation of prompt and certain payment).

58. See *supra* notes 28-29 and accompanying text. As Dolan has explained, "[w]hen the beneficiary presents documents that are not facially conforming, the issuer cannot investigate the underlying transaction to determine whether the defects are significant or insignificant. Such investigation destroys the advantages of the credit device—certainty and celerity. Once the issuer begins the inquiry, those advantages evaporate." Dolan, *Letter of Credit Disputes*, *supra* note 32, at 386.

59. *Courtaulds N. Am., Inc.*, 528 F.2d at 805; see also *Murphy v. FDIC*, 12 F.3d 1485, 1489 (9th Cir. 1993) ("[L]etters of credit, by their very nature, represent an obligation of the issuing bank independent of the relationship between the bank's customer, who asked that the letter of credit be issued, and the beneficiary of the letter of credit."). It has been emphasized that "[i]f the letter of credit is to retain its utility as a financing device, the standard of strict compliance must be revitalized and consistently applied. Such a standard ensures that prior to honor, the beneficiary has performed the protective conditions prescribed by the customer." Thier, *supra* note 22, at 856 (footnotes omitted).

60. *Courtaulds N. Am., Inc.*, 528 F.2d at 805-06; see also Thier, *supra* note 22, at 852 ("To involve the issuer in any of the myriad of performance problems in the underlying transaction would frustrate the definite nature of the payment promise. Letter of credit insulation emphasizes that performance under a letter is entirely a 'paper' transaction.") (footnotes omitted).

61. *Beyene*, 762 F.2d at 6.

62. *Id.* (quoting *Voest-Alpine Int'l Corp.*, 707 F.2d at 683). Because the issuing bank is viewed as the confirming bank's customer, "the confirming bank has the same obligations to the issuing bank . . . as the issuing bank has to the original customer." *Banque Paribas v. Hamilton Indus. Int'l, Inc.*, 767 F.2d 380, 384 (7th Cir. 1985).

63. See Dolan, *The Correspondent Bank*, *supra* note 22, at 396-97, for a discussion of the rectangular transaction in international practice. UCC § 5-103(1)(f) defines "confirming bank" as "a bank which engages either that it will itself honor a credit already issued by

confirming bank. Letter of credit transactions become rectangular when a beneficiary feels dubious about the issuer because it is located in a distant country or because the beneficiary simply mistrusts the credit worthiness of the issuer.<sup>64</sup> In such instances, the beneficiary will require that a local bank be the confirming bank or the bank that will actually pay out on the letter of credit.

When a confirming bank becomes part of the transaction, there is an additional purpose behind the doctrine of strict compliance. Although it is not unusual that the confirming bank is "a local firm in cahoots with the beneficiary,"<sup>65</sup> the problem is that once the confirming bank pays that beneficiary, the issuing bank is obliged to reimburse it.<sup>66</sup> Consequently, some courts have recognized that in such rectangular transactions with both an issuing and confirming bank, it is "all the more important that the confirming bank be required to comply with the literal terms of the letter of credit."<sup>67</sup> Thus, by holding confirming banks to the strict compliance standard, the rule serves

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another bank or that such a credit will be honored by the issuer or a third bank." U.C.C. § 5-103(1)(f) (1990); *see also* Colon, *supra* note 22, at 7 (explaining seller may present requisite documents for credit from confirming bank which then presents documents to issuing bank for payment); Dann, *supra* note 26, at 1219-21 (explaining confirming bank's role in international transactions as providing additional security to beneficiary but adding risk to customer).

64. *See* Bullitt & Lagomarsino, *supra* note 32, at 317; Colon, *supra* note 22, at 7; Dann, *supra* note 26, at 1219-20.

65. *Banque Paribas*, 767 F.2d at 384; *see also* ROBERT BRAUCHER & ROBERT A. RIEGERT, *INTRODUCTION TO COMMERCIAL TRANSACTIONS* 367 (1977) ("The seller who lives in a country different from that of the buyer may insist upon dealing with a bank in his own country; he may, therefore, require that a credit issued in the buyer's country be confirmed by a bank in his own country."); HENRY HARFIELD, *BANK CREDITS AND ACCEPTANCES* 37 (5th ed. 1974) ("The beneficiary may prefer to be secured by the liability of a bank which is close at hand."); J. WHITE & ROBERT SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 18-1, at 710 (2d ed. 1980) (discussing confirming bank's potential liability to beneficiary). For an analysis of the role of the confirming bank and how, in letter of credit transactions, it places additional risks on the customer, *see* Dann, *supra* note 26, at 1234-37.

66. In Dann, *supra* note 26, at 1228-30, the author presents a hypothetical that illustrates how the presence of a confirming bank in a letter of credit transaction can place additional risks on the customer. As she explains:

Because the confirming bank deals directly with the beneficiary, it is often in a better position than the issuer or customer to recognize forgery. However, because of geographical proximity, the confirming bank is often closely allied with the beneficiary, and therefore may fail to fulfill the limited duty of good faith imposed upon every party in a transaction governed by the Code. Because the confirming bank is not amenable to suit by the ultimate customer, the customer assumes the risk of the confirming bank's bad faith.

*Id.* at 1230-31 (footnotes omitted).

67. *Banque Paribas*, 767 F.2d at 384.



to "minimize the likelihood that a fraudulent demand for payment will be made and accepted."<sup>68</sup>

It, of course, makes sense that fraud is a well-recognized exception to the independence principle.<sup>69</sup> Under certain circumstances, the UCC contemplates that fraud may relieve a bank from its obligation to pay the beneficiary.<sup>70</sup> As commentators have explained, "[i]f [the] issuer were always bound by the *face* of presented papers, even when seemingly clean in form but fouled by forgery or other fraud, then letters of credit would be so prone to abuse as to become useless."<sup>71</sup> Thus, fraud may provide an issuer with a defense in a suit against it for wrongful dishonor.<sup>72</sup> Fraud may also be a basis for a court to enjoin a bank's payment on documents or a beneficiary's draw or both.<sup>73</sup>

The rule of preclusion, also part of the UCP, is contained in what was Article 16. Article 16 gives the issuing bank a "reasonable time in which to examine the documents and to determine . . . whether to take up or to refuse the documents."<sup>74</sup> The provision also states:

If the issuing bank decides to refuse the documents, it must give notice to that effect without delay by telecommunication or, if that is not possible, by other expeditious means, to the bank from which it received the documents (the remitting

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68. *Id.*

69. See Dolan, *The Correspondent Bank*, *supra* note 22, at 399-400; Grebenar & Young, *supra* note 21, at 1993-94; McLaughlin, *supra* note 28, at 1197; Pawlowic, *supra* note 28, at 6.

70. UCC § 5-114(2) (1990) constitutes the exclusive statutory scheme by which a letter of credit payment can be prevented or avoided. See Barnes & Byrne, *supra* note 33, at 1639-41; Byrne, *supra* note 33, at 1374-80; Dolan, *The Correspondent Bank*, *supra* note 22, at 399; Farrar, *Letters of Credit* (1984), *supra* note 33, at 1321-25; Farrar & Landau, *supra* note 32, at 1181-84; Givray, *Letters of Credit* (1989), *supra* note 32, at 1620-31; Givray et al., *Letters of Credit* (1991), *supra* note 32, at 1641-51; Grebenar & Young, *supra* note 21, at 1994; McLaughlin, *supra* note 28, at 1197; Pawlowic, *supra* note 28, at 6.

71. Givray et al., *Letters of Credit* (1991), *supra* note 32, at 1642 n.326.

72. See Barnes & Byrne, *supra* note 33, at 1639-41; Byrne, *supra* note 33, at 1378-79; Grebenar & Young, *supra* note 21, at 1994.

73. Byrne, *supra* note 33, at 1374-75; Givray, *Letters of Credit* (1989), *supra* note 32, at 1620-31; Givray et al., *Letters of Credit* (1991), *supra* note 32, at 1641-49; Grebenar & Young, *supra* note 21, at 1994.

74. UCP art. 16(c) (1983). Under Article 13(b) of the 1993 revision, the reasonable time is "not to exceed seven banking days following the day of receipt of the documents." *Id.* art. 13(b) (1993).

bank) . . . . Such notice must state the discrepancies in respect of which the issuing bank refuses the documents . . . .<sup>75</sup>

In addition, under that same Article, a bank that fails to comply with such UCP's provisions is "precluded from claiming that the documents are not in accordance with the terms and conditions of the credit."<sup>76</sup>

There are essentially two components of the timeliness and notification requirements of Article 16.<sup>77</sup> The issuer has a "reasonable time" to examine the presented papers and to decide whether to accept or reject them.<sup>78</sup> If the issuer does decide to reject the papers, it must provide such notification "without delay by telecommunication or, if that is not possible, by other expeditious means."<sup>79</sup> Also, when a bank decides to reject the documents, the notification of dishonor must spell out the discrepancies in the papers, which caused the issuer to reject them,<sup>80</sup> and state whether the issuer is holding the papers at the presenter's disposal or returning them to the presenter.<sup>81</sup>

The prominent feature of Article 16, however, is what one set of commentators have called its "sting" or "automatic preclusion" provision.<sup>82</sup> Under Article 16, an issuer that has not complied with any timeliness or dishonor notification requirement is simply barred from dishonoring.

The principles behind the rule of preclusion are really not inimical to those underlying the rule of strict compliance. Like the rule of strict compliance, Article 16 is just another vassal to the lord of certainty and efficiency. It serves to encourage the swift examination of the documents and expeditious notification of dishonor, which, in turn, aim to enhance the fluidity of the letter of credit.<sup>83</sup>

Also, the whole focus of Article 16, of course, is on the reviewing of documents, a process which purposely divorces itself from anything going on with respect to the underlying transaction. Such an empha-

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75. *Id.* art. 16(d) (1983). Under Article 14(d) of the 1993 revision, the notification must not be "later than the close of the seventh banking day following the day of receipt of the documents." *Id.* art. 14(d).

76. *Id.* art. 16(e) (1983). In the 1993 revision, the preclusion is contained in Article 14(e). *Id.* art. 14(e) (1993).

77. For a discussion of Article 16, see Givray et al., *Letters of Credit* (1991), *supra* note 32, at 1626-27.

78. UCP art. 16(c) (1983). See *supra* note 38 for the 1993 revision.

79. UCP art. 16(d) (1983). See *supra* note 39 for the 1993 revision.

80. UCP art. 16(d) (1983).

81. *Id.*

82. Givray et al., *Letters of Credit* (1991), *supra* note 32, at 1626.

83. *Id.*

sis, of course, harmonizes with the independence principle, which is based on the traditional notion of a bank being not in the business of goods, but solely in the business of documents.<sup>84</sup> Thus, like the rule of strict compliance, Article 16 serves to nurture the independence principle.

Further, the time frames in Article 16 aim to force a bank to give the beneficiary an opportunity to cure discrepancies and take mitigative measures if the bank has rejected the documents. This particular UCP's purpose derives from ancestral doctrines of estoppel and waiver.<sup>85</sup>

In fact, the UCP's rule of preclusion is really a codification of such estoppel and waiver doctrines. Classic estoppel situations involve "discoverable nonconformities," which the beneficiary could have cured before the expiration of the letter of credit.<sup>86</sup> Where, however, a bank omits to raise defects until the actual time of dishonor, and in so doing effectually prevents the beneficiary from curing the defects, courts will sometimes deem the bank to be estopped from asserting such defects as grounds for dishonor. Consequently, estoppel typically occurs where a bank has either assured a beneficiary that its documents complied with the letter of credit or has said nothing while retaining the noncomplying documents for an unreasonably long time after the beneficiary's presentment.<sup>87</sup>

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84. See *supra* notes 28-30, 58-60 and accompanying text.

85. For discussions of waiver and estoppel, see Barnes & Byrne, *Letters of Credit* (1993), *supra* note 33, at 1636-39; Byrne, *Letters of Credit* (1988), *supra* note 33, at 1370-71; Dolan, *Letter-of-Credit Disputes*, *supra* note 32, at 408-09; Dolan, *Strict Compliance*, *supra* note 24, at 29-32; Givray, *Letters of Credit* (1990), *supra* note 32, at 2422-38; Givray, *Letters of Credit* (1989), *supra* 32, at 1605-16; Givray et al., *Letters of Credit* (1991), *supra* note 32, at 1624-37; McLaughlin, *On the Periphery*, *supra* note 32, at 24-28.

86. *Cochin I*, 612 F. Supp. at 1541; see also Dolan, *Strict Compliance*, *supra* note 24, at 29-32 (asserting that two estoppel rules provide protection against abuse of strict compliance rule); McLaughlin, *On the Periphery*, *supra* note 32, at 24-28 (concluding that equitable doctrines of estoppel and waiver affect court's application of strict documentary compliance).

87. See *supra* text accompanying note 86; see also *Marino Indus. v. Chase Manhattan Bank, N.A.*, 686 F.2d 112, 116-18, (2d Cir. 1982) (remanding because bank did not return certificates until after letter expired which made it impossible for plaintiff to correct deficiencies); *Data General Corp. v. Citizens Nat'l Bank*, 502 F. Supp. 776, 786 (D. Conn. 1980) (estopping bank from denying responsibility because bank held letter for six months without notifying plaintiff of any indication that it intended to revoke letter); *United States Indus. v. Second New Haven Bank*, 462 F. Supp. 662, 666 (D. Conn. 1978) (estopping bank from asserting defense where seller, based on bank's assurances, reasonably assumed bank would honor its obligation under its letter of credit and where seller acted in reliance to its detriment).

Waiver situations are akin to those of estoppel. Classic waiver cases involve issuers that attempt to justify dishonor on grounds which are later deemed to be unjustified.<sup>88</sup> In such instances, courts conclude that “all *other* possible grounds for dishonor are . . . waived.”<sup>89</sup>

Significantly, both classic estoppel and waiver share the element of detrimental reliance, which is an issue that typically goes to the trier of fact. Essentially, the beneficiary seeking to prove waiver or estoppel must demonstrate that by failing to specify defects or by specifying defects in an untimely fashion, the bank actually induced its detrimental reliance.<sup>90</sup> As such, the beneficiary must show that the bank’s conduct was what *caused* the harm or was what *prevented it from curing* the defects before it was too late.<sup>91</sup>

88. *Cochin I*, 612 F. Supp. at 1541.

89. *Id.* (emphasis added). Several commentators have explained the difference between “waiver” and “estoppel” as follows:

To charge waiver against issuer suggests that issuer meant to give up a known right. In a true waiver, then, issuer has said or done something that signaled his knowing retreat from his right to insist upon strictly complying documents. To estop issuer means to bar issuer from asserting a right because issuer’s conduct would make assertion of the right unfair. Classic estoppel thus applies when issuer has failed to notify beneficiary of some discrepancy that was correctable before the letter’s expiry deadline. Issuer’s silence or belated advice of discrepancies thus deprived beneficiary of an opportunity to make a curative re-presentation. In classic estoppel terms, beneficiary’s reasonable reliance upon issuer’s conduct caused beneficiary to suffer detriment. Courts, however, use “waiver” and “estoppel” interchangeably towards the same end: to preclude issuer from clubbing beneficiary with a noncompliance that would otherwise justify dishonor.

Givray et al., *Letters of Credit* (1991), *supra* note 32, at 1624; *see also* Thier, *supra* note 22, at 871 (arguing that issuer must make *full* disclosure of *all* documentary defects at time of honor or dishonor, or be estopped from raising defects at trial). McLaughlin, *On the Periphery*, *supra* note 32, at 24-28, discusses the doctrines of waiver and estoppel. His thesis is, however, that when courts apply such doctrines, they dilute the standard of strict compliance and end up, in effect, applying one of substantial compliance. *Id.* at 5. *But see* Dolan, *Strict Compliance*, *supra* note 24, at 29-32 (suggesting that estoppel principles are “healthy” and mitigate rigors of strict compliance standard without engendering vagueness and unfairness of substantial compliance test).

90. *See* JOHN F. DOLAN, *THE LAW OF LETTERS OF CREDIT* ¶ 6.06[1][a] (2d ed. 1991); Dolan, *Strict Compliance*, *supra* note 24, at 29-30; Givray et al., *Letters of Credit* (1991), *supra* note 32, at 1624-25.

91. In *Barclays Bank D.C.O. v. Mercantile Nat’l Bank*, 481 F.2d 1224, 1237 (5th Cir. 1973), *cert. dismissed*, 414 U.S. 1139 (1974), the Fifth Circuit stated:

[The issuer] cannot lull [the customer] into believing that there was no problem with the documentation when there was still time for [the customer] to have attempted to cure the technical defect and then turn around and assert the lack thereof as a defense to the suit on the draft.

*See also* Thier, *supra* note 22, at 871-72 (“Application of estoppel is usually conditioned upon proof that the beneficiary could have cured the defect, not raised by the issuer, within the effective period of the letter.”).

Although classic waiver and estoppel principles reside in Article 16, most commentators read the UCP's preclusion rule as being purely automatic and as dispensing with detrimental reliance as a prerequisite to having a bank barred from dishonoring documents.<sup>92</sup> In fact, at least one commentator praises the UCP's eradication of the prerequisite as a welcome promotion of the certain and efficient resolution of the disputes that arise out of a bank's untimely or improper notification of dishonor.<sup>93</sup> Thus, the view is essentially that the rule of preclusion, by excising detrimental reliance and causation or prevention of cure, issues which are well suited for the trier of fact, has ostensibly made such disputes more amenable to summary resolution.<sup>94</sup>

There is, however, still another aspect of Article 16 which is peculiar to the rectangular transaction. In such a context, Article 16 contemplates some protection for an issuing bank. Because of the often cozy alliance between the confirming bank and its beneficiary, the confirming bank can be predisposed to accept the beneficiary's presentment.<sup>95</sup> If, however, the confirming bank wrongfully honors non-conforming documents, Article 16's provisions effectually compel the issuer to examine the documents within a "reasonable time" and to notify the confirming bank of such fatal discrepancies "without delay."<sup>96</sup> Thus, in the rectangular configuration, the notification provisions of the UCP contemplate and, in effect, encourage the issuing bank to perform an overseer or watchdog role. In this way, the provisions prompt the issuing bank to exert *some* control over a payment that will often take place in a distant land between a local confirming bank and a local beneficiary.

It is in the rectangular transaction that the most dramatic disruption of the usual peaceful coexistence of the rule of strict compliance and the preclusion sanction occurs. Such a collision of two rules of

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92. See, e.g., Dolan, *The Correspondent Bank*, *supra* note 22, at 419 n.47 ("The UCP imposes a preclusion rule on the issuer without any showing of detriment."); Givray et al., *Letters of Credit* (1991), *supra* note 32, at 1625-26.

93. Dolan, *Letter-of-Credit Disputes*, *supra* note 32, at 408 ("The estoppel rule of the Uniform Customs and a similar estoppel rule fashioned by courts add to the efficiency of the credit transaction by encouraging the correction of defects before it is too late, thereby avoiding the inefficiencies for all parties that dishonor of the credit inevitably entails.") (footnotes omitted).

94. There are commentators who wholeheartedly support the rule of automatic preclusion and believe that courts should apply it even when UCC § 5-112(1) or the 1974 version of the UCP controls in lieu of the 1983 version. See summary of the views of Mr. Harfield and Professors Dolan, White, and Summers in Givray et al., *Letters of Credit* (1991), *supra* note 32, at 1625-26.

95. See *supra* notes 63-68 and accompanying text.

96. UCP art. 16(c), (d) (1983); see *supra* notes 38-39.

certainty and efficiency arises when a confirming bank wrongfully pays out on nonconforming documents, and an issuing bank fails to provide timely or adequate notice of its decision to reject the same documents.<sup>97</sup> Most significantly, this pugilistic arena illustrates how obstinate quests for certainty and efficiency can and do lead to an abyss of unfairness along with a concentric perpetuation of fraud on banks.

### III. CERTAINTY AND EFFICIENCY AFTER *COCHIN*

#### A. *Summary Judgment in the District Court*

*Bank of Cochin, Ltd. v. Manufacturers Hanover Trust Co.*,<sup>98</sup> was a dispute between a confirming bank and an issuing bank, which arose out of a rectangular transaction. In *Cochin*, the federal courts confronted the issue of which bank must bear the loss where the confirming bank had violated the rule of strict compliance, and the issuing bank had triggered the preclusion sanction of Article 16 of the UCP.

In *Cochin*, a customer, Vishwa Niryat (Pvt.) Ltd. (Vishwa) requested the Bank of Cochin, Limited (Cochin), an Indian corporation, to issue an irrevocable letter of credit covering up to \$798,000 for the benefit of a "purported" New York corporation, St. Lucia Enterprises, Ltd. (St. Lucia).<sup>99</sup> The letter covered an anticipated shipment and purchase of aluminum melting scrap and, after several amendments, had an expiration date of June 15, 1980. In the transaction, Manufacturers Hanover Trust Company (Manufacturers) served as the confirming bank.

In February 1980, Cochin requested Manufacturers to supply financial information on the beneficiary, St. Lucia. Manufacturers responded by telex the next day that "St. Lucia did not maintain a [ ] [Manufacturers] account and that a thorough check of normal credit sources did not reveal any 'pertinent' information."<sup>100</sup> Eight days later, Cochin telexed to Manufacturers the terms and conditions of the letter of credit, requested it to advise St. Lucia of the letter's establish-

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97. See, e.g., *Banque de l'Union Haitienne, S.A. v. Manufacturers Hanover Int'l Banking Corp.*, 787 F. Supp. 1416 (S.D. Fla. 1991), *aff'd per curiam*, 959 F.2d 971 (11th Cir. 1992) (opinion on file with *Loyola of Los Angeles Law Review*); *Kuntal, S.A. v. Bank of New York*, 703 F. Supp. 312 (S.D.N.Y. 1989); *Bank of Cochin, Ltd. v. Manufacturers Hanover Trust Co.*, 612 F. Supp. 1533 (S.D.N.Y. 1985), *aff'd*, 808 F.2d 209 (2d Cir. 1986).

98. 612 F. Supp. 1533 (S.D.N.Y. 1985), *aff'd*, 808 F.2d 209 (2d Cir. 1986).

99. *Cochin I*, 612 F. Supp. at 1534.

100. *Id.*

ment, and asked it to add Manufacturers' confirmation.<sup>101</sup> The letter of credit was issued subject to the UCP.<sup>102</sup> In late February, Manufacturers mailed its written advice of the letter of credit's establishment to St. Lucia and then confirmed the amended letter.<sup>103</sup>

The aluminum was supposedly shipped on May 29, 1980, from West Germany to Bombay.<sup>104</sup> In June, St. Lucia established an account at a Manhattan office of Citibank, N.A. (Citibank) and on June 9, presented Manufacturers with documents and ten sight drafts payable to St. Lucia.<sup>105</sup> Manufacturers compared the documents against the requirements of the letter and, determining that they complied with all of its terms and conditions, negotiated the drafts and issued a check for \$798,000 payable to St. Lucia.<sup>106</sup> St. Lucia endorsed the check and deposited it in its account at Citibank.<sup>107</sup> Citibank collected the check from Manufacturers and Manufacturers debited Cochin's account for \$798,000.<sup>108</sup>

On June 13 Manufacturers sent a copy of its payment advice, together with the drafts and documents, to Cochin by registered air mail.<sup>109</sup> Cochin, however, did not receive these documents until eight days later.<sup>110</sup> As it turned out St. Lucia had shipped nothing to Vishwa and the documents that it had submitted to Manufacturers were fraudulent in all respects.<sup>111</sup> In fact, the corporations that had apparently issued the bills of lading and quality and vessel certifications did not even exist.<sup>112</sup>

On June 18 Cochin sent a telex to Manufacturers and inquired whether St. Lucia had presented documents for negotiation.<sup>113</sup> Two

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101. *Id.*

102. The letter of credit was governed by the 1974 version of the UCP pursuant to its express terms. The district court, however, noted that the UCP was revised effective October 1, 1984. *See id.* at 1534 n.3. The court stated that it "must ordinarily apply the law in effect at the time it renders its decision." *Id.* Although the application of the 1983 UCP would favor Manufacturers, the court insisted it would not alter its decision on the motions. *See id.* With respect to the discussion of *Cochin* in this article, references to the UCP are to those in the 1983 version.

103. *Id.* at 1534-35.

104. *Id.* at 1535.

105. *Id.*

106. *Id.* at 1536.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

days later, Manufacturers informed Cochin by telex that it had already paid St. Lucia and had already forwarded the documents to Cochin.<sup>114</sup> In a June 21 telex to Manufacturers, Cochin stated: "We acknowledge receipt of the documentu [sic] Stop We find certain discrepancies [sic] in the same Stop kindly donot [sic] make payment against the same until we telex you otherwise Stop."<sup>115</sup>

In a telex of June 23, Manufacturers replied:

Reference your telex June 21 credit BB VN 4180 our 500748 Stop We note your telex fails to give reason fro [sic] rejection documents as required UCP Article 8 Stop According our records documents fully complied credit terms and beneficiary already paid therefore we cannot accept your refusal of documents.<sup>116</sup>

In still another telex, dated June 27, Cochin informed Manufacturers of the alleged defects in the documents, which were those Vishwa had apparently discovered.<sup>117</sup> By telex dated July 3, Cochin asked Manufacturers to recredit its account for the amount and advised Manufacturers it was returning the documents. At that time Cochin also cited an additional discrepancy.<sup>118</sup> A day later, Cochin informed Manufacturers by telex that the documents were defective in two more respects.<sup>119</sup>

By telex of July 14, Manufacturers responded that Cochin had failed to specify in a timely and proper fashion the alleged variances and thus had not complied with what had become Article 16 of the UCP.<sup>120</sup> Manufacturers also asserted that Cochin had failed to comply with the UCP by not promptly returning the documents or advis-

114. *Id.*

115. *Id.*

116. *Id.*

117. The alleged defects were as follows:

(1) St. Lucia's cable to Oriental showed the wrong insurance covernote number of 4291 instead of 429711; (2) St. Lucia did not submit "proof" that a set of non-negotiable documents and confirming cable had been sent to Vishwa; (3) only one set of documents showed the original certificate of origin whereas the rest included only photocopies; and (4) the invoice packing list and certificate of origin were not duly authenticated. Cochin also noted (5) the overpayment of \$1,396.50.

*Id.*

118. The additional discrepancy was that "(6) [Manufacturers] had negotiated documents for St. Lucia Enterprises but that the letter of credit was established for St. Lucia Enterprises Ltd." *Id.*

119. The additional defects were as follows: "(7) only five signed copies of the commercial invoices, rather than six, were forwarded and (8) documents were signed by 'D Agney' without specifying his capacity at St. Lucia." *Id.*

120. *Id.* For a discussion of the UCP revision effective at the time of the district court's decision, see *supra* note 102.



ing that it was holding the documents at Manufacturers' disposal. In a follow-up telex two days later, Manufacturers said that it still had not received certain documents from Cochin.<sup>121</sup>

After the flurry of telexes failed to result in an amicable resolution, Cochin sued Manufacturers in federal court for wrongful honor of the letter of credit and then both banks moved for summary judgment. In entering summary judgment in favor of Manufacturers, the district court initially defined "[t]he central issue" as "whether St. Lucia's demand for payment from [Manufacturers] was in compliance with the conditions specified in the letter of credit."<sup>122</sup> The real problem was, according to the court, that "[n]either the [UCP] nor the [UCC] specify whether a bank honoring a letter of credit should be guided by a standard of strict compliance or substantial compliance."<sup>123</sup> In so doing the court acknowledged that "[t]he great weight of authority . . . holds that an issuing or confirming bank is usually obligated to honor the beneficiary's draft only when the documents are in strict compliance with the terms of the letter of credit."<sup>124</sup>

In *Cochin I*, however, the decision did not entail mere deference to the majority rule because there existed a rather anomalous impediment, which was New York's apparent "bifurcated standard of compliance."<sup>125</sup> New York courts applied the strict compliance standard in cases in which beneficiaries sued banks for wrongful dishonor. When, however, customers sued banks for wrongful honor, New York courts relaxed the test and instead applied the standard of substantial compliance.<sup>126</sup> The court in *Cochin* explained that "[t]he stated rationale for the bifurcated standard is that it accords the bank flexibility in reacting to 'a cross-fire of pressures . . . especially in times of falling commodity prices.'"<sup>127</sup> In the court's view, what the bifurcated stan-

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121. *Cochin I*, 612 F. Supp. at 1536-37.

122. *Id.* at 1537.

123. *Id.*

124. *Id.*

125. *Id.* at 1538.

126. See Dolan, *Letter-of-Credit Disputes*, *supra* note 32, at 388 n.13, in which he states: In *Bank of Cochin, Ltd. v. Manufacturers Hanover Trust Co.*, . . . the court, after reviewing . . . cases and the views of various commentators, concluded: "In discussing New York's bifurcated standard, courts and commentators have mistakenly cited each other and the following cases as support for the position that New York courts use a bifurcated approach. . . ." [612 F. Supp.] at 1539 n.8. That reading of the cases may be superficial.

For a discussion of *Cochin I*, see Dolan, *Letter-of-Credit Disputes*, *supra* note 32, at 389-92.

127. *Cochin I*, 612 F. Supp. at 1538 (citing J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE*, § 18-6, at 731-32 (citation omitted)); see Dolan, *Letter-of-Credit Disputes*, *supra* note 32, at 390-91. Dolan writes:

dard accommodates is a bank that is "caught between the 'rock of a customer insisting on dishonor for highly technical reasons, and the hard place of a beneficiary threatening to sue for wrongful dishonor.'"<sup>128</sup> Thus, the application of a less rigorous standard in one case and a strict one in the other alleviates the pressure on the bank by limiting its "liability burden."<sup>129</sup>

In *Cochin I*, Manufacturers, seeking to avail itself of the more lax standard, characterized itself as Cochin's "customer" and argued that the St. Lucia's documents *substantially* complied with the letter of credit.<sup>130</sup> Cochin's position, however, forced the court to grapple with the question of whether the bifurcated standard had any bearing on such rectangular disputes between issuing banks and confirming banks.

The court reasoned that when a customer objects to defects that are, in truth, "inconsequential," the issuing bank must exercise its "good faith discretion."<sup>131</sup> Typically though, an issuing "bank would usually not want to exercise [such] discretion in favor of the beneficiary for fear that its right to indemnity would be jeopardized or that its customer would break off existing banking relationships."<sup>132</sup> Thus, in such instances, the less stringent standard of substantial compliance is the appropriate one because it has its own "built-in safety valve."<sup>133</sup> Specifically, the bank's preference for its customer over the beneficiary naturally inhibits the bank from misusing the less stringent standard.<sup>134</sup> As such, the pressures inherent in the transaction itself prevent the bank from taking too much comfort in a substantial-compliance test.

The *Cochin I* court, however, viewed the rectangular transaction as rather unique, as one which could conceivably spawn the abuse of the less stringent test. Specifically, "[a] confirming bank, by contrast, is usually in relatively close geographical proximity with the benefi-

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A fall in commodity price is a sufficient but not a necessary condition for application of a more lenient rule in the customer context. It is not the only time the issuer faces the squeeze. In all of these cases the customer no longer values the underlying contract. If it did, the customer would waive the documentary defects, as customers do on a regular basis in letter-of-credit transactions.

*Id.*

128. *Cochin I*, 612 F. Supp. at 1538 (citing B. CLARK, *THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS* ¶ 8.5[4], at 8-48 (1981)).

129. *Id.*

130. *Id.*

131. *Id.* at 1539.

132. *Id.*

133. *Id.*

134. *Id.*

ary and typically chosen by the beneficiary."<sup>135</sup> Consequently, although a confirming bank is usually concerned with maintaining a good relationship with the other bank—the issuer—the confirming bank's affinity with its own beneficiary tends to be stronger and thus can cause the confirming bank to be "somewhat biased in favor of the beneficiary."<sup>136</sup> Also, "the confirming bank is not in privity with the ultimate customer, who would be most likely to become dissatisfied if a conflict is resolved by the confirming bank."<sup>137</sup> As such, with respect to confirming banks, the court concluded that "it would be inequitable to let [them] exercise such discretion under a protective umbrella of substantial compliance" because, unlike a triangular transaction with just one bank—an issuer—there is no "safety mechanism" to inhibit "misuse" of the more lax standard.<sup>138</sup>

After concluding that the standard of strict compliance was controlling, the district court examined the ten enumerated discrepancies between the documents and the letter of credit and found that Manufacturers had violated the rule of strict compliance with respect to two of them.<sup>139</sup> But, according to the court, Manufacturers' violation did

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135. *Id.*

136. *Id.*; see *supra* notes 63-64 and accompanying text.

137. *Cochin I*, 612 F. Supp. at 1539. See Dolan, *Letter of Credit Disputes*, *supra* note 32, at 391-92, for a criticism of the *Cochin* court's analysis "that a strict rule better suits the realities of the confirming bank/issuer relationship because the confirming bank is in the beneficiary's market and is more likely to tilt toward the beneficiary in evaluating the documents." *Id.*

138. *Cochin I*, 612 F. Supp. at 1539. In *Cochin I*, the district court was also of the view that the facts before it did not warrant the application of the looser standard because Manufacturers "was not faced with a 'cross-fire of pressures' or concern that a disgruntled 'customer' would refuse reimbursement because *Cochin* had sufficient funds on deposit with [Manufacturers]." *Id.*

139. The first defect was "St. Lucia's cable to Oriental using the wrong covernote number of 4291 instead of 429711." *Id.* at 1540. As the court explained, "[t]he failure to provide the correct covernote was not inconsequential as the mistake could have resulted in Oriental's justifiable refusal to honor Vishwa's insurance policy." *Id.* The court cited *Beyene v. Irving Trust Co.*, 596 F. Supp. 438, 442 n.8 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 4, 5-6 (2d Cir. 1985), where "the Second Circuit affirmed the dishonor of a letter of credit on the sole ground that the misspelling of Mohammed Sofan as Mohammed Soran on the bill of lading constituted a material discrepancy." *Cochin I*, 612 F. Supp. at 1540. The sixth defect was "that the payment was made on documents presented by St. Lucia Enterprises despite the fact that the letter of credit was established for St. Lucia Enterprises, *Ltd.*" *Id.* at 1541. As the court explained, "[a]lthough there does not appear to be any difference between the two entities, it is not clear that the 'intended' party was paid" and "[t]he difference in names could also possibly be an indicia of unreliability or forgery." *Id.* The court found "[t]he alleged noncompliance with conditions (2), (3), (4), (8), (9) and (10) [to be] unsupported" because the "provisions were not explicitly required by the letter of credit." *Id.* at 1540-41. "The seventh alleged defect . . . that only five copies of the documents, rather than six, were submitted to [Manufacturers]" was a "deviation . . . similar to a

not end the case because the doctrines of equitable waiver and estoppel had to come into play.<sup>140</sup> Although the court in *Cochin* acknowledged the case law on classic waiver and estoppel in letter of credit transactions, it ultimately turned to the UCP's preclusion provision and found it to be an absolute bar to *Cochin*'s recovery for wrongful honor. In so doing, the court explained:

The issuing bank must give notice "without delay" that the documents received are (1) being "held at the disposal" of the remitting or confirming bank or (2) "are being returned" to the second bank. An issuing bank that fails to return or hold the documents for the second bank is precluded from asserting that the negotiation and payment were not effected in accordance with the letter of credit requirements.<sup>141</sup>

Fixing on the language in Article 16, which gives the issuing bank a reasonable time to examine the documents and "determine whether to make such a claim," the court noted that neither the 1974 nor the 1983 versions of the UCP defined what constitutes a reasonable time.<sup>142</sup> Also, neither version of the UCP defined notice "without delay."<sup>143</sup> The problem though, as the court acknowledged, was that both terms were crucial because the bank that does not satisfy them walks right into the sting of the preclusion sanction. The district court, however, noting that the UCC gives the issuer three banking days to honor or reject a documentary draft for payment, simply engrafted the UCC time frame onto the UCP's more open-ended deadline.<sup>144</sup>

The district court concluded that *Cochin* had activated the preclusion sanction of the UCP in several respects: *Cochin* had failed to "promptly notify [Manufacturers] that it had returned the documents

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hypothetical error not affecting strict compliance." *Id.* at 1541 (quoting *Beyene*, 762 F.2d at 6 ("Smith misspelled as Smithh")).

140. *Cochin I*, 612 F. Supp. at 1541.

141. *Id.* at 1542 (citations omitted).

142. *Id.* Article 13(b) of the 1993 revision of the UCP states that the "reasonable time" must not "exceed seven banking days following the day of receipt of the documents." UCP art. 13(b) (1993).

143. *Cochin I*, 612 F. Supp. at 1542. Article 14(d)(i) of the 1993 revision of the UCP states that the refusal notice must be "no later than the close of the seventh banking day following the day of receipt of the documents." UCP art. 14(d)(i) (1993).

144. The district court relied on the principle that "[w]hen the [UCP] is silent or ambiguous, analogous UCC provisions may be utilized if consistent with [the UCP]." *Cochin I*, 612 F. Supp. at 1542 (citing *First Commercial Bank v. Gotham Originals, Inc.*, 475 N.E.2d 1255, 1259 n.4 (N.Y. 1985); *United Bank Ltd. v. Cambridge Sporting Goods Corp.*, 360 N.E.2d 943, 947 n.2 (N.Y. 1976); *Eljay Jrs., Inc. v. Rahda Exports*, 470 N.Y.S.2d 12, 14 (1984)).

or that it was holding them at [Manufacturers's] disposal."<sup>145</sup> Also, while Cochin's telex of June 21 stated that there were some discrepancies in St. Lucia's documents, "Cochin did not advise [Manufacturers] that it was returning the documents . . . until the July 3 telex."<sup>146</sup> In addition, because, as the court found, the three-day UCC period was the "maximum" time for notification, and because June 21 was a Saturday, "Cochin should have complied with its notice obligations no later than June 26."<sup>147</sup> Thus, "[t]he passage of an additional week . . . preclude[d] Cochin from asserting its wrongful honor claim."<sup>148</sup> Cochin, moreover, did not specify any reason for its dishonor until June 27 and omitted to mention one of the fatal variances until July 4.<sup>149</sup>

In an effort to dissuade the district court from treating Article 16 as such a rigid sanction, Cochin proposed an escape hatch in the form of a causation or incurability theory. What Cochin urged upon the court was that its failure to provide timely and adequate notice to Manufacturers should not make it liable to Manufacturers because it did not *cause* additional loss to Manufacturers.<sup>150</sup> Specifically, "Cochin argue[d] that the defects were in any case incurable by the time Cochin received the documents, because St. Lucia had disappeared with the letter of credit proceeds."<sup>151</sup> In rejecting Cochin's theory, the district court said:

Cochin's contention ignores the expectation in the international financial community that the parties will live up to their statutory obligations and is at odds with the basic letter of credit tenet that banks deal solely with documents, not in goods. Cochin's argument would defeat the letter of credit's function of being a swift, fluid and reliable financing device.<sup>152</sup>

In its response to Cochin's position that it did not cause the loss, or more timely notice on its part would not have prevented the loss, the district court wove together three platitudes, all of which could

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145. *Id.* at 1542-43.

146. *Id.* at 1543.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* (citing *Voest-Alpine Int'l Corp. v. Chase Manhattan Bank*, 707 F.2d 680, 684-85 (2d Cir. 1983) (rejecting contention that waiver analysis was inappropriate because defects were incurable)).

just as well be twisted to *favor* Cochin. For example, it is likewise an “expectation in the international financial community” that confirming banks—not just issuing banks—will “live up to their statutory obligations” by dishonoring documents that do not strictly comply with the letter of credit.<sup>153</sup> Also, the forgiving of a confirming bank that fails to abide by the rule of strict compliance is indeed at odds with the independence principle or the basic letter of credit tenet that banks deal solely with documents, not in goods.<sup>154</sup> In addition, the exoneration of the bank that violates the rule of strict compliance defeats “the letter of credit’s function of being a swift, fluid and reliable financing device.”<sup>155</sup>

Although ostensibly rejecting Cochin’s causation or incurability theory, the district court actually injected that very theory of causation or incurability into the heart of the analysis, but lodged it *against* Cochin.<sup>156</sup> The court opined that the two documentary discrepancies that Cochin could have anticipated “were *curable* before the demand for payment”<sup>157</sup> and explained:

Cochin received a copy of [Manufacturers’s] incorrect March 31 advice to St. Lucia, which mistakenly listed the insurance covernote as 4291. Similarly, Cochin received copies of all of [Manufacturers’s] advices to St. Lucia, which omitted the “Ltd.” from the corporate name. Cochin had sufficient notice and time to correct [Manufacturers’s] confirming defects to St. Lucia and is therefore estopped from asserting them.<sup>158</sup>

As such, according to the district court, the very theory it had apparently discarded—that of causation or curability—somehow *did* matter. Because, in the court’s view, Cochin was the bank that could have prevented the loss, it should also be the bank that has to bear the loss.

Consequently, the trial court decision in *Cochin* is a repugnant paradox: Stated otherwise, in deeming the UCP’s preclusion rule to be well-suited for the certain and efficient resolution on summary judgment, the district court purported to excise the factors of causation or curability from the inquiry. But, in its final analysis, that same court actually reinsinuated such factors of causation or curability into the inquiry and through *use* of those very factors, ended up branding

153. *Id.*

154. *See id.*

155. *See id.*

156. *Id.*

157. *Id.* (emphasis added).

158. *Id.*

Cochin, the issuing bank, the loser. In effect, the trial court issued findings with respect to causation and curability and in essence rendered a verdict. All of this happened on summary judgment—that is, without a trial.

*B. An Affirmance in the Second Circuit*

In *Cochin II*,<sup>159</sup> the Second Circuit affirmed and concluded “that Cochin’s untimely notice constituted a waiver of its right to assert the documents’ noncompliance.”<sup>160</sup> What makes the appellate court’s decision so significant, however, is not the result it reached, but four aspects of its reasoning.

One, while the Second Circuit saw that there were really two separate time frames in what was Article 16, the court refused to quantify either one.<sup>161</sup> As the court said, the UCP required Cochin:

(1) to examine the documents and determine, within a reasonable time, whether to make a claim that [Manufacturers’s] payment was not in compliance with the terms of the credit; and (2) without delay and using expeditious means, to notify [Manufacturers] of the specific defects and to advise [Manufacturers] of the disposition of the documents.<sup>162</sup>

In the Second Circuit’s view, timeliness under the UCP’s provisions entails a two-tiered analysis of: (1) the bank’s examination of the documents and decision of whether to claim improper payment within a reasonable time; and (2) the bank’s notification of defects without delay through the use of expeditious means.<sup>163</sup> The court, however, expressly declined to approve the district court’s approach of engrafting the Uniform Commercial Code’s three-days onto the UCP.<sup>164</sup> That is, the appellate court simply determined that it did not have to reach this issue because it could conclude that Cochin had “failed to notify [Manufacturers] ‘expeditiously’ and ‘without delay’ of specific defects and of the disposition of the documents.”<sup>165</sup>

The Second Circuit’s reluctance to impose a set time frame on the examination of documents or on the issuance of the dishonor notifica-

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159. *Bank of Cochin, Ltd. v. Manufacturers Hanover Trust Co.*, 808 F.2d 209 (2d Cir. 1986).

160. *Id.* at 211.

161. *See id.* at 212.

162. *Id.*

163. *Id.*

164. *See id.* at 212-13.

165. *Id.* at 213.

tion is quite telling because in its approach, the court in effect imbued the UCP's provisions with greater pliancy. Thus, reasonable is reasonable and without delay "connote[s] a sense of urgent action within the shortest interval of time possible."<sup>166</sup> Because, as the court determined, what it was facing was "a twelve to thirteen day period from Cochin's initial inspection of the documents to its notification of the noncomplying defect and its decision to return the documents to [Manufacturers]" such a lapse of almost two weeks could not "be considered notification 'without delay' under any reasonable definition of that phrase."<sup>167</sup>

Two, the Second Circuit stated that "[i]n this era of near instantaneous international communications, we can find no *rationale* to justify Cochin's delay in informing [Manufacturers] of the specific defects and of its intention to return the documents."<sup>168</sup> Albeit arguably dicta, such language suggests that the rule of preclusion might not be so absolutely automatic and that the imposition of the sanction might, in some situations, require a court first to consider other factors—namely, whether there was a rationale or justification for a bank's delay or defect in notification.<sup>169</sup>

Three, the court also said that "[h]ad this information been imparted in a timely fashion, some part or all of the funds might have been recovered before they were removed from St. Lucia's Citibank account."<sup>170</sup> Although ostensibly treating Article 16's sanction as one automatically barring the recovery of a bank that fails to provide timely or adequate notice, the court nevertheless acknowledged that causation or curability are indeed relevant.<sup>171</sup>

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166. *Id.* The Second Circuit said that the "phrase is akin to 'immediate (*at once*), instant, instantaneous, instantly, prompt.'" *Id.* (quoting W. BURTON, *LEGAL THESAURUS* 1053 (1980)).

167. *Id.*

168. *Id.* (emphasis added).

169. See *Alaska Textile Co. v. Chase Manhattan Bank, N.A.*, 982 F.2d 813, 824-25 (2d Cir. 1992) (holding that "reasonable time" was not automatically three-day period in § 5-112 of UCC and that fifteen banking days was reasonable where presenter repeatedly requested issuer to ask applicant to waive discrepancies); Barnes & Byrne, *supra* note 33, at 1636-37; see also Donna L. Salerno, Note, *Commercial Law—Letters of Credit—Discrepant Documents Submitted on an Approval Basis Under a Letter of Credit May Be Dishonored If Issuing Bank Acts on Beneficiary's Demand for Payment Within a Reasonable Time Under Uniform Customs and Practices for Documentary Credits, Article 16(c)*—*Alaska Textile Co., Inc., v. Chase Manhattan Bank, N.A.*, 982 F.2d 813 (2d Cir. 1992), 23 SETON HALL L. REV. 1253 (1993) (discussing 16(c) as construed in *Alaska Textile*).

170. See *Cochin II*, 808 F.2d at 213.

171. See *id.* at 212-13.



Four, the court appeared to suggest that the respective culpability of the banks should also figure into the calculus.<sup>172</sup> As the court explained:

Cochin was at all times in the best position to learn of the fraudulent nature of St. Lucia's activities and to prevent payment of the funds. Its failure to take advantage of that position, in spite of several opportunities to do so, resulted in the loss it seeks to charge to [Manufacturers] here.<sup>173</sup>

Taken as a whole, the Second Circuit decision suggests that in a rectangular dispute, the determination of which bank should bear the loss is not and should not be merely a matter of mechanically counting days or picking at the minutia in a bank's dishonor notification. In fact, according to the Second Circuit in *Cochin II*, the flexibility of standards like reasonable or without delay or expeditious should remain perfectly in tact. After *Cochin II*, liability in the rectangular dispute involves not just a consideration of whether there is a "rationale to justify" a delay or omission, but also an analysis of whether the delay or omission *caused* the loss.<sup>174</sup> Also, after *Cochin II*, there should be an assessment of which of the banks was the more culpable party, or stated otherwise, which bank was in the best position to prevent the loss.<sup>175</sup>

### C. *Certainty and Efficiency After Cochin*

Professor Dolan perceived an incongruity in *Cochin I* between "the language of the district court opinion" which "flatly requires the confirming bank to follow the strict-compliance standard of the beneficiary relationship when it pursues its claim against the opening bank," and the actual "result" of *Cochin I*, which "is to give the confirming bank reimbursement even though it pays over nonconforming documents[.]"<sup>176</sup> Dolan elaborated:

In short, *Bank of Cochin*, using estoppel, fashions an exception to the very rule it says it is establishing. To that extent, the case is consistent with many others and supports the conclusion that by paying attention to what the courts do rather

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172. *See id.* at 213.

173. *Id.*

174. *See id.*

175. *See id.*; Farrar, *Letters of Credit* (1987), *supra* note 33, at 1313 ("As the court noted, had Bank of Cochin timely notified [Manufacturers], some of the funds diverted by the admittedly fraudulent beneficiary might have been recovered in time. Accordingly, the party who could have prevented the loss must accept the consequences.").

176. Dolan, *Letter-of-Credit Disputes*, *supra* note 32, at 389-90.

than what they say yields the rule that this article advocates—a rule that determines the issuer or confirming bank's right of reimbursement from facts other than the nature of documentary compliance.<sup>177</sup>

Really though, after the appellate decision in *Cochin II*, the incongruity disappears and what the appellate court actually did and what it said congeals. On the broadest level, the Second Circuit's simultaneous adherence to the rule of strict compliance and willingness to allow a bank to absent itself from the rigors of that very rule is an implicit acknowledgement that certain and efficient rules and procedures cannot and should not be doggedly unyielding. Such an implication, however, embraces not just the rule of strict compliance, which is only *one* rule of certainty and efficiency, but also the other putatively certain and efficient creation—namely, the UCP's preclusion sanction. In this regard, the Second Circuit has indicated that particular disputes can and will arise—disputes that, by their very natures, resist the certain and efficient summary judgment mechanism.

In *Cochin I*, the district court had found the law to be “sufficiently chartered to require summary judgment for [the confirming bank]” and remarked that “[l]etter of credit liability cases are particularly appropriate for judicial resolution without trial because they present solely legal issues.”<sup>178</sup> In its reasoning, however, the Second Circuit proposed an exception to that very proposition by delineating four attributes of a letter of credit liability case, any one of which could conceivably make the case come out another way.<sup>179</sup> That is, the Second Circuit foresaw a rectangular case, which could require summary judgment for the other bank—the issuer—or at least, could be a dispute that is particularly *inappropriate* for judicial resolution without trial.

First, the effect of the Second Circuit's refusal to “decide whether a three-day time period should be read into the [UCP]” was to leave the UCP's “reasonable time requirement” as is.<sup>180</sup> One of the most

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177. *Id.* at 390.

178. *Cochin I*, 612 F. Supp. at 1537.

179. *See Cochin II*, 808 F.2d at 213.

180. *Id.* While Article 13(b) of the 1993 revision of the UCP specifies that “reasonable time” does not “exceed seven banking days following the day of receipt of the documents[,]” a bank that uses all seven days is not necessarily acting within a “reasonable time.” *See* DOCUMENTARY CREDITS: UCP 500 & 400 COMPARED 40 (ICC Publishing S.A. Paris, 1993) [hereinafter DOCUMENTARY CREDITS] (“[J]ust because a bank now has a limit not to exceed seven days following the day of receipt of the documents, to examine the documents and determine whether to take up or refuse the documents does not mean that

basic propositions, however, is that "[t]he reasonableness of a period of time—except as to extremes—[is] a classic issue for the trier of fact."<sup>181</sup> Thus, what *Cochin* indicates is that some delays—like the twelve- or thirteen-day period in *Cochin*—are so excessive that they are simply unreasonable as a matter of law.<sup>182</sup> Where, however, the lapse of time between the receipt of the documents and the decision to dishonor is quite short, that period could instead be deemed *reasonable* as a matter of law.<sup>183</sup> In such cases, the question of reasona-

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it is prudent, reasonable, or even proper for a bank to take all of that time to examine the documents and determine whether to accept or refuse such documents.").

181. *Flagship Cruises, Ltd. v. New England Merchants Nat'l Bank*, 569 F.2d 699, 702 (1st Cir. 1978). In *Flagship*, the court found that the reasonableness of delay in presenting the letter of credit is generally an issue for the trier of fact. *See id.* at 702-03, 705; *see also* *Timber Falling Consultants, Inc. v. General Bank*, 751 F. Supp. 179, 183-84 (D. Or. 1990) (holding that beneficiary "presented evidence which creates a genuine issue of material fact as to whether [the] [b]ank gave notice to [the beneficiary] . . . and whether any such notice was adequate and timely under Article 16."). Other courts, declining to apply the preclusion provision mechanically, have found that compliance with various requirements of Article 16 of the UCP presents questions of fact. *See, e.g.,* *Offshore Trading Co. v. Citizens Nat'l Bank*, 650 F. Supp. 1487, 1491 (D. Kan. 1987) (stating that whether bank gave beneficiary notice of nonconformity constituted genuine issue of material fact).

182. In *Kuntal, S.A. v. Bank of New York*, 703 F. Supp. 312, 314 (S.D.N.Y. 1989), decided in the wake of *Cochin I*, the district court, entering final summary judgment for the confirming bank, found that the issuing bank's failure to comply with Article 16 was a waiver of its objections to the discrepancies in the documents. In *Kuntal*, the bank received the documents on February 19, 1987, and gave notice of its refusal on March 4, 1987. *Id.* at 312-13. The plaintiff characterized this as a two-week delay, and the bank took the position that it was a nine-day delay because it "examined the submitted documents two business days later on February 23, 1987" and gave notice nine days after that on March 4, 1987. *Id.* at 313. The court, however, stated that for the purposes of the memorandum, it would accept the bank's characterization. *Id.* at 314 n.3; *see also* *Auto Servicio San Ignacio, S.R.L. v. Compania Anonima Venezolana De Navegacion*, 765 F.2d 1306, 1310 (5th Cir. 1985) (holding that "the one to two year hiatus" between time that documents were submitted to procure payment and time that issuing bank raised claim of nonconformity was, as matter of law, unreasonable); *Integrated Measurement Sys., Inc. v. International Commercial Bank of China*, 757 F. Supp. 938, 947 (N.D. Ill. 1991) (precluding bank from arguing nonconformity where it gave notice 20 days after receipt of documents and five days after credit had expired so that beneficiary was precluded from curing defects); *Petra Int'l Banking Corp. v. First Am. Bank*, 758 F. Supp. 1120, 1128 (E.D. Va. 1991) (precluding issuing bank from raising nonconformity more than one year after receipt of documents).

183. In *Occidental Fire & Casualty Co. v. Continental Bank N.A.*, 918 F.2d 1312 (7th Cir. 1990), *aff'g* 725 F. Supp. 383 (N.D. Ill. 1989), the district court applied the UCC to the UCP and found that "banks [had] three business days to review the documents." *Id.* at 1318. The district court entered a final summary judgment for the bank because, *inter alia*, the bank's decision to dishonor the draw, made within three days of receipt of the documents, and its decision not to notify the beneficiaries until the next business day "was reasonable under the circumstances." *Id.* In affirming the final summary judgment for the bank, the Seventh Circuit stated:

Indeed, it is entirely possible that the [UCP] would allow an issuing bank more than three business days to review draw documents under some circum-

bleness could alternatively be deemed one of fact, which a court could not resolve on summary judgment.

Second, the appellate court said that “[it could] find no rationale to justify Cochin’s delay in informing [Manufacturers] of the specific defects and of its intention to return the documents.”<sup>184</sup> Such language embraces the possibility that in a rectangular dispute, the bank that provides an untimely or inadequate dishonor notification could nevertheless prevail. At the very least, the Second Circuit has foreseen a situation where such a bank, although derelict in its Article 16 duties, could be deemed entitled to have the trier of fact decide whether there is a rationale to justify its delayed or defective dishonor notification.

Third, the Second Circuit said that had the “information been imparted in a timely fashion, some part or all of the funds might have

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stances. . . . Certainly, the issuing bank is not required to drop everything—including other letter of credit draw submissions—just because a beneficiary has decided to delay submitting a draw until less than a week before the letter of credit expires. Thus, the district court did not err as a matter of law when it concluded that [issuer] had three business days to review the joint draw, nor did it err as a matter of fact in finding that [issuer] acted reasonably under the circumstances.

*Id.* at 1318 n.3; see also discussion in Givray et al., *Letters of Credit* (1991), *supra* note 32, at 1627-29 (discussing whether reasonable time can be construed as less than statutory three-day period).

In *Penfli Industries, Inc. v. Bank of China New York Branch*, No. 90 CIV. 1115 (RLC), 1990 WL 89339 (S.D.N.Y. June 19, 1990), the district court actually approved a lapse of four business days from receipt of the documents to notification. The bank had made its determination to reject payment “some three days after receipt of the documents” and the court found this to meet the reasonable time requirement of the UCP. *Id.* at \*1. The court then went on to state that “[i]f [the bank] is believed, however, the ‘delay’ between [its decision to reject the] documents and the notification of the rejection was one day or less. Such swift action would undoubtedly satisfy Article 16(d).” *Id.* at \*2. As such, the district court in *Penfli* indicated that three business days to decide whether to accept or reject the documents plus one business day to provide notification is well within the parameters of timely notice; see also discussion in Givray et al., *Letters of Credit* (1991), *supra* note 32, at 1630-31 (determining whether dishonor notice was given to beneficiary without delay).

In *Datapoint Corp. v. M & I Bank*, 665 F. Supp. 722, 727 (W.D. Wis. 1987), although the bank received the draft one day before the letter of credit was to expire, it sent the notice of dishonor by mail and it was not received until three days after the expiration date. This lapse of four days, along with the bank’s choice of using the mail, was deemed unreasonable because it deprived the recipient of a chance to cure the defect. *Id.*; see also *Integrated Measurement Sys.*, 757 F. Supp. at 947 (“[T]he [UCP] might allow more than three business days . . .”). Under the 1993 revision of the UCP, a very short period could be deemed “unreasonable.” See *supra* note 166 and accompanying text.

184. *Cochin II*, 808 F.2d at 213; see also *Kuntal*, 703 F. Supp. at 314 (“In the absence of any persuasive and reasonable justification for the Bank’s . . . delay following its examination of the documents, . . . the delay waived the issuing bank’s right to object to [the] discrepancies . . .”).

been recovered before they were removed from St. Lucia's Citibank account."<sup>185</sup> In so doing, what the Second Circuit accomplished was the endorsement of loss causation or curability as pertinent factors in such a rectangular dispute, which arose out of a beneficiary having perpetrated a fraud on both banks.

In *Cochin I*, the district court cited a Second Circuit decision, *Voest-Alpine International Corp. v. Chase Manhattan Bank, N.A.*,<sup>186</sup> to bolster its ostensible decision not to consider causation or curability. In truth, however, the *Voest-Alpine* case was entirely inapposite. Specifically, the court in *Voest-Alpine* did *not* espouse the proposition that courts should ignore the futility of more timely notice or more specific notice when a fraud has been perpetrated and the notice is to go from one bank to another.

*Voest-Alpine* involved the more typical triangular transaction, in which a beneficiary sued the bank for wrongful dishonor and argued that the bank had waived its objections to the defects in the documents by approving them.<sup>187</sup> The Second Circuit rejected the bank's contention that as a matter of law, the "incurability of [the] defect defeats any possibility of waiver."<sup>188</sup> In reversing the final summary judgment for the bank, the Second Circuit defined the factual dispute in *Voest-Alpine* as whether the bank had acted in such a way as to intentionally relinquish its right to insist that the beneficiary strictly comply with the letter of credit.<sup>189</sup> In so doing, however, the Second Circuit determined that the curability of *the defect* has no bearing on whether the bank committed acts of waiver.<sup>190</sup>

The *Voest-Alpine* case was really a red herring with respect to the *Cochin* matter and had no bearing whatsoever on the theory that *Cochin* was urging on the district court. What *Cochin* had tried to persuade the district court was that "by the time [it had] received the documents, . . . St. Lucia had disappeared with the letter of credit proceeds" and thus because the fraud had already been consummated, its own failure to timely notify Manufacturers "caused no additional loss."<sup>191</sup> While the bank in *Voest-Alpine* was talking about the incurability of *defects* in the *documents*, the bank in *Cochin* was talking about the incurability of a *loss* caused by *fraud*.

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185. *Cochin II*, 808 F.2d at 213.

186. 707 F.2d 680, 686 (2d Cir. 1983).

187. *Id.* at 683-84.

188. *Id.* at 685 (emphasis added).

189. *Id.*

190. *Id.*

191. *Cochin I*, 612 F. Supp. at 1543.

Also, *Voest-Alpine* did not involve the rectangular battle between the banks. As discussed above, in the rectangular transaction, the UCP notice provisions have an additional function. As we said, it is frequently the case that a confirming bank is a "local firm in cahoots with the beneficiary."<sup>192</sup> Since the confirming bank "is usually in relatively close geographical proximity with the beneficiary and typically chosen by the beneficiary because of past dealings[.]" it tends to be "somewhat biased in favor of the beneficiary."<sup>193</sup> Consequently, the UCP notice provisions aim to encourage the issuing bank to be vigilant and to try to prevent a confirming bank from incurring loss or effectually rewarding a defrauder through improper acceptance of a beneficiary's fraudulent demand for payment. As such, once a confirming bank enters the triangle, the rules have to, and do indeed, change a little. In this context, what was Article 16 and is now predominantly Article 14 induces the issuing bank to become an overseer or watchdog and exert some control over the transaction in a distant land between a local bank and a local beneficiary.

The Second Circuit in *Cochin II*, by finding that curability is relevant, underscores the inapplicability of *Voest-Alpine*. As such, the Second Circuit indicates that where there is a perpetration of a fraud and the confirming bank has wrongfully paid out on the fraudulent documents and a rejection notice is to go from the issuing bank to the confirming bank, the futility of more timely or more specific notice should indeed be a factor in determining which bank should bear the loss.<sup>194</sup> The Second Circuit suggests at least that in some instances, the issuing bank should have the chance to show to the trier of fact that its notice was expeditious enough or detailed enough because more expeditious or more detailed notice would not have changed a thing.<sup>195</sup>

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192. *Banque Paribas v. Hamilton Indus. Int'l, Inc.*, 767 F.2d 380, 384 (7th Cir. 1985); see also *supra* notes 63-68 and accompanying text (discussing letter of credit transactions which have rectangular configurations).

193. *Cochin I*, 612 F. Supp. at 1539.

194. See discussion of causation as an issue not susceptible to summary judgment in Eric K. Yamamoto et al., *Summary Judgment at the Crossroads: The Impact of the Celotex Trilogy*, 12 U. HAW. L. REV. 1, 14-15 (1990).

195. In various disputes involving letters of credit, federal courts typically consider whether proper notice would have served any purpose. See, e.g., *Marino Indus. Corp. v. Chase Manhattan Bank, N.A.*, 686 F.2d 112, 118 (2d Cir. 1982) (stating that by not returning documents until after letter had expired, bank made it impossible for beneficiary to correct any deficiencies and still make timely presentation); *Crist v. J. Henry Schroder Bank & Trust Co.*, 693 F. Supp. 1429, 1432 n.4 (S.D.N.Y. 1988) ("[E]ven if the Bank chose a less than expeditious means of notifying the Receiver, the Receiver's rights were not prejudiced by that choice, because by then it could do nothing to remedy the nonconform-

Fourth, the Second Circuit stressed that Cochin was the bank "in the best position to learn of the fraudulent nature of St. Lucia's activities and to prevent payment of the funds" and that Cochin's "failure to take advantage of that position, in spite of several opportunities to do so, resulted in the loss it [sought] to charge to [Manufacturers] here."<sup>196</sup> What this language suggests is that the UCP's rule of preclusion might not spell an automatic victory for one miscreant bank and demise for the other. Instead, causation or curability of loss is integral to the process of ascertaining which of the two banks is the more culpable. Consequently, according to the *Cochin* court, a form of comparative fault can and does enter into the decision of which bank will ultimately have to pay. Here too, the Second Circuit suggests that in some cases, the issuing bank should, at least, be given the chance to persuade the trier of fact that the confirming bank was in the best position to prevent fraud and that the confirming bank nevertheless failed to prevent fraud and thus, *ipse dixit*, the confirming bank should be the one that has to pay.

It is interesting that Professor Dolan maintains that in situations such as that in *Cochin*, "the issuer or confirming bank's right to reimbursement" should be determined "from facts other than the nature of documentary compliance."<sup>197</sup> That is, what Dolan advances is that assessing the "relative liability between the issuer and its customer . . . should turn not on the nature of the documentary breach but on its consequences and on the bona fides of the issuer."<sup>198</sup>

While Dolan advocates a minor erosion of the certain and efficient rule of strict compliance, the present author advocates a similar erosion of the certain and efficient UCP's preclusion rule. And, in fact, such an erosion is most appropriate in a rectangular case, such as *Cochin*, where the rules of strict compliance and preclusion collide. In

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ity that the Bank thought it had found in the sight drafts."); *Datapoint Corp.*, 665 F. Supp. at 727 (precluding bank from claiming that draft varied from terms of letter where "[c]ommon experience would have suggested that it was unlikely that [beneficiary] would receive [the] notice in time to correct the variance").

196. *Cochin II*, 808 F.2d at 213. Some courts have determined that where a bank facilitates a fraud by knowingly accepting forged documents, it is liable even if it did not benefit from the fraudulent scheme. See, for example, *Instituto Nacional De Comercializacion Agricola (Indeca) v. Continental Illinois Nat'l Bank & Trust Co.*, 530 F. Supp. 279, 281 (N.D. Ill. 1982), and cases cited therein. In *Instituto*, the district court found that although a customer failed to state objections to nonconforming documents within 10 days, as required by Illinois law, it was not barred from pursuing its claims against the bank which accepted forged documents. *Id.* at 281-82.

197. Dolan, *Letter-of-Credit Disputes*, *supra* note 32, at 390.

198. *Id.* at 381.

its reasoning, the Second Circuit in *Cochin*, effectually ratifies precisely such an approach. Although the specific facts of *Cochin* justified the imposition of liability on the issuing bank, the Second Circuit conjures up a hypothetical case, one in which an issuing bank should escape liability even though it has failed to fulfill what are *its* UCP's notification obligations. As such, the Second Circuit envisions a fact pattern, which would justify shifting the liability to the confirming bank that violated the rule of strict compliance. In essence, the Second Circuit in *Cochin* spawned the contours of *Cochin's* alter ego by anticipating four factors that could present themselves in such a rectangular dispute, any one or combination of which, could make the battle between the banks come out the other way. At least, the Second Circuit envisioned a rectangular letter of credit case, which could survive the certain and efficient summary judgment motion.

#### IV. CERTAINTY AND EFFICIENCY AFTER *Banque de l'Union Haitienne*

##### A. Summary Judgment in the District Court

*Banque de l'Union Haitienne, S.A. v. Manufacturers Hanover International Banking Corp.*,<sup>199</sup> another dispute arising in a rectangular transaction, is *Cochin's* doppelganger.

The *Banque* problem began when Banque de l'Union Haitienne (Union Bank) issued a letter of credit in favor of its customer, Eleck S.A. (Eleck) in the amount of \$1,400,000.<sup>200</sup> On the same day, Manufacturers Hanover (Manufacturers) agreed not only to act as the advising, confirming, and paying bank in the transaction, but also that the UCP would govern its relationship with Union Bank.<sup>201</sup> After several amendments, the letter of credit had an expiration date of April 30, 1989, and then due to an assignment, the final beneficiary became International Basic Economic Co. (IBEC).<sup>202</sup>

On April 19, 1989, IBEC first presented documents to Manufacturers for payment.<sup>203</sup> Manufacturers's employees, however, determined that the documents did not conform to the terms and

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199. 787 F. Supp. 1416 (S.D. Fla. 1991), *aff'd per curiam*, 959 F.2d 971 (11th Cir. 1992) (opinion on file with *Loyola of Los Angeles Law Review*).

200. *Id.* at 1418.

201. *Id.*

202. *Id.*

203. *Id.*



conditions of the letter of credit and thus properly rejected that initial payment.<sup>204</sup>

Manufacturers did not inform Union Bank of IBEC's first attempted presentment, but instead Union Bank found out about it the next day from its own customer, Eleck.<sup>205</sup> Consequently, on April 20, Union Bank, itself taking the initiative, telexed Manufacturers and asked it to specify what discrepancies had led to the first rejection of the documents.<sup>206</sup> On April 21, although Manufacturers sent a telex, it basically just told Union Bank that IBEC was going to try again on April 24.<sup>207</sup> Manufacturers, however, did not identify any particular defects in the IBEC documents. Union Bank did not receive this telex until April 24, 1989.<sup>208</sup>

When IBEC tried for payment again on April 21, Manufacturers again rejected the documents because they failed to meet the terms and conditions of the letter of credit.<sup>209</sup> Then on April 24, IBEC made still another presentation and again Manufacturers turned away IBEC because of discrepancies between the documents and the requirements of the letter of credit.<sup>210</sup>

After the third aborted presentation, IBEC decided to try again later the same day, but this time IBEC sought out a different Manufacturers's employee, one who had *not* been involved in any of the three previous rejections.<sup>211</sup> This time, however, the ploy worked and the employee accepted IBEC's documents.<sup>212</sup> After acceptance, Manufacturers transferred the money to IBEC's account at another bank in Miami, Florida and debited Union Bank's account at Manufacturers for the same amount.<sup>213</sup> On the following day, when IBEC wire transferred the money overseas, the IBEC principals disappeared, and so did the money.<sup>214</sup> As it turned out, the documents that IBEC had presented to Manufacturers were fraudulent.<sup>215</sup>

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204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 1418-19.

210. *Id.* at 1419.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

After paying on the letter of credit, Manufacturers sent the documents over to Union Bank.<sup>216</sup> Although Manufacturers claimed that Union Bank received the documents on April 26, Union Bank claimed that it did not receive them until April 27.<sup>217</sup> Either date, however, was undisputedly *after* the IBEC principals and the money had vanished.

In the *Banque* case, there was a dispute over exactly when Union Bank *first* notified Manufacturers of its belief that the documents that IBEC had presented had discrepancies. Specifically, Union Bank claimed to have provided Manufacturers with notice by telephone on May 5. Manufacturers, however, claimed that Union Bank did not notify it until May 8, which was the day Manufacturers had received Union Bank's telex.<sup>218</sup>

After Union Bank sued Manufacturers for damages for Manufacturers's wrongful honor, both parties moved for summary judgment. Although Union Bank's complaint listed several discrepancies, allegedly existing in the documents, the district court determined that the dispute really centered around two: First, as Union Bank claimed, the document "was neither visaed nor stamped by the Haitian Consulate in Miami"; and second, "IBEC did not make a proper presentment of an insurance certificate to Manufacturers."<sup>219</sup> One of the impediments, however, was that Union Bank's May 8, 1989, telex delineated only two discrepancies that were not, as the district court concluded, required by the letter of credit.<sup>220</sup> Also, the telex failed to state "whether Union Bank was holding the documents at the disposal of Manufacturers or was returning the documents to it."<sup>221</sup>

216. *Id.*

217. *Id.*

218. The May 8, 1989, telex pointed to two discrepancies, which, according to the district court "were not required by the letter of credit." *Id.* As the court elaborated:

First, the telex stated that the original of an all risks insurance policy was not submitted and second, that the legalization of the consular invoice was made in Miami rather than in the port of shipment. The letter of credit merely required, however, the presentation of copies of the insurance policy and did not specify the location for the consularization.

*Id.*

219. *Id.*

220. *Id.* The May 8, 1989, telex stated:

Your ref: 6-29956 our LC 3445 USD 1,400,000.00 documents received showing following discrepancies. 1) Original of insurance policy not presented 2) On-sular invoiclrgd [sic] and legalized in Miami instead of in port of shipment Stop We express our reserves in this context

*Id.* at 1419 n.1.

221. *Id.* at 1419-20.

The district court said that it was well settled that the rule of strict compliance governs the UCP's Article 15 and that "a confirming bank (Manufacturers) owes the same duty of reasonable care to the issuing bank (Union Bank) and that it is accountable to the issuer for improper payment."<sup>222</sup> Manufacturers's defense was based, however, on the rule of preclusion or as Manufacturers stated, that even assuming that it had violated the rule of strict compliance and that "such discrepancies would have been detected by using reasonable care, . . . Article 16 of the UCP *alone* disposes of this case."<sup>223</sup>

The district court, agreeing with Manufacturers, focused on what it viewed as Union Bank's Article 16 violation:

Union Bank failed in its obligations to Manufacturers by first not giving notice "without delay" by expeditious means of its decision to dishonor and second, by not stating whether it was holding or returning the documents. Although Union Bank received the documents on or about April 27, three days before the letter was to expire, its first documented communication to Manufacturers informing Defendant of the alleged defects was by telex on May 8, eight days *after* the expiration of the letter and *eleven* days after receipt of such documents. Moreover, the telex claims only two defects (which were not actually required by the letter) and it failed to contain any statement regarding the fate of the documents.<sup>224</sup>

The district court found that "[e]ven if . . . Union Bank's first notification was made by telephone on May 5 rather than May 8, that date was the fifth business (and eighth calendar) day after the date Union Bank states that it received the documents."<sup>225</sup> The court, like the district court in *Cochin I*, also determined that the three-day period contained in the Uniform Commercial Code was controlling<sup>226</sup>

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222. *Id.* at 1420 (citing *Banque Paribas v. Hamilton Indus. Int'l, Inc.*, 767 F.2d 380 (7th Cir. 1985); *Instituto Nacional de Comercializacion Agricola v. Continental Ill. Nat'l Bank & Trust Co.*, 530 F. Supp. 279 (N.D. Ill. 1982)).

223. *Id.*

224. *Id.* at 1421.

225. *Id.*

226. The district court in *Banque* stated that "[the] purported telephone call [was] still too late given the three-day rule set forth in U.C.C. § 5-112 as the maximum 'reasonable time' period in which to give notice." *Id.* (citing *Cochin I*, 612 F. Supp. at 1543). However, telephonic notice is permissible under the UCP. See, e.g., *Occidental Fire & Casualty Co. v. Continental Bank, N.A.*, 918 F.2d 1312, 1318 (7th Cir. 1990). Under some circumstances, federal courts have actually required it. See, e.g., *Datapoint Corp. v. M & I Bank*,

and further found that the “call could not be considered ‘expeditious’ since Union Bank allowed the credit to expire.”<sup>227</sup>

Union Bank apparently tried to persuade the district court that the situation in *Banque* contrasted with that in *Cochin*. As part of this effort, Union Bank urged upon the court the causation or incurability theory. Union Bank thus asserted that, unlike the situation in *Cochin*, “by the time [it] received notice of the wrongful payment, the damage had already been done and there was nothing that could have been accomplished by notice from Union.”<sup>228</sup> Specifically, as Union Bank pointed out, by the time it had received the fraudulent documents from Manufacturers, payment had been made and the defrauders and the funds were already gone.<sup>229</sup>

To support its position, Union Bank relied on what it defined as “the true purpose served by the notice provisions of Article 16,” which purpose is “to allow the beneficiary an opportunity to cure the discrepancies prior to the expiration of the [credit].”<sup>230</sup> From there, Union Bank urged the trial court to conclude that the purpose behind Article 16 “[was] not served in the instant case because no matter how quickly or what type of notice Union Bank might have given Manufacturers, there was no possibility that the defects could have been cured.”<sup>231</sup>

Although agreeing that “‘curing a defect’ may well be a purpose under Article 16,” the district court determined that “where the beneficiary is the presenter, it is surely not the only purpose.”<sup>232</sup> While the court stated that “Union’s ‘usefulness of notice’ argument ha[d] been clearly rejected . . . by the Second Circuit in *Cochin*,” the court quoted *not* from the Second Circuit decision, but from the district court decision in *Cochin I*.<sup>233</sup> The district court in *Banque* also did *not* acknowledge the fact that the Second Circuit had not rejected, but actually *adopted*, the “usefulness of notice” assertion as one that could con-

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665 F. Supp. 722, 727 (W.D. Wis. 1987) (holding telephonic notice is required so beneficiary has time to cure defects).

227. *Banque*, 787 F. Supp. at 1421.

228. *Id.* at 1422.

229. *Id.* at 1419.

230. *Id.* at 1422.

231. *Id.* at 1423.

232. *Id.*

233. *Id.* The district court also stated that the Eleventh Circuit in *Pro-Fab, Inc. v. Vipa, Inc.*, 772 F.2d 847, 854 (11th Cir. 1985), had also rejected the “usefulness of notice” argument. *Banque*, 787 F. Supp. at 1423.

ceivably bring about the acquittal of the bank that fails to comply with Article 16.<sup>234</sup>

Union Bank, moreover, sought to distinguish itself from the issuer in *Cochin* by suggesting that in the circumstances of *Banque*, it was the confirming bank that was, in fact, more culpable. What Union Bank stressed was that "four days before Manufacturers disbursed the funds, Union [had] asked Manufacturers why it had previously rejected the documents."<sup>235</sup> Manufacturers, however, had shunned the question by omitting to specify the discrepancies and by merely providing a hollow retort that the "'documents [were] presented with some discrepancies.'"<sup>236</sup> As Union Bank argued, "it may have discovered the fraud had Manufacturers advised Union of the discrepancies early on."<sup>237</sup>

The district court dismissed Union Bank's argument by stating that "Manufacturers owed no duty to inform Union of the reasons why Manufacturers rejected a demand for payment made to it, or even that a demand for payment had been made."<sup>238</sup> Such reasoning, however, is disturbingly cavalier. That is, while there is no specific mandate in the UCP that the confirming bank answer an issuing bank's questions, there is likewise no provision in the UCP or the UCC that forbids a confirming bank from disclosing information to the issuer.

In addition, Union Bank pointed out that Manufacturers, unlike the confirming bank in *Cochin*, was in the best position to learn of the fraud and to prevent payment, and that it—Union Bank—unlike the

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234. *Banque*, 787 F. Supp. at 1423.

235. *Id.* at 1422.

236. *Id.*

237. *Id.*

238. *Id.* The district court cited *Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230, 237 (5th Cir. 1983), and *Five Star Parking v. Philadelphia Parking Auth.*, 703 F. Supp. 20 (E.D. Pa. 1989), for this proposition. Neither case, however, dealt with a dispute between an issuing bank and a confirming bank. In *Philadelphia Gear*, the Fifth Circuit rejected the beneficiary's argument that under Louisiana law, the issuing bank "possessed an unqualified duty to notify it of the precise defects within its drafts and that absent such notice liability must attach." 717 F.2d at 237. In *Five Star Parking*, the district court determined that neither state law nor the letter of credit required the issuing bank to notify a customer before allowing the beneficiary to draw upon a letter of credit. 703 F. Supp. at 21-22.

While neither *Philadelphia Gear* nor *Five Star Parking* held that a confirming bank has an obligation to communicate problems to the issuing bank, such a refusal to communicate is unreasonable in light of the fact that courts have recognized that confirming banks "may be . . . local firm[s] in cahoots with the beneficiary" and that doctrines, like the rule of strict compliance, aim "to minimize the likelihood that a fraudulent demand for payment will be made and accepted." *Banque Paribas v. Hamilton Indus. Int'l, Inc.*, 767 F.2d 380, 384 (7th Cir. 1985); see *supra* notes 64-67 and accompanying text.

issuer in *Cochin*, did not have “knowledge of the document discrepancies . . . before the documents were presented to the confirming bank.”<sup>239</sup> Thus, as Union Bank asserted, what made the issuer in *Cochin* the more culpable party was that it “took no action in spite of the fact that it had an opportunity to do so.”<sup>240</sup> Union Bank, however, “was never made aware of any of the defects before payment was made” and thus, unlike *Cochin*, had simply no opportunity to take any action.<sup>241</sup> The district court, apparently relegating such an argument into the same category as causation or usefulness of notice, just summarily brushed it aside.<sup>242</sup>

The district court concluded by extolling the UCP’s “vital policy of promoting *certainty* in letter of credit transactions.”<sup>243</sup> The court also elaborated on how Union Bank’s theory that the “confirming bank [be required to] establish a loss as a result of the issuing bank’s failure to fulfill its Article 16 obligation” was tantamount to an emasculation of heroic certainty and efficiency.<sup>244</sup>

[I]f an issuing bank can avoid the preclusion penalty in such a fashion, not only would Article 16 be stood on its head, but the *certainty* essential to letter of credit operations would be frustrated. Indeed, if we were to rule in Union Bank’s favor today, this would defeat the letter of credit’s function of being a swift, fluid and reliable financing device and would ignore the expectation in the international financial community that parties will fulfill their statutory duties. Such a decision would invite issuers to disregard their duties and prove in court that “their” case is excepted from Article 16 because there was nothing they could have done to cure the loss.<sup>245</sup>

In sum, apparently persuaded that if it abided by Union Bank’s position, it could have a “harmful effect” on the certain and efficient “system as a whole,” the district court gave Manufacturers a judgment as a matter of law.<sup>246</sup>

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239. *Banque*, 787 F. Supp. at 1423.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 1424.

244. *Id.*

245. *Id.*

246. *Id.*

### B. *An Affirmance in the Eleventh Circuit*

The Eleventh Circuit affirmed the district court and in an unpublished decision, provided:

The judgment of the district court is affirmed for the reasons stated in the Memorandum Opinion and Order of Summary Judgment entered on February 27, 1991. We note on page 12 of that opinion an adoption of the "three-day rule" discussed in *Cochin [I]*. We do not adopt such a rigid rule and find it unnecessary to establish a precise period of time. We agree, however, that the notice given in this matter by Union Bank did not satisfy the "without delay" requirement of Article 16(d) of the UCP. In all other regards, we agree with the reasoning of the district court.<sup>247</sup>

What is interesting is that the Eleventh Circuit views itself as perfectly aligned with the Second Circuit. But while the Eleventh Circuit agrees with the Second Circuit that timeliness under Article 16 of the UCP does not entail the mere tallying of three days, the similarity ends there. That is, in its reasoning, the Second Circuit had envisioned a rectangular dispute in which a confirming bank honors non-conforming documents and the issuing bank that fails to comply with Article 16 nevertheless either prevails or survives summary judgment. Although the *Banque* case is the Second Circuit's hypothetical in the flesh, Union Bank—the issuing bank—neither prevails nor survives summary judgment.<sup>248</sup>

### C. *Certainty and Efficiency after Banque*

What *Cochin* giveth, *Banque* taketh away. As previously stated, the Second Circuit in *Cochin II* described four attributes of a rectangular dispute, any one or combination of which would require either summary judgment for the issuer or at least be deemed inappropriate for judicial resolution without trial.<sup>249</sup> *Banque* has all four of these attributes.

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247. *Banque de l'Union Haitienne, S.A. v. Manufacturers Hanover Int'l Banking Corp.*, 787 F. Supp. 1416 (S.D. Fla. 1991), *aff'd per curiam*, 959 F.2d 971 (11th Cir. 1992) (citations omitted) (opinion on file with *Loyola of Los Angeles Law Review*).

248. Despite the faulty analysis of both the district court and the Eleventh Circuit in *Banque*, few commentators have even mentioned the case and those that have treat it as just another case applying the UCP's Article 16 preclusion to nonconforming presentations. See, e.g., Barnes & Byrne, *supra* note 33, at 1637 n.16.

249. *Cochin II*, 808 F.2d at 212-13.

First, in rejecting a set time frame for Article 16, the Second Circuit in *Cochin II* left the reasonable time standard intact.<sup>250</sup> Because it is apodictic that the “reasonableness of a period of time—except as to extremes—[is] . . . a classic issue for the trier of fact[.]”<sup>251</sup> the Second Circuit implicitly acknowledged that the reasonableness of some lapses of time could present a question of fact.

We know, however, from *Cochin II* that a twelve- to thirteen-day period from inspection to notification does not satisfy the reasonableness or without delay requirements as a matter of law.<sup>252</sup> Also implicit in the *Cochin II* decision is a sense that a lapse of more than three days can in some instances satisfy the UCP’s timeliness provision.<sup>253</sup> In *Banque*, Union Bank had argued that it had given notice on May 5 and Manufacturers said that notice had occurred on May 8.<sup>254</sup> This period, which amounts to a lapse of five to eight business days after receipt of the documents, could be reasonable and without delay as a matter of law and at least present a factual issue.

Second, in *Cochin II*, the Second Circuit said that on these facts there could be “no rationale to justify [the issuer’s] delay.”<sup>255</sup> What such language acknowledges is the possibility that an issuing bank, although providing untimely or even inadequate dishonor notification, might nevertheless prevail in such a dispute with a confirming bank.

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250. *Id.* at 212. Under Article 13(b) of the 1993 revision of the UCP, the reasonable time standard still exists, but it has a cap of seven banking days following the day of receipt of the documents. If one of the benefits of quantifying the time frame is to promote certainty, then the 1993 revision has not accomplished that goal. That is, a bank that does not take the full seven banking days may still be deemed unreasonable. See DOCUMENTARY CREDITS, *supra* note 180, at 41 (“UCP 500 sub-Article 13(b) considers a reasonable time to be still a reasonable time (whether one hour or several days, depending on the individual transaction) subject to a maximum of seven banking days following the day of receipt of the documents.”). While the 1993 revision retains the supposedly inefficient reasonableness inquiry for time frames of less than the seven banking days, it precludes the conceivably fair determination that a bank that exceeded the seven banking days acted reasonably. *Cf. id.* at 40-41 (“Among other criteria on which reasonableness depends are the circumstances of presentation, the type and the value of documents. At one end of the spectrum one may encounter an examination of hundreds of documents. This examination could consume every hour of the seven-day period.”). As such, the 1993 revision has both drawbacks—inefficiency and unfairness.

251. *Flagship Cruises, Ltd. v. New England Merchants Nat’l Bank*, 569 F.2d 699, 702 (1st Cir. 1978); see *supra* note 181.

252. *Cochin II*, 808 F.2d at 213.

253. See Dolan, *Letter-of-Credit Disputes*, *supra* note 32, at 389-90.

254. *Banque de l’Union Haitienne, S.A. v. Manufacturers Hanover Int’l Banking Corp.*, 787 F. Supp. 1416, 1419 (S.D. Fla. 1991), *aff’d per curiam*, 959 F.2d 971 (11th Cir. 1992) (opinion on file with *Loyola of Los Angeles Law Review*).

255. *Cochin II*, 808 F.2d at 213.



In *Banque*, it is reasonable to conclude that Manufacturers's actions were what impaired Union Bank's ability to discover the problems *before* the wrongful payment and that Manufacturers's conduct was what blocked Union Bank from blowing the whistle on IBEC. Four days before Manufacturers honored IBEC's fraudulent documents, Union Bank had asked Manufacturers to provide some details with respect to IBEC's first rejected presentation.<sup>256</sup> Manufacturers's reply, however, was unresponsive: It merely told Union Bank that IBEC was going to try again on April 24 and did not identify the discrepancies that had precluded payment.<sup>257</sup> Union Bank did not even get this telex until April 24, which was the very day IBEC got paid.<sup>258</sup> Also in the interim, Manufacturers never bothered to tell Union Bank that IBEC had knocked on the door two more times and both times it had rejected IBEC's presentations.<sup>259</sup> Thus, the arguable reason why Union Bank did not try to act sooner was because Manufacturers's conduct had prevented Union Bank from learning that there was a need to act sooner.

In the district court, Union Bank had asserted that when "four days before Manufacturers disbursed the funds, Union asked Manufacturers why it had previously rejected the documents[,]” Manufacturers "did not specifically advise of the discrepancies but only replied 'documents presented with some discrepancies.'”<sup>260</sup> Using these facts, Union Bank argued "that it *may* have discovered the fraud had Manufacturers advised Union of the discrepancies early on.”<sup>261</sup>

The district court concluded, however, that such an argument "misses the mark" and stated that "neither custom, Code, nor [UCP] requires [the] issuer to notify its customers before rejecting non-conforming documents, although issuers often do consult customers, as a matter of etiquette, for purposes of securing customer's waver [sic] of defects.”<sup>262</sup> The problem is that what the district court diminished into a mere "matter of etiquette" is, in truth, an implicit component of the UCP.

As we said, in a rectangular transaction, the beneficiary often enjoys an alliance with its confirming bank. Thus, in the rectangle, what

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256. *Banque*, 787 F. Supp. at 1418.

257. *Id.*

258. *Id.* at 1418-19.

259. *Id.*

260. *Id.* at 1422.

261. *Id.*

262. *Id.* (citing *Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230, 237 (5th Cir. 1983)).

was Article 16, and is now Articles 13 and 14, compels an issuer to promptly examine documents and notify the confirming bank of fatal defects.<sup>263</sup> In so doing, the UCP contemplates that the issuer will serve as an overseer or watchdog. As such, the UCP encourages the issuer to be vigilant with respect to a payment that is to take place in a distant land between a local bank and local beneficiary. Consequently, in the rectangular context, the UCP by prompting an issuing bank, like Union Bank, to actively assert some control over payment, bestows upon the issuer a means of preventing fraud.

In *Banque*, the issuer actually attempted to function as the overseer or watchdog. In fact, by assuming that role, Union Bank early on sought information from the confirming bank. Had Manufacturers simply given the issuer information, Union Bank might have been able to discover the fraud and perhaps prevent it. And had Manufacturers merely answered Union Bank's question, Union Bank *at the very least* might have sensed that something was not quite right and might have watched the transaction more closely and might have been ready to act with greater celerity.

While the *Banque* court's finding that Manufacturers had no obligation to answer Union Bank's question thwarts basic policies behind the UCP, it also derogates a significant aspect of the UCC. As we said, one of the most basic letter of credit tenets is the independence principle, which means that banks should concern themselves only with documents and not with the underlying transaction.<sup>264</sup> Under the UCC, fraud, however, activates a critical exception to the principle of independence.<sup>265</sup> Where there is forgery or fraud, courts may, on the basis of the *underlying transaction*, enjoin a bank's payment under a letter of credit.<sup>266</sup> Thus, the UCC gives a party a means of preventing fraud by rushing into court to enjoin a bank's honor of a presentment or a beneficiary's draw, or both.

In *Banque*, after Union Bank learned of IBEC's first attempted presentment from its own customer, it reasonably tried to obtain more information from the confirming bank. Had Manufacturers simply provided that information, Union Bank, its customer, Eleck, or both might have investigated and learned of the fraud and then under the aegis of the UCC sought injunctive relief to prevent the fraud. Thus, the potential dialogue between the two banks is something to be en-

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263. See *supra* notes 75-81, 96 and accompanying text.

264. See *supra* notes 28-31, 58-60 and accompanying text.

265. See *supra* notes 69-73 and accompanying text.

266. See *supra* notes 70-73 and accompanying text.

couraged. The *Banque* court should have instead put its imprimatur on that salutary dialogue between the banks because such transmittals of information can prevent fraud on banks in letter of credit transactions.

Third, the Second Circuit in *Cochin II* found that had *Cochin* "imparted [the information] in a timely fashion, some part or all of the funds might have been recovered."<sup>267</sup> As such, the Second Circuit acknowledged that causation or curability is germane. In *Banque*, however, the district court had rejected what it denominated Union Bank's "usefulness of notice"<sup>268</sup> argument and, in so doing, relied not just on its interpretation of the Second Circuit decision in *Cochin II*, but also on an Eleventh Circuit decision, *Pro-Fab, Inc. v. Vipa, Inc.*<sup>269</sup> *Pro-Fab*, however, is similar to the *Voest-Alpine* case on which the district court in *Cochin I* improperly relied.<sup>270</sup> *Pro-Fab* also does not espouse the proposition that courts should ignore the futility of more timely or specific notice when the notice is to go from an issuing bank to a confirming bank.

In *Pro-Fab*, which did not arise out of a rectangular transaction, the issuing bank refused to honor the draft and sent the beneficiary a list of defects.<sup>271</sup> Although the beneficiary had cured all but a few of these defects by the expiration date, the bank still continued to refuse payment.<sup>272</sup> In an action against the bank for wrongful refusal to honor the letter of credit, the beneficiary argued that the bank had violated certain provisions of the Georgia statute by failing to give notice of dishonor within the mandatory time frame.<sup>273</sup> The bank, conceding that it failed to give timely notice, argued, *inter alia*, that "notice was irrelevant because [the beneficiary] admits that it could never have produced the two missing documents no matter how much time it was given."<sup>274</sup> In rejecting the bank's argument, the Eleventh Circuit stated:

The bank's duty to notify is in no way contingent upon its evaluation of the usefulness of the notice. The fact that [the b]ank has now realized in hindsight that [the beneficiary] did not have direct access to the required documents because

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267. *Cochin II*, 808 F.2d at 213.

268. *Banque*, 787 F. Supp. at 1423.

269. 772 F.2d 847 (11th Cir. 1985).

270. See *supra* text accompanying note 186-195.

271. *Pro-Fab*, 772 F.2d at 850.

272. *Id.*

273. *Id.* at 854.

274. *Id.*

they were passing through another department of the bank would not excuse a failure to give timely notice in March 1983.<sup>275</sup>

While there were many distinctions between *Banque* and *Pro-Fab*, one of the most striking was that in *Pro-Fab*, the notice was to be given by the issuing bank directly to the beneficiary.<sup>276</sup> In *Banque*, the notice was to be given by the issuing bank to the confirming bank.<sup>277</sup> As discussed above, a critical purpose of notice in the rectangular transaction is to give the issuer a means of preventing the confirming bank from paying out on fraudulent documents. Under the circumstances in *Banque*, where payment had *already* been made, where the fraud was *already* consummated and the damage *already* done, the issuing bank's delay could have no impact whatsoever on such an objective behind the notice provision.

Also, because in the triangular *Pro-Fab*, the purpose of the notice was to give the beneficiary an opportunity to review and perhaps cure the *defects*, the *Pro-Fab* court concluded that such a purpose—that of curing defects—was not served where a bank makes a unilateral evaluation that the beneficiary cannot effectuate a cure.<sup>278</sup> In *Banque*, unlike the situation in *Pro-Fab*, Union Bank did not fortuitously realize in hindsight that defects could not be cured.<sup>279</sup> Instead, when Union Bank received the nonconforming documents, it was *then* true that no matter how quickly it had acted, it could not have prevented the loss by stopping the local bank from accepting the fraudulent documents.<sup>280</sup>

In short, both the district court in *Cochin I* and the district court in *Banque* relied on inapposite cases arising out of triangular transactions. In fact, both district courts adhered to precedent that did *not* involve an issuing bank and a confirming bank and the perpetration of fraud. According to the Second Circuit's reasoning in *Cochin II*, however, causation or curability should apply to a case like *Banque*.<sup>281</sup> Specifically, in a rectangular transaction, the UCP's notice provisions have a twofold purpose; affording the beneficiary an opportunity to cure defects and encouraging issuing banks to take measures to prevent a confirming bank from accepting a fraudulent demand for pay-

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275. *Id.*

276. *Id.* at 850.

277. *Banque*, 787 F. Supp. at 1419.

278. *Pro-Fab*, 772 F.2d at 854.

279. *Banque*, 787 F. Supp. at 1422-23.

280. *Id.*

281. See *Cochin II*, 808 F.2d at 213.

ment. Had the *Banque* court really followed the appellate decision in *Cochin II* and considered the goals behind the UCP, it would have at least allowed Union Bank to try to show to a fact finder that more expeditious or more detailed notice would have done nothing to advance *either* purpose behind the notice provisions.

Fourth, as we said, the Second Circuit emphasized that *Cochin* was the bank "in the best position to learn of the fraudulent nature of St. Lucia's activities and to prevent payment of the funds" and that *Cochin's* "failure to take advantage of that position, in spite of several opportunities to do so, resulted in the loss it [sought] to charge to [Manufacturers]."<sup>282</sup> In accordance with what is the Second Circuit's implicit adoption of a comparative culpability analysis, the court in *Banque* should have considered or at least permitted Union Bank to show that it was Manufacturers that was in the best position to prevent the fraud and Manufacturers that failed to do so. Union Bank might also have shown that Manufacturers had effectually contributed to the fraud. After all, in *Banque*, it was Manufacturers that knew of IBEC's three rejected presentations, and it was Manufacturers that should have been aware of a potential fraud. Also, when Union Bank took it upon itself to try to learn more about IBEC's first rejected presentation, Manufacturers's lack of cooperation had the effect of keeping Union Bank in the dark and, thus, of impairing Union Bank's ability to try to halt the payment of the funds.

In sum, the Second Circuit in *Cochin II* envisioned a rectangular letter of credit case, which involved an issuing bank that although failing to comply with its UCP notice obligation, it nevertheless either prevailed or survived summary judgment. *Banque* was that very case and should have been the one in which the issuer had either a summary victory or a trial.

## V. CONCLUSION

Rectangular UCP disputes, such as *Cochin* and *Banque*, which involve an issuing bank and confirming bank, are significant because they present a context in which several rules of certainty and efficiency converge. The rule of strict compliance, which precludes a bank from looking beyond the face of the documents to the underlying transaction, serves to advance the goal of certainty and efficiency. The UCP's rule of preclusion, which sanctions a bank for its failure to perform its timeliness or rejection notification duties, also serves the

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282. *Id.* at 213.

lord of certainty and efficiency.<sup>283</sup> Moreover, because courts view such cases as “particularly appropriate for judicial resolution without trial[.]”<sup>284</sup> the cases also implicate that certain and efficient summary judgment mechanism.

Implicit in the Second Circuit’s analysis in *Cochin II* is the notion that rules of certainty and efficiency should not be so invariably rigid that they undermine the fundamental jurisprudential objective of fairness. Specifically, the appellate court in *Cochin II* allowed a bank to escape the consequences of its violation of the strict compliance rule *not just* because its opponent had triggered the UCP’s preclusion sanction, but also because of the particular circumstances before it. Thus, what emanates from the Second Circuit decision is, in truth, a vision of a hypothetical antithesis. That is, the Second Circuit described an issuing bank escaping the UCP’s preclusion sanction, *not just* because its opponent had violated the strict compliance rule, but because of the presence of one or more facts. Inherent in the Second Circuit decision is an acknowledgment that the envisioned hypothetical might be one in which the law is *not* “sufficiently chartered” to be resolved on summary judgment.<sup>285</sup> On its broadest level the Second Circuit in *Cochin II* may constitute an essay on the jurisprudential pursuit as something other than a mere yearning for certainty and efficiency.

*Banque* is significant not just because it illustrates the complete derogation of the approach implicitly endorsed in *Cochin*, but also because it discloses the ramifications of thwarting the policies of *Cochin*. While the *Cochin* court implicitly acknowledged that a lapse of more than three days can, in some instances, satisfy the UCP’s time requirements, the *Banque* courts mechanically branded the lapse of five to eight business days as unreasonable as a matter of law. While the appellate court in *Cochin II* said that a “rationale” could justify an issuing bank’s delay,<sup>286</sup> the *Banque* courts summarily rejected a compelling justification.<sup>287</sup> While the *Cochin II* court acknowledged that causation of loss or curability should be considered in determining liability, the *Banque* courts perfunctorily exonerated the very bank that

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283. See *supra* notes 81-84 and accompanying text.

284. *Bank of Cochin, Ltd. v. Manufacturers Hanover Trust Co.*, 612 F. Supp. 1533, 1537 (S.D.N.Y. 1985), *aff’d*, 808 F.2d 209 (2d Cir. 1986) (citing *Dulien Steel Prods. Inc. v. Bankers Trust Co.*, 298 F.2d 836, 837 (2d Cir. 1962); *Transamerica Delaval Inc. v. Citibank, N.A.*, 545 F. Supp. 200, 203 (S.D.N.Y. 1982)).

285. *Cochin I*, 612 F. Supp. at 1537.

286. See *Cochin II*, 808 F.2d at 213.

287. *Banque*, 787 F. Supp. at 1421.

caused the loss or *could have*—but did *not*—prevent the loss.<sup>288</sup> And while the *Cochin II* court posited a comparative culpability analysis, the *Banque* courts avoided just such a comparison and ended up expeditiously convicting the *least* culpable party.<sup>289</sup>

Further, the *Banque* courts defeated the principle which was inherent in *Cochin*, that rules of certainty and efficiency should not be so unyielding that they effectively preclude fairness<sup>290</sup> and effectively engender loss. That is, in *Banque*, the blind devotion to “promoting *certainty* in letter of credit transactions”<sup>291</sup> resulted in not only punishment for the almost blameless party, but also dangerous precedent, which would not serve to hinder—but instead facilitate—letter of credit fraud upon banks.

In sum, the inquiry in such a rectangular dispute should be, in essence, the one that emerges from the appellate decision in *Cochin II*. The district court in *Banque* recognized that the task before it was “undoubtedly . . . difficult since a fraud ha[d] been perpetrated on both banks.”<sup>292</sup> It is here quite significant that the common denominator, the independence principle, resides in the rule of strict compliance as well as the timeliness and notification requirements of the UCP.<sup>293</sup> Fraud is, as was also stated, one critical exception to the rule of strict compliance, which allows scrutiny beyond the face of the documents to the underlying transaction.<sup>294</sup> Thus, it follows that a rectangular dispute, which involves a fraud, epitomizes the kind of dispute that courts should *not* resolve by mechanistically applying one rule over another. Instead, as the UCC contemplates, fraud or forgery

288. Compare *Cochin II*, 808 F.2d at 213 (rejecting *Cochin I*'s rationale for justifying its delay thereby implying adequate rationale may have been acceptable) with *Banque*, 787 F. Supp. at 1423 (rigidly enforcing three-day rule set forth in UCC § 5-112).

289. Compare *Cochin II*, 808 F.2d at 213 (holding *Cochin* liable because it was in best position to prevent loss and because it failed to take advantage of opportunities to avoid loss) with *Banque*, 787 F. Supp. at 1422 (stating “Manufacturers owed no duty to inform Union”).

290. Cf. Stempel, *supra* note 7, at 164-65. Professor Stempel stated:

If the judge is making evaluations of fact, the judge is therefore engaging in conduct that was traditionally regarded as a jury function. When this occurs in “cases at law,” however that phrase is defined, it would seem that these new summary judgment, directed verdict, and judgment n.o.v. ground rules violate the seventh amendment.

*Id.*

291. *Banque*, 787 F. Supp. at 1424.

292. *Id.* at 1420.

293. See *supra* notes 58-60, 83-84 and accompanying text.

294. See *supra* notes 33, 69-73 and accompanying text.

should instead justify an inquiry into the particular underlying circumstances.<sup>295</sup>

First, as the *Cochin II* court has determined, there is no set time frame for the reasonable time or without delay requirements of the UCP's Article 16.<sup>296</sup> Because, as explained above, "[t]he reasonableness of a period of time—except as to extremes—[is] a classic issue for the trier of fact[.]"<sup>297</sup> where, as in the *Banque* case, the lapse of time from receipt of the documents to notification is relatively short and even possibly less than seven banking days, the issue, at least, presents a question of fact.

Second, in such disputes, courts should, as the appellate decision in *Cochin II* suggests, consider whether there is a "rationale to justify [the issuer's] delay."<sup>298</sup> That is, even if the issuer's dishonor notification is untimely or otherwise improper, the issuer could conceivably prevail against the confirming bank if there is an adequate justification for the delay or omission. The conduct of the confirming bank, of course, can and should figure into the analysis.

Third, although some commentators view the strength of the UCP's preclusion provision as its eradication of the elements of classic waiver and estoppel—that of detrimental reliance or causation and curability<sup>299</sup>—these very elements should come right back into the analysis in a rectangular dispute involving fraud where there are two banks that have both broken UCP rules. As the appellate court in *Cochin II* indicated, courts should, of course, consider which bank acted in such a way as to cause the loss and which bank could have taken measures to prevent the loss.

Fourth, and perhaps as an inextricable aspect of causation or curability, courts should, as the *Cochin II* court suggested, consider which bank was more at fault. A focus on comparative culpability has to bring about a more fair result through the imposition of liability on the more culpable party. A comparative culpability approach will also promote greater vigilance on the part of both banks and in so doing, serve to discourage or prevent letter of credit fraud.

This four-factor approach, however, does not necessarily lend itself to resolution on summary judgment. In particular, an inquiry,

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295. See *supra* note 70.

296. *Cochin II*, 808 F.2d at 213; see *supra* notes 38-39 and accompanying text.

297. *Flagship Cruises, Ltd. v. New England Merchants Nat'l Bank*, 569 F.2d 699, 702 (1st Cir. 1978); see also *supra* note 181 (listing cases for similar proposition).

298. *Cochin II*, 808 F.2d at 213.

299. See *supra* notes 92-94 and accompanying text.



that subsumes issues like reasonableness, that invites parties to proffer justifications, that entails the weighing of causation or curability, and that involves an analysis of comparative fault will typically implicate questions of fact. Concededly, the four-factor approach can be villainized as an affront to the post-*Celotex* "bench trial on paper"<sup>300</sup> and portrayed as an archaic revitalization of the once esteemed Seventh Amendment.<sup>301</sup> Such an approach, however, will probably tend to engender greater fairness and vigilance on the part of banks. Specifically, the approach, although ostensibly at odds with the jurisprudential obsession with certainty and efficiency, is closer to what Keats called negative capability with its toleration of "uncertainties, mysteries [and] doubts."<sup>302</sup> But in its most expansive sense, the implication is that artistic and jurisprudential attainment need not always be antipodal.

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300. See Childress *supra* note 10, at 184.

301. See *supra* text accompanying note 7.

302. See KEATS, *supra* note 1, at 277.