Chapter 2: Obligations: Issuers, Confirmers, Advisors, and Silent Confirmations
Introduction

It is debatable whether the starting point in understanding the obligation of parties to an independent undertaking is the undertaking itself, the rules (if any) governing it, or the statute or law enfolding it. While early LCs stated the nature of the obligations, the use of rules has permitted and enforced a standardization.

Therefore, the starting point in understanding the various obligations of the players must be the rules.

Exercise 2-A.

1. Issuer (Issuing Bank). Read ISP98 Rule 2.01(a), (b), and (c) & UCP600 Article 7.

**Question 2-1**: What is the Issuer’s obligation? When does it start? Can it be cancelled or modified, or otherwise amended? When does it terminate? See also Revised UCC Section 5-102(a)(8), (9), and (10) and 5-108; UCP600 Article 7 (Issuing Bank Undertaking); UCP500 Article 9(a); UN LC Convention Articles 2, 6, 7, and 13. See generally, ABCs UCC Article 5 Chapter 2. For the form of a straight Commercial LC, see Citibank Forms page 15.

2. Confirming Bank (Confirmer). Read ISP98 Rule 2.01(d) & UCP600 Article 8.

**Question 2-2**: What is the difference between the undertaking of the issuer and that of the confirmer? To whom does the confirmer look to be reimbursed? See also Revised UCC Section 5-102(a) (4) and 5-107; UCP500 Article 8 (Confirming Bank Undertaking); UCP500 Article 9(h); and UN LC Convention Article 6(e). See generally, ABCs UCC Article 5 Chapter 4. For the format of a confirmed commercial LC, see Citibank Forms page 13.

**Question 2-3**: Consider whether the following undertaking is enforceable and how:

“We hereby add our confirmation, provided that timely presentation is made at our offices at [location] and that we are placed in funds by [name of Issuer].”

3. Advising Bank (Adviser). Read ISP98 Rule 2.05 & UCP600 Article 9.

**Question 2-4**: What is the difference between a confirmer and an adviser? See also Revised UCC Section 5-102(a) (1) and 5-107(c); UCP500 Article 7. See ABCs UCC Article 5 page 24. See Citibank Forms at page 8 and for the form of an advice, see page 11.

4. Beneficiary. See Revised UCC Section 5-102(a) (3); ISP98 Rule 1.09(a) “Beneficiary” & UCP600 Article 9.

**Question 2-5**: Does the beneficiary have any obligation under an LC or confirmation? If not, is either undertaking supported by consideration?

5. Applicant. See UCP600 Article 2 “Applicant”.

**Question 2-6**: Is an applicant a party to a letter of credit? What is a ‘party’ to a credit? Is it obligated to reimburse the confirmer? Can it be an action against the confirmer for wrongful honor?

The following description of the letter of credit and its operation is useful.
Chapter 2 — Obligations: Issuers, Confirmers, Advisors, and Silent Confirmations

**Alaska Textile Co., Inc. v. Chase Manhattan Bank, N.A.**

982 F.2d 813 (2nd Cir.1992)

Mc Laughlin, J.

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A brief description of what a letter of credit is and how it works may illuminate the discussion. Suppose that B, a Japanese buyer, wants to buy cloth from S, a New York seller. S does not know B and is reluctant to ship the cloth to Japan on credit, with no solid assurance that B will ever pay him.

To allay S’s concerns, B may arrange to have a bank issue an irrevocable letter of credit in favor of S. S may then ship the cloth to Japan, secure in his own mind that he will be paid by the bank. The commercial letter of credit, then, is a common payment mechanism in international trade that permits the buyer in a transaction to substitute the financial integrity of a stable credit source (usually a bank) for his own.

In its classic form, the letter of credit is only one of three distinct relationships between three different parties: (1) the underlying contract for the purchase and sale of goods between the buyer (“account party”) and the seller (“beneficiary”), with payment to be made through a letter of credit to be issued by the buyer’s bank in favor of the seller; (2) the application agreement between the bank and the buyer, describing the terms the issuer must incorporate into the credit and establishing how the bank is to be reimbursed when it pays the seller under the letter of credit; and (3) the actual letter of credit which is the bank’s irrevocable promise to pay the seller-beneficiary when the latter presents certain documents, “the terms and conditions of a letter of credit which the documents may relate.” UCP art. 4; accord U.C.C. §§ 5-109 & 5-114(1); United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 259, 392 N.Y.S.2d 265, 270, 360 N.E.2d 943, 948 (1976).

Because the credit engagement is concerned only with documents, “the terms and conditions of a letter of credit must be strictly adhered to….” Corporacion De Mercadeo Agricola v. Mellon Bank Int’l, 608 F.2d 43, 47 (2d Cir.1979).

“There is no room for documents which are almost the same, or which will do just as well.” Equitable Trust Co. v. Dawson Partners, [1927] Lloyd’s List L.R. 49, 52 (1926) (appeal taken from Eng.C.A.), quoted in Supreme Merchandise Co. v. Chemical Bank, 70 N.Y.2d 344, 352, 520 N.Y.S.2d 734, 738, 514 N.E.2d 1358, 1362 (1987). “This rule [of strict compliance] finds justification in the bank’s role in the transaction being ministerial, and to require it to determine the substantiality of discrepancies would be inconsistent with its function.” United Commodities- Greece v. Fidelity Int’l Bank, 64 N.Y.2d 449, 455, 489 N.Y.S.2d 31, 33, 478 N.E.2d 172, 173 (1985) (citations omitted). Issuers are likewise held to rigorous standards. If the documents do comply with the terms of the credit, the issuer’s duty to pay is absolute, regardless of whether the buyer-account party complains that the goods are nonconforming. Issuers, moreover, must swiftly and carefully examine documents submitted for payment; and they are estopped from complaining about discrepancies they did not assert promptly.

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Bank of Nova Scotia v. Angelica-Whiteware Ltd., 36 D.L.R.4th 161, 166 (Sup.Ct.Can.1987), quoted in John F. Dolan, Documentary Credit Fundamentals: Comparative Aspects, 3 Bank. & Fin.L.Rev. 121, 127 (1989); see also Marino Ind. Corp. v. Chase Manhattan Bank, N.A., 686 F.2d 112, 115 (2d Cir.1982) (“It is the complete separation between the underlying commercial transaction and the letter of credit that gives the letter its utility in financing transactions.”); First Commercial Bank, 64 N.Y.2d at 294, 486 N.Y.S.2d at 719, 475 N.E.2d at 1259 (“The fundamental principle governing [letter of credit] transactions is the doctrine of independent contracts.”). This independence principle infuses the credit transaction with the simplicity and certainty that are its hallmarks. The letter of credit takes on a life of its own as manifested by the fact that, “[i]n credit operations all parties concerned deal in documents, not in goods, services, and/or other performances to which the documents may relate.” UCP art. 4; accord U.C.C. §§ 5-109 & 5-114(1); United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 259, 392 N.Y.S.2d 265, 270, 360 N.E.2d 943, 948 (1976).

The great utility of the letter of credit derives from the fact that these three relationships are utterly independent of one another:

The fundamental principle governing documentary letters of credit and the characteristic which gives them their international commercial utility and efficacy is that the obligation of the issuing bank to honour a draft on a credit when it is accompanied by documents which appear on their face to be in accordance with the terms and conditions of the credit is independent of the performance of the underlying contract for which the credit was issued.
Question 2-7: What is the legal character of the three relationships to which the court alludes?

Question 2-8: Must the three parties be different entities?

Question 2-9: In reading the following case, consider what constitutes issuance of the letter of credit and at what point in time the credit was issued.

ITM ENTERPRISES, INC. v. BANK OF NEW YORK
302 A.D.2d 359 (N.Y.A.D., 2003), 49 U.C.C. Rep. Serv. 2d (Callaghan) 1278 754 N.Y.S.2d 663 (N.Y.A.D. 2 Dept., 2003);

SUMMARY: In an action, inter alia, to recover funds pursuant to a letter of credit, the defendant appeals from an order of the Supreme Court, Queens County (Posner, J.), dated February 6, 2001, which denied its motion for summary judgment dismissing the complaint.

OPINION: This action arises from an international agreement for the purchase and shipment of goods, which was financed by a letter of credit. It is undisputed that when the defendant bank transmitted the letter of credit to the bank representing the plaintiff shipper, it omitted a condition for payment. When the plaintiff allegedly failed to satisfy this condition, the bank representing the buyer refused to issue payment on the letter of credit. The plaintiff shipper subsequently commenced this action seeking damages from the defendant bank for its failure to accurately advise the terms of the letter of credit.

Contrary to the contention of the defendant bank, the Supreme Court properly denied that branch of its motion seeking summary judgment dismissing the plaintiff’s first cause of action to recover the funds due under the letter of credit. The letter of credit was expressly made subject to the Uniform Customs and Practices for Documentary Credits (hereinafter UCP), which is a compilation of internationally-accepted commercial practices (see Alaska Textile Co. v Chase Manhattan Bank, N.A., 982 F2d 813; E & H Partners v Broadway Natl. Bank, 39 F Supp 2d 275, 281)(ITM was divided under NY Prior 5-102, or non conforming amendment, which made the statute inapplicable where the UCP applied to the LC). Although a letter of credit which is subject to the UCP is exempt from the Uniform Commercial Code (hereinafter UCC) provisions dealing with letters of credit, courts may rely upon analogous UCC provisions if consistent with the UCP (see Nassar v Florida Fleet Sales, 79 F Supp 2d 284, 291; E & H Partners v Broadway Natl. Bank, supra; Canadian ImperialBank of Commerce v Pamukbank Tas, 166 Misc 2d 647; Ross Bicycles v Citibank, 161 Misc 2d 351). The UCP contains no provision governing an advising bank’s duty to accurately transmit the terms of a letter of credit. Therefore, we may rely upon UCC 5-107 (c), which imposes a duty on an advising bank to accurately transmit the terms of the letter, since it is not in conflict with the UCP. Under the UCC, once the beneficiary of a letter of credit receives written advice of its issuance, he acquires the right to collect damages from the advising bank if the purpose of the letter of credit is frustrated by the giving of an inaccurate advice (see Sound of Mkt. St. v Continental Bank Intl., 819 F2d 384, 393; see also Merchants Bank of N.Y. v Credit Suisse Bank, 585 F Supp 304, 307).

Guided by these principles, we agree with the Supreme Court’s denial of summary judgment dismissing the plaintiff’s first cause of action because there are disputed questions of fact, inter alia, as to whether the defendant’s role in the transaction *361 was limited to that of an advising bank, and, even if its role was so limited, whether the payment term which it omitted in advising the letter of credit was a material component of the underlying agreement upon which the plaintiff relied (see Voest-Alpine Intl. Corp. v Chase Manhattan Bank, N.A., 707 F2d 680, 682; Merchants Bank of N.Y. v Credit Suisse Bank, supra; Sound of Mkt. St. v Continental Bank Intl., supra).

However, the Supreme Court should have granted that branch of the defendant’s motion which was for summary judgment dismissing the plaintiff’s second cause of action to recover consequential and punitive damages. A claimant under a letter of credit may recover the amount that is the result of the dishonor or repudiation, as well as incidental damages, but not consequential or punitive damages (see UCC 1-106, 5-111; Nassar v Florida Fleet Sales, supra at 293-294).

Krausman, J.P., Friedmann, Mastro and Rivera, JJ., concur.
Question 2-10: What is the obligation of an advising bank?

Question 2-11: Is the court in *ITM Enterprises* correct in stating that UCP500 does not address the obligation of an advising bank with respect to accurate transmission of the terms of an LC? What conclusion should be drawn from its failure to speak to this point? Compare ISP98 Rule 2.05 and UCP600 article 9(b).

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**TAY YONG KWANG JC:** 1 The plaintiff is a bank carrying on business in Singapore. It is part of the United Overseas Bank ("UOB") group. The defendant is a bank carrying on business in Italy. The plaintiff’s claim is for payment on two standby letters of credit ("SBLCs") issued by the defendant in its favour.

2 The first SBLC for USD12m ("Global SBLC") was said to have been issued by the defendant’s Udine branch, in consideration of the plaintiff having granted and/or agreeing at the defendant’s request to grant and/or continuing to grant to one Super Shipmanagement Pte Ltd (now known as Global Trade & Consultancy Pte Ltd ("Global")) banking facilities and/or other banking accommodation, as security for the facilities. The material terms of this SBLC were that the defendant shall immediately pay to the plaintiff USD12m, interest thereon and other banking charges as may be certified by the plaintiff upon demand made by way of authenticated teletransmission. ... The plaintiff’s certificate on the outstanding sum, interest and other charges due shall be final and conclusive.

3 By an authenticated teletransmission dated 14 February 2000, the plaintiff certified that USD10,659,605.96 and interest at the rate of 3.5% over three months Singapore Interbank Overnight Rate ("SIBOR") from 12 February 2000 were due and owing under the Global SBLC and demanded immediate payment of the same.

4 The second SBLC for an amount of USD3m ("Ghosh SBLC") was issued by the defendant’s Udine branch as security for facilities granted to one Amarendra Nath Ghosh ("Ghosh"). The material terms of this SBLC were similar to those set out above in respect of the Global SBLC.

5 By an authenticated teletransmission dated 1 February 2000, the plaintiff certified that USD2,229,875.39 and interest thereon at the rate of 2.5% over three months SIBOR from 1 February 2000 were due and owing under this SBLC and demanded payment of these amounts.

6 The defendant failed to pay the sums demanded in respect of both SBLCs.

7 The defendant’s defence is that it never intended to issue the two SBLCs in question which were issued by its employee, Philip Martino Pigozzo ("Pigozzo") fraudulently pursuant to a fraudulent scheme involving Pigozzo, Ghosh, the plaintiff’s employee, Samuel Lee and others.

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**The issues** 8 On facts, this case turned essentially on the question of Pigozzo’s fraud and any complicity on the part of the plaintiff’s bank officers. On law, the issue concerned the effect of authenticated SWIFT messages. “SWIFT” is an acronym for Society for Worldwide Interbank Financial Telecommunication.

9 ... The defendant was a large private Italian bank with its head office in Milan and over 550 branches in Italy. It was part of the Intesa Group of banks, one of the largest banking conglomerates in Italy. The defendant’s main business was in providing corporate banking services such as payment orders, collection, letters of credit and guarantees.

13 In 1999, Ghosh [Principal of Global] applied for a revolving term loan of USD3m in his own name. Subsequently, he asked for another revolving term loan of USD2.7m. One of the securities required by the plaintiff in respect of these facilities was an SBLC from the defendant for the sum of USD3m on terms acceptable to the plaintiff.

14 On 11 June 1999, the plaintiff received the Ghosh SBLC via an authenticated SWIFT message from the defendant. The Ghosh SBLC stated that it was issued to secure the facilities to be furnished by the plaintiff to Ghosh. The plaintiff had no reason to doubt its authenticity.

15 The Ghosh SBLC was in a 760 format (meant for guarantees) while the plaintiff required SBLCs to be in 799 format to conform to SWIFT standards. The defendant was requested to re-issue the Ghosh SBLC in the proper format and it did so on 14 June 1999.

16 Ghosh also applied for credit facilities for Global, initially for USD17.9m. The plaintiff asked for various securi-
ties including a SBLC from the defendant for USD4m. On 16 September 1999, the plaintiff received the Global SBLC for USD4m from the defendant via authenticated SWIFT message. As with the Ghosh SBLC, the plaintiff assumed that Ghosh had made the necessary arrangements with the defendant for this SBLC.

17 When Super Shipmanagement Pte Ltd changed its name to Global, Ghosh requested the defendant to amend the Global SBLC accordingly. On 12 October 1999, the plaintiff received the amended Global SBLC via an authenticated SWIFT message.

18 Global subsequently applied for further facilities from the plaintiff. Consequently, the plaintiff requested that the amount of the Global SBLC be increased to USD12m and its validity period be extended to 16 September 2002. On 12 November 1999, the plaintiff received the revised Global SBLC with the amendments requested, again via an authenticated SWIFT message. Thereafter, the plaintiff issued a new letter of offer dated 27 November 1999 to Global offering the increased facilities which was accepted by Ghosh.

19 The plaintiff’s internal policies regarding the acceptance of securities from foreign banks were as follows. Before it accepted such securities, the credit officer in charge would check on the creditworthiness and standing of the foreign bank with UOB’s Correspondent Banking Division. There was a pre-approved list of foreign banks and limits which the plaintiff could accept for various dealings. For banks outside this list, the plaintiff would obtain ad hoc approval from UOB’s Correspondent Banking Division before accepting the securities. The defendant fell outside this list.

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21 In addition, there existed an internal guideline which stipulated that where a SBLC was issued by a bank from a G-7 (group of seven major industrialised nations) country, there was no need for verification of the authority of the branch to issue that SBLC. As Italy was a G-7 country, there was accordingly no need to verify the authority of the defendant’s Udine branch. However, Albert Yeo overlooked that guideline and suggested to Quinton Chew to verify the authority of the Udine branch with the defendant’s head office in view of the proposed new amount of the Global SBLC and the fact that letters of credit of such an amount (USD12m) would normally be issued by a bank’s head office instead of its branch. Albert Yeo wanted to be “doubly sure”. The plaintiff then sent a SWIFT message to the defendant’s head office in Milan for this purpose.

22 A reply came from the Udine branch confirming that it was authorised to issue the SBLCs. Albert Yeo noticed that it emanated from the Udine branch and asked Quinton Chew about it. Quinton Chew in turn said he would check with Clement Lim of UOB’s International Trade Services and Remittances Department.

23 One or two days later, Quinton Chew informed Albert Yeo that the defendant’s head office must have routed the plaintiff’s request to its Udine branch for it to reply. Clement Lim also reminded Quinton Chew about the internal guideline relating to G-7 countries and told him there was no need to verify the branch’s authority anyway.

24 Subsequently, the plaintiff received faxes and SWIFT messages dated 23 January 2000, 27 January 2000 and 1 February 2000 from the defendant alleging that Ghosh was suspected of having perpetrated fraud on the defendant through the use of various accounts with the plaintiff including Global’s account and that the SBLCs had been issued fraudulently and were null and void.

25 By its solicitors’ letters dated 1 February 2000, the plaintiff wrote to Global and to Ghosh demanding repayment of all outstanding sums under the respective facilities. Actions were then commenced against Global and Ghosh here (Suit Nos 600168/2000 and 600169/2000) and on 26 April 2000, the plaintiff was awarded summary judgment in both actions.

26 The plaintiff also decided to enforce the two SBLCs against the defendant and made the respective demands mentioned earlier in this judgment. As mentioned before, the defendant failed to pay up despite the demands.

27 Addressing the defendant’s contentions, Albert Yeo said that even if the terms of the two SBLCs were not favourable to the defendant, the plaintiff had expressly stipulated to Ghosh and to Global that the SBLCs would be on terms acceptable to the plaintiff. That was reasonable as the plaintiff was taking a commercial risk in extending facilities to Ghosh and to Global. The plaintiff had no knowledge of the authority of the defendant’s Pigozzo and that was why it was all important that the SBLCs together with the amendments were received by way of authenticated SWIFT messages which would assure the recipient of the identity of the sender and the correctness of the message text. That obviated the need to determine the authority of the issuer or its officer sending the message. If Pigozzo did by-pass the defendant’s internal controls for its SWIFT system, that was the defendant’s internal matter. Far from being evidence of fraud, most of the amendments sought were not substantial or unusual and the speed with which the defendant responded was not extraordinary if Ghosh was indeed a major customer of the defendant as he had claimed. Again, if Ghosh and Global did not furnish any security to the defendant for the SBLCs, that was a matter not within the knowledge of the plaintiff which was under no duty to inquire about such security. Pigozzo had been arrested and had confessed to his misdeeds but, significantly, had not implicated any of the plaintiff’s officers in the alleged fraud.

28 In cross-examination, Albert Yeo agreed that it was not usual to address the SBLCs and the messages relating thereto to a person (the plaintiff’s Samuel Lee) who was not
directly involved in the SBLCs. He surmised that that was done because of the substantial Asian Currency Unit ("ACU") deposit dealings that Ghosh had with Samuel Lee. In any event, when he was shown the SWIFT messages with Samuel Lee’s name in it, he was more concerned with the terms rather than the name.

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33 Ghosh told Joseph Wong [plaintiff’s main banking manager from 1994 to August 1998] during discussions that he wanted a USD3m loan. Joseph Wong explained that he could have a term loan or an overdraft. Ghosh decided on a revolving term loan. Joseph Wong then told him that he would have to provide security for at least USD3m. Ghosh said he would arrange for the defendant to issue a SBLC.

34 Joseph Wong then prepared a report dated 23 June 1999 together with a credit officer in the main branch to seek approval for the facilities from the management. In doing his background checks on Ghosh, Joseph Wong asked Ghosh for a reference letter from his bankers. Joseph Wong received a letter of introduction from the defendant dated 11 June 1999 signed by Pigozzo.

35 Joseph Wong also spoke to U Kean Seng, a lawyer in a Singapore law firm, as Ghosh had referred Joseph Wong to him. U Kean Seng told Joseph Wong that Ghosh had a few tens of millions of dollars worth of assets. He also sent Joseph Wong Ghosh’s resume by a letter dated 22 June 1999.

36 ... Joseph Wong also checked with a former credit officer of the plaintiff who had handled Ghosh’s current account and was told that Ghosh had good connections and was of good financial standing.

37 Having received all this information, Joseph Wong accepted that Ghosh was creditworthy and formed a favourable impression about his business acumen. In any event, the facilities extended to Ghosh were more than adequately secured.

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52 UOB and the plaintiff adhered to the following internal guidelines before accepting any SBLC: (a) if the SBLC was received by SWIFT, the transmission must be authenticated; (b) the SBLC must conform with UOB’s standard format for such; and (c) in certain cases, the head office of the branch issuing the SBLC must verify the authority of that branch. The last requirement was not necessary where: (a) the SBLC amount did not exceed $100,000; (b) the head office and the issuing branch were both in G-7 countries, regardless of the monetary limit of the SBLC; and (c) the head office was within a G-7 country but the issuing branch was not, if the amount did not exceed $10m. Where verification was required and a SWIFT arrangement existed between UOB and the issuing bank, it must be done via authenticated SWIFT.

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61 For SBLCs received by SWIFT, their duty was to check that they had been authenticated. Clement Lim would first look at the application header and then check that the authentication was alright. There was a key with a lot of numbers. From this, he could tell that that was an authenticated message, which meant that it was both a genuine document from the Udine branch to the plaintiff as well as one issued with the full authority of the sender, the Udine branch. He understood the SWIFT system to be such. Within the UOB group, a format 799 message could not be sent by just anybody with access to SWIFT. There were controls over who could send such messages because they would bear the full authority of the bank. Clement Lim was not aware whether the UOB guidelines had been circulated to departments other than his.

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63 Lim Lye Huat, the Vice-President of Human Resources in UOB, testified about the termination of Samuel Lee’s employment with the plaintiff.

64 Samuel Lee joined the plaintiff in August 1997. From 1 April 1999, Samuel Lee was an Assistant Vice-President in the ACU Department. Around February or March 2000, it was discovered that Samuel Lee had singly, and without authority, issued various letters (in particular, those dated 26 July 1999, 11 January 2000 and 21 January 2000) and a document entitled “Letter of Conditional Undertaking” dated 13 September 1999 to the defendant. This was viewed as gross misconduct and the plaintiff terminated his services on 20 March 2000.

65 In cross-examination, Lim Lye Huat said the discovery of Samuel Lee’s misconduct came in the form of a report dated 10 March 2000 from the Internal Audit Department in consultation with internal and external lawyers. He was aware that Samuel Lee had given two statements to the Internal Audit Department on 26 and 27 January 2000. The decision to dismiss Samuel Lee was taken by Lim Lye Huat and his superior, Ronald Tan Hee Huan, then Head of Human Resources in the plaintiff. Lim Lye Huat did not see various other letters written by Samuel Lee which were all signed by him singly and which involved USD2m and more. He was also not aware of the fact that the defendant had sent a number of cheques to Samuel Lee for collection and that Samuel Lee had sent them instead to Ghosh free of payment. Lim Lye Huat said he was aware, however, that the plaintiff had made a police report against Samuel Lee but did not know who made the report. He did not know where Samuel Lee was working at present. He disagreed that the plaintiff’s management had already taken the decision earlier to dismiss Samuel Lee and that he was constrained to carry out the decision.
66 Lim Lye Huat went on to say that the four documents mentioned in his affidavit of evidence-in-chief were sufficient to dismiss Samuel Lee, as signing singly and without authority was viewed very seriously by the bank. As for other allegations like having received paid overseas trips from Ghosh, they would have to convene an inquiry if they wished to dismiss Samuel Lee on this ground.

67 Samuel Lee was informed of his dismissal by Lim Lye Huat who called him, spoke to him and told him the reason and then handed him the letter of dismissal dated 20 March 2000. The four documents in question were, however, not mentioned. There was no need to hear Samuel Lee’s explanations as he had admitted the facts. Samuel Lee took the letter, feeling very sad. He mentioned that the plaintiff should be more compassionate as he had a son to take care of. Lim Lye Huat consoled him and the matter was not pursued further.

…

98 Samuel Lee … joined the plaintiff in August 1997 as Assistant Vice-President with the ACU Customer Services and Marketing Section at the main branch…. He was not authorised to and did not deal with customers’ applications for credit facilities, something which was within the domain of the Credit Department. He would only assist the customers in making general inquiries with the Credit Department and would refer them to a credit officer if they wanted to apply for credit facilities. He was not involved in any decision to grant credit facilities or the security to be furnished therefor.

99 Samuel Lee was introduced to Ghosh by his colleague, Adrian Ler, in June/July 1999, when Ghosh wanted to open fixed deposit accounts for himself and his company. Samuel Lee made enquiries about Ghosh. Adrian Ler told him that Ghosh had been a customer of the plaintiff for two years, was related to royalty in India and had substantial assets abroad. He was also told that Ghosh maintained some corporate accounts with UOB. Both Joseph Wong (then branch manager) and Adrian Ler told him that as Ghosh only wanted to open a fixed deposit account, there was no risk to the bank.

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101 Ghosh had general discussions with Samuel Lee on his facilities on several occasions, mentioning that although the plaintiff’s interest rates were relatively high, he continued to use the bank because of the efficiency of the staff and his long relationship with the bank. Ghosh also mentioned to him in passing that he wanted to use SBLCs issued by the defendant as security for the facilities extended to him by the plaintiff. As Samuel Lee’s knowledge of SBLCs and credit matters was limited, he could not advise Ghosh on this.

102 However, Samuel Lee obtained and gave a copy of the plaintiff’s standard form for SBLCs to Ghosh at his request. He also faxed a copy thereof to the defendant on Ghosh’s instructions as Ghosh had told him that the defendant wished to have a look at the plaintiff’s standard form for SBLCs before deciding whether to issue any in the plaintiff’s favour.

103 For the Global SBLC, Samuel Lee subsequently prepared a letter dated 11 October 1999 on Ghosh’s request to inform the defendant of the change of name of Super Shipmanagement to Global. He also assisted Ghosh in preparing the letters to the defendant concerning the increase in the value of the SBLC and the extension of its expiry date. All this was part of customer service as far as Samuel Lee was concerned. He did not however advise Ghosh on matters relating to the SBLCs.

104 Samuel Lee denied any knowledge of or involvement in any alleged conspiracy with Ghosh and Pigozzo to defraud the defendant. He was not aware of the details of Ghosh’s dealings with the defendant or with Pigozzo and had no reason to suspect that Ghosh was involved in any illegal or fraudulent activity.

105 From time to time, Ghosh would go to Samuel Lee’s office and ask him or one of his staff to prepare cheques drawn on his companies’ accounts made payable to a company known as Cenacle Holdings. He told them that this company belonged to him and the payments were for foreign exchange trades.

106 Samuel Lee prepared the cheques drawn on Sofia Palace’s account but did not help in the cheques drawn on Nellington’s account. There was insufficient money in Sofia Palace’s account at that time to meet several of the cheques drawn by Ghosh. However, Ghosh assured him that there would be sufficient funds in the account when the cheques were presented for payment.

107 Once the cheques were signed, Ghosh would tell Samuel Lee to send them by courier to the defendant for the attention of Pigozzo. Samuel Lee would prepare a simple covering letter to the defendant.

108 The plaintiff would subsequently receive a package from the defendant containing some cheques for collection. This would come by courier for Samuel Lee’s attention. Most of the cheques sent by Samuel Lee to the defendant were not returned to the plaintiff for collection. The cheques that were returned would be accompanied by a covering letter from the defendant. As the funds were insufficient to cover the cheques, Samuel Lee would call Ghosh for his instructions. Ghosh would inform him that the defendant would send him instructions on the cheques. Samuel Lee did not communicate directly with Pigozzo concerning the cheques.
Subsequently, an authenticated SWIFT message from the defendant would arrive instructing Samuel Lee to cancel the transaction. The message would refer to the collection reference numbers and instruct the plaintiff to return the cheques “free of payment”. Samuel Lee would do as instructed and would get Ghosh to acknowledge receipt of the cheques identified in the SWIFT message.

All the cheques received were thus returned to Ghosh pursuant to the defendant’s instructions via authenticated SWIFT save for the last instruction which the plaintiff received by fax dated 12 November 1999 from the defendant. That bore Pigozzo’s signature which Samuel Lee had seen many times before. He did as he had done before, asked Ghosh to sign on the fax acknowledging receipt of the cheques and then handed them over to him. He did not believe there was anything wrong or suspicious about all this. He did ask Ghosh once whether he kept issuing such cheques and was told that they were only a stand-by for the defendant for his foreign exchange transactions and were cancelled subsequently as he would make payment to the defendant from his other bank accounts. Samuel Lee believed his explanation.

On one occasion, Ghosh asked him to remit USD10,000 to Pigozzo, saying that the money was reimbursement for Pigozzo’s and his wife’s travelling expenses. Ghosh asked him to remit the funds in his (Samuel Lee’s) name as a misunderstanding could arise if Pigozzo was seen to be receiving money from a customer of the defendant. Further, if it was done in Samuel Lee’s name, there would be no bank charges levied on the remittance and a preferential foreign exchange rate would be applied. Samuel Lee felt that it would not be proper for him to use his bank privileges for this and they therefore went to OUB next door to effect the transaction. This was the only time Samuel Lee remitted money in his name to Pigozzo or anyone else.

Around September 1999, Ghosh asked that the plaintiff issue a Letter of Conditional Undertaking to the defendant in respect of his foreign exchange transactions. He gave Samuel Lee a draft for this purpose and explained that it would enable him to carry out substantial foreign exchange trades. Ghosh appeared very experienced and knowledgeable in foreign exchange trades. Samuel Lee did not suspect anything was wrong and saw no harm in providing the undertaking. He made amendments to the draft to eliminate any risk to the plaintiff. In his mind, the Letter of Conditional Undertaking as amended by him, merely purported to undertake to pay the defendant all moneys advanced by the defendant to Sofia Palace’s account with the plaintiff. He did not believe there was any connection between the Letter of Conditional Undertaking and the SBLCs or the cheques sent to the defendant by courier.

The covering letter dated 13 September 1999 from Samuel Lee to Pigozzo at the defendant’s Udine branch was marked “Strictly Private and Confidential”. Both the covering letter and the Letter of Undertaking were typed on the plaintiff’s letterheads and they read as follows:

13 September 1999

STRICTLY PRIVATE & CONFIDENTIAL

Banco Ambrosiano Veneto
Nucleo Operativo Estero Merci
Via Vittorio Veneto, 21
1-33100 UDINE/Italy

Dear Mr P Pigozzo,

Re: Letter of Conditional Undertaking

Enclosed is the Letter of Conditional Undertaking dated 13 September 1999 for your personal attention.

The details and transactions mentioned in the said Letter of Conditional Undertaking is strictly restricted and remain in confidence only to the two officers-in-charge (Your goodself and the undersigned) as Bankers for the parties concerned namely Cenacle Holding SA and Sofia Palace International Ltd respectively.

Thank you.

Yours truly,

(Signed)

Samuel Lee
Assistant Vice President ... 13 September 1999

Banco Ambrosiano Veneto
Nucleo Operativo Estero Merci
Via Vittorio Veneto, 21
1-33100 UDINE/Italy

Dear Mr P Pigozzo

Dear Sir,

Letter of Conditional Undertaking

Reference is made to the annex Trade Agreement concluded between M/S Cenacle Holding SA and M/S Sofia Palace International Ltd on SALE AND PURCHASE AND EXCHANGE AND SWAP contracts.
From time to time, M/S Cenacle Holding SA or Banco Ambrosiano Veneto, Udine, Italy as Banker for M/S Cenacle Holding SA will be remitting funds in different currencies (USD/AUD/GBP/DEM/JPY and others) to M/S Sofia Palace International Ltd’s accounts maintained with us. Only upon receipt of such funds and according to the Trade Agreement, an amount of equal value or equivalent will be remitted to M/S Cenacle Holding SA’s accounts maintained with you.

According to the Trade Agreement, Banco Ambrosiano Veneto, Udine, Italy as Banker for M/S Cenacle Holding SA will make advance payment in different currencies to the accounts of M/S Sofia Palace International Ltd maintained with us as instructed by your client. The amount will be determined by M/S Cenacle Holding SA and M/S Sofia Palace International Ltd which will be of equal or equivalent value of the contracted amount as per the Trade Agreement. This amount will be secured by a Bank Guarantee for the partial or total refund of the advance payment in the event of non-delivery of other currencies or payment as per the Trade Agreement by M/S Sofia Palace International Ltd.

At the request of M/S Sofia Palace International Ltd, we Industrial & Commercial Bank Ltd, Main Branch, 80 Robinson Road, Singapore, Dealing Officer: Samuel Lee, Assistant Vice-President establish this Guarantee and undertake irrevocably to pay to Banco Ambrosiano Veneto, Udine, Italy as Banker of Cenacle Holding SA on your first written demand, irrespective of the validity and the effect of the Trade Agreement and waiving all rights of objection and defense arising from the Trade Agreement any amount up to USD60,000,000.00 (United States Dollars Sixty Million only) upon receipt of your written request that M/S Sofia Palace International Ltd has failed to deliver the other currencies to M/S Cenacle Holding SA in conformity with the Trade Agreement. The amount in the written demand is restricted only up to the maximum of advance payment made to us by Banco Ambrosiano Veneto, Udine, Italy. The amount of this Guarantee will automatically be reduced in proportion to the value of each part delivery of currencies upon receipt by you from the account of M/S Sofia Palace International Ltd which we shall be entitled to accept as conclusive evidence that such part payment has been effected to you, Banco Ambrosiano Veneto, Udine, Italy by telegraphic transfer debiting the account of M/S Sofia Palace International Ltd maintained with us. Any payment made by us under this Guarantee will automatically reduce our engagement by same. This document is to be returned to us when our Guarantee is no longer required or its validity has expired.

This Guarantee is valid for written demands received by us at our address: Attn: Samuel Lee, Officer-in-Charge of M/S Sofia Palace International Ltd, Industrial & Commercial Bank Ltd, 80 Robinson Road, Singapore on or before 16 December 2001 after which date the liability to you under this Guarantee will be of no further effect, whether this document is returned to us or not.

This Guarantee will come into force only after receipt by us of the advance payment in favour of M/S Sofia Palace International Ltd. This Guarantee is only for Banco Ambrosiano Veneto, Udine, Italy and not assignable. The confidentiality of this Guarantee is strictly restricted between the two officers-in-charge of both parties respectively.

This Guarantee shall be governed by the laws of Singapore. Place of jurisdiction is Singapore.

Yours faithfully (signed) Samuel Lee Industrial & Commercial Bank Ltd Main Branch, Singapore

135 Samuel Lee then elaborated on the all-expenses-paid trip to Australia in October 1999 mentioned by him in his statement to the plaintiff’s internal auditor.... When Ghosh heard that Samuel Lee was on leave during that week in October 1999, he invited him and his son along. They travelled together to Sydney by Singapore Airlines in first class and then to Adelaide by Qantas in economy class. Samuel Lee booked the air tickets for Ghosh through UOB Travel. As far as he was concerned, this trip was a personal matter although he was also Ghosh’s banker. He therefore did not tell anyone in the plaintiff about it.

136 Later in October 1999, Samuel Lee and his son again travelled with Ghosh. This time it was to Bangkok. They travelled by Singapore Airlines in Business Class and stayed in Ghosh’s apartment there. The airfare was paid by Ghosh. Samuel Lee had vacation leave to clear and Ghosh wanted Samuel Lee’s son to have a holiday as the Australian trip was a business one.

137 The third trip was to London between 7 to 10 January 2000. Samuel Lee went there alone on Qantas, Economy Class, to deliver legal documents to Ghosh to sign as his lawyers required them by the following Monday (10 January 2000). Samuel Lee applied for leave on Monday, 10 January 2000 and departed from Singapore on Friday, 7 January 2000. The trip was paid for by Ghosh. Ghosh did not want the documents delivered to and from London by courier as he was afraid that there would be delay.

138 In London, Samuel Lee met Pigozzo for the first time at Ghosh’s office. He had brought along the plaintiff’s letterhead at Ghosh’s request in case there were documents he needed to sign and pass to Samuel Lee to bring back to Singapore. He also brought one cheque book for Ghosh. Ghosh had also told him that a few bankers including Pigozzo were there in London to discuss some deal with him. Samuel Lee prepared two letters dated 7 January 2000 in Ghosh’s office in London and handed them with the cheques to Pigozzo. Samuel Lee did not talk much to Pigozzo who left on the afternoon of 8 January 2000 for Italy. They did not discuss the letters enclosing the cheques sent to the plaintiff.
139 Ghosh gave Samuel Lee $20,000 for his son as Samuel Lee had to pay quite a lot to his ex-wife after the divorce. Ghosh also offered him the post of Chief Executive Officer in the bank that he was buying in Vanuatu. Other than the initial amount of USD5,000 mentioned in his statement, Ghosh did not pay the rest of the USD500,000 into the account Samuel Lee opened with OCBC Bank.

140 Samuel Lee met Andrew Pigozzo, the younger brother of Philip Pigozzo, once in Ghosh’s office in Singapore. Quinton Chew was also there. A copy of Andrew Pigozzo’s passport was faxed or given to Samuel Lee for him to book a room in one of the hotels in the UOB Group so that he could enjoy a special concession. Andrew Pigozzo came to Singapore around December 1999.

141 On 11 June 1999, Philip Pigozzo sent an authenticated SWIFT message to Samuel Lee as a test to ensure that everything was in order as there was a problem in the test key between the plaintiff and the defendant. Samuel Lee could not remember why that was addressed to him. The Ghosh SBLC was sent for the attention of Samuel Lee as the defendant must have thought that he was in charge of Ghosh’s account. Ghosh could have told Pigozzo to send matters pertaining to the SBLCs to Samuel Lee.

142 Samuel Lee worked in the same department as the recipient bank, and was therefore able to forward the authenticated SWIFT message to Samuel Lee for the sending bank to make sure that the message was received at the recipient bank and relay the message to the recipient bank.

143 He testified that a SWIFT message was an electronic one and since such messages could not be signed manually, they were authenticated by means of a code arrangement known only to the sender and to SWIFT. When a bank sent a SWIFT message to another bank, that message would not go directly to the recipient bank. It was sent instead to a SWIFT switching centre in Brussels, Belgium. The sending bank would enter a code on the message which was known only to the sending bank and SWIFT. When the message was received at the switching centre, the code of the sender would be reviewed for authenticity by a computer. If the computer recognised the coded message as having emanated from the sending bank, it would add an authentication by means of a code known only to SWIFT and to the recipient bank and relay the message to the recipient bank.

144 When Ghosh asked Samuel Lee over the weekend in January 2000 to destroy the documents in his custody (as stated in his statement dated 26 January 2000 to the internal auditors), he did not do so as that would mean doing something that was wrong. He would have asked the internal auditors for advice if they were more gentle with him and had not arrived at the conclusion that he had done something wrong. He disobeyed their instructions on 24 January 2000 not to discuss the matter with anyone nor to take any action as he did not think that they had all the information. He wanted Ghosh to provide all the information but Ghosh said it was merely an internal conflict in the defendant and if he were to fax the letters over, everything would be closed. He gave all the documents to the internal auditors on the night of 25 January 2000 as he had realised by 24 January 2000 that the Commercial Affairs Department was involved in the case. He knew something was not right and wanted to clarify and reveal everything.

145 In June 1999, Samuel Lee spoke to and met Ghosh almost everyday. They would talk about their families and their problems. Samuel Lee trusted Ghosh and regarded him as a friend. He confided in him as he had no one else to turn to. Ghosh appeared very, very rich and influential. In Thailand, he showed Samuel Lee his factories, his restaurants and his hotel. When Ghosh’s car went into the factories’ compounds, guards would salute him. When he walked out of the airport, he would not be checked by anyone. Ghosh was also generous with his money, making donations to charitable causes. When he gave money to Samuel Lee, he did not ask for any favour in return.

151 Until he was questioned by the internal auditors in January 2000, Samuel Lee had no suspicion at all that Ghosh was involved in anything illegal or that there was a fraud perpetrated within the defendant. The last contact he had with Ghosh was during that fateful weekend in January 2000. He continued to cooperate with the plaintiff even after his dismissal as he felt it was his duty and he wanted to clear up matters as soon as possible. He did a lot of personal things for Ghosh as he had been offered a job by him and thought Ghosh was going to be his future employer. He did not know that the Sumitomo Group owned 18% of Ghosh’s companies.

152 The plaintiff’s expert witness was Joseph Colleran (“Colleran”) who testified via video conference from the USA. Colleran was with the Irving Trust Co between 1952 to 1988. His career was almost entirely in International Operations and/or International Trade Financing. He retired as a vice-president and was presently doing lecturing and consulting work in matters concerning International Trade Finance.

153 He testified that a SWIFT message was an electronic one and since such messages could not be signed manually, they were authenticated by means of a code arrangement known only to the sender and to SWIFT. When a bank sent a SWIFT message to another bank, that message would not go directly to the recipient bank. It was sent instead to a SWIFT switching centre in Brussels, Belgium. The sending bank would enter a code on the message which was known only to the sending bank and SWIFT. When the message was received at the switching centre, the code of the sender would be reviewed for authenticity by a computer. If the computer recognised the coded message as having emanated from the sending bank, it would add an authentication by means of a code known only to SWIFT and to the recipient bank and relay the message to the recipient bank.

154 The recipient bank could therefore reply on the SWIFT message as having been sent by the named sending bank and the authenticated message would bind the sending bank in the same way as a manual signature on a paper document would.
158 Although SBLCs were issued for particular situations, certain types were now so common that many banks had standard forms for them like the plaintiff did in this case. In the USA for instance, at the end of the first quarter of 2000, there were outstanding at US banks some USD227bn in SBLCs. SBLCs had therefore become an internationally recognised instrument and the plaintiff had acted reasonably in accepting them to support the facilities extended to Ghosh and to Global.

159 The authentication process was meant to avoid any investigation by the recipient bank as to whether the composer of the message and the sender thereof had the actual authority of the sending bank to do so. Authentication showed conclusively that the message came from and with the authority of the sending bank.

160 In 1999, the SWIFT network carried over one billion messages and the average daily payment volume of such messages was more than USD5 trillion. With the sheer volume, investigations or inquiries beyond authentication would run completely contrary to the purpose of the SWIFT system. That was how Colleran treated authenticated SWIFT messages from other banks while he was at Irving Trust Co. Once authenticated, he acted upon the veracity and accuracy of the contents of the SWIFT message with complete confidence. The SWIFT system was meant to obviate arguments and inquiries about authority. Otherwise, the banking system could not function and the authentication arrangements would be meaningless.

161 The plaintiff did not need to verify the authority of the defendant’s Udine branch to issue the SBLCs. Banks differed in the way they organised themselves. It could be that the defendant’s international activities were centralised in Udine. The plaintiff was not required to know the defendant’s policy in responding to inquiries about its branches. The fact that the response came from the Udine branch was not unusual. The plaintiff’s authenticated messages had been sent to the defendant’s head office and it did not need to speculate on what the defendant’s head office had done. The response from the defendant was also by authenticated SWIFT message.

162 Commenting on the defendant’s defence, Colleran was of the view that the fact that named individuals were mentioned in SWIFT messages could not lead to the conclusion that they were implicated in any fraud or that they were involved in the processing or amending of the SBLCs. The deletion of an account number was not unusual as lending banks could extend facilities to a named party who may have more than one account at the lending bank. Removal of an account number would cover the lending bank for facilities extended to any of those accounts. Similarly, changing the place of expiry to where the lending bank was located was convenient for that bank in computing time.

163 In cross-examination, Colleran agreed that when one was looking at a paper document bearing a manual signature, one must always examine the signature to determine that it was genuine. It was also necessary to see whether the person signing had the authority to do so. The signature and the authority of the person concerned would be in the signature book for verification.

164 The change of name in the SBLC from Super Shipmanagement to Global was a natural consequence of the company changing its name. ... The amendment to extend the expiry date of the SBLC was to match the last possible due date for repayment of loans covered by the SBLC. The amendment to increase the amount by USD8m was merely to correlate it with the amount of the facilities covered by the SBLC.

165 In cross-examination, Colleran agreed that when one was looking at a paper document bearing a manual signature, one must always examine the signature to determine that it was genuine. It was also necessary to see whether the person signing had the authority to do so. The signature and the authority of the person concerned would be in the signature book for verification.

166 An authenticated SWIFT message received would bind the sending bank if the recipient bank was willing to accept its commitment after doing a credit check. Different branches of the sending bank may have different issuing authority but that would be unknown to the recipient bank. It was up to the sending bank to control which of its branches could send authenticated SWIFT messages.

167 Asked whether the internal guidelines of the plaintiff were at variance with his testimony in that they implied that mere receipt of a SWIFT message did not guarantee the authority of the issuing branch, Colleran said the plaintiff did not have to verify the authority of the branch but could decide to do so as a policy in order to minimise risks.

168 When the defendant’s head office received the enquiry, it could have read the contents and stopped the fraud but did not. The plaintiff was not required to know the organisational make-up of the defendant. If the Udine branch did not have the requisite authority, the head office could have said so in reply and it would have been very imprudent for the plaintiff to act on the SBLC. In any event, the defendant’s own evidence showed that the Udine branch was authorised to handle SBLCs.

169 It was not unusual for the plaintiff to receive an amendment increasing the value of the Global SBLC by USD8m without request as most amendments would be initiated by the account party and not by the beneficiary bank. Colleran agreed that the two banks did not appear to have been involved in high volume or frequent SWIFT traffic until 1999. Asked whether the plaintiff in such a situation, upon receiving SBLCs of large amounts, ought to have exercised caution before accepting the SBLCs, Colleran replied that the plaintiff did exercise caution by doing a credit analysis and sending the query by SWIFT message to the defendant’s head office.

170 Colleran accepted the criticism of the defendant’s expert (Anthony Dodd) that there were a number of technical inaccuracies regarding the SWIFT system in his affidavit. He
explained that he was not testifying as an expert in the technicalities of the SWIFT system but as a user, both as a sender and recipient.

The defendant’s case

171 Tommaso Cartone (“Cartone”) the Managing Director of the defendant, gave evidence via video conference from Italy. He explained in his affidavit of evidence-in-chief that the defendant was an Italian bank with its principal place of business in Italy and was part of the Intesa group of banks, the largest banking group in Italy, with Banca Intesa SpA as the holding company. The defendant had many branches throughout Italy, grouped into about 20 different areas, with the branches in each area being managed by the area head office. In each area head office, there was a department known as Nucleo Operativo Estero Merci (“NOEM”) (or the Operations Centre for Foreign Goods Department) which administered for the branches in its area remittances, documentary credit, letters of guarantee and stand-by letters with a foreign element. NOEM did not have the power to grant or approve overdrafts or to establish and manage banking relationships with foreign clients, its role being a purely administrative one.

172 The NOEM of the Friuli Venezia Giulia area head office was in Udine. It did not have direct connection with the head office in Milan but was under the Head of the Friuli Venezia Giulia area. The coordinator or manager of this NOEM was Philip Martino Pigozzo who had been in that post since 22 September 1997. His duties included the coordination of human resources, ensuring the legal and procedural correctness in relation to collections, documentary credits and foreign guarantees, providing consultation, operational and technical assistance, and the dissemination of knowledge and know-how. Pigozzo did not have the power to grant or approve overdrafts or to manage applications for lines of credit, to open and manage bank accounts for Italian or foreign clients, to issue letters of credit or to perform any act relating to any of the transactions for which he was authorised to act through the SWIFT system without the simultaneous use of the electronic data (User-ID and password) of another authorised employee of the defendant (ie a sort of double electronic signature was required).

173 On 14 January 2000, an officer of the defendant’s auditing department in Milan, Maurizio Spinelli, carried out a routine internal inspection of foreign accounts opened with the defendant. He was alerted to a USD2m credit into Cenacle Holding’s account number 58909. This led to further investigations and on 18 January 2000, Spinelli went to the area head office in Udine to investigate specifically the irregularities relating to the account of Cenacle Holdings. As a result, a series of fraudulent banking transactions was uncovered and it involved: (a) Pigozzo; (b) Ghosh, an Indian citizen; (c) Ng Yean Kiat, a director of Cenacle Holdings, a Luxembourg holding company controlled by Ghosh; (d) Ante Devic, a Yugoslav; (e) Samuel Lee, Assistant Vice-President in the plaintiff; and possibly some other high-level officials of the plaintiff. The fraudulent transactions caused the defendant to suffer damages of about USD39m.

174 The fraud was in two broad categories. The “chequeing fraud” or “cheque-kiting” involved a process of depositing cheques into accounts in the defendant linked to Ghosh and withdrawing the money without there being actual funds in the accounts. The second category involved the unauthorised issue of SBLCs to other financial institutions.

175 It was discovered that in 1999, Pigozzo opened six current accounts at the Udine branch in the names of Ghosh and Cenacle, denominated in various foreign currencies. The accounts were highly anomalous because the application forms for opening them were signed but not filled out. They were also opened with no deposit of funds or with insignificant amounts therein. Ghosh and Cenacle were not an Italian citizen and entity respectively and had no commercial interests nor production activities in Italy. Ghosh also controlled two companies with accounts with the plaintiff - Sofia Palace and Global.

177 These matters led to further discovery that Ghosh had negotiated a number of cheques for large amounts with the defendant. Pigozzo, upon receipt of the cheques, would immediately credit the amounts into Ghosh’s or his related accounts before the cheques were sent to the correspondent bank for collection and without ascertaining whether they would be honoured. Ghosh and Cenacle were never granted any overdraft facilities.

178 For the earlier transactions, when the cheques sent for collection were dishonoured and returned unpaid to the defendant, Pigozzo would use the pretext that there had been a mistake in presenting the cheques and would have them presented again. For the latter transactions, Pigozzo sent the cheques to the drawee bank but they were not returned nor was payment received. Pigozzo would use credit transfers to cover the deficit created by the unpaid cheques at his own discretion.

187 Where the SBLC fraud was concerned, the defendant first became aware of it on 27 January 2000 when Pigozzo decided to deliver more documents to the defendant. There was no record of any request from Ghosh or Cenacle to the defendant requesting SBLCs to be issued in favour of the plaintiff. Cartone then detailed the transactions relating to the two SBLCs. The two SWIFT messages sent by the plaintiff to the defendant’s head office in July 1999 and the one sent in November 1999 were transmitted by the head office to
the Udine branch, giving rise to the anomalous situation where the department issuing the SBLCs confirmed its own authority to do so.

…

189 It was clear that the terms and the circumstances surrounding the SBLCs were highly suspicious. Pigozzo confessed that he had entered into the Udine branch’s SWIFT system by using the user-ID and password of a colleague which he had obtained by reading over that colleague’s shoulders. It was highly significant that almost all of the SWIFT messages were sent for the attention of Samuel Lee who was not the officer who dealt with SBLCs. It was inconceivable that a bank would agree to be bound by letters of credit so unfavourable to itself and that the defendant would issue the SBLCs on the format sent to it by the plaintiff without requesting any of its own standard terms to be incorporated therein. It was also inconceivable that the defendant would accede to each and every request by the plaintiff to amend the SBLCs and in so short a period of time. The wording of the scope of the SBLCs was also so vague that they were tantamount to a blank cheque being given by the defendant. Any bank officer would also have insisted on knowing the terms of the credit facilities as well as the reasons for requiring those facilities. There were also no guarantees by Ghosh or Cenacle for the SBLCs found at the Udine branch.

…

194 Cartone was of the view that it was dishonest of the plaintiff to be pursuing their claim under the SBLCs while denying at the same time the validity of the other financial instruments created in the course of the conspiracy. It was clear that Samuel Lee was trying to conceal the chequeing fraud by not returning them to the presenting bank. On top of that, Samuel Lee had also written the documents mentioned earlier and appeared not only to be making unauthorised representations but unauthorised payments as well. It was not possible to segregate the chequeing fraud from the SBLC fraud because of the proximity in time and the common participants. Samuel Lee, being a participant in the chequeing fraud, must have been clearly aware that the SBLCs were fraudulent.

195 The conduct of Pigozzo, Ghosh and Samuel Lee constituted criminal offences under Italian law. Pursuant to the complaint filed on 7 February 2000, the Public Prosecutor in Italy applied to the Court at Udine and obtained a “Decree of Preventive Seizure” prohibiting the plaintiff from calling and the defendant from paying on the SBLCs. The decree was executed on 12 April 2000.

196 On 22 February 2000, the defendant commenced legal proceedings in the Civil Court of Udine against Pigozzo, Ghosh, Cenacle, Sofia Palace, Global and the plaintiff for payment of about USD25m and a declaration that the two SBLCs were null and void for damages and costs. On 16 March 2000, an interim injunction was applied for in Udine and that was granted subsequently on 21 July 2000 prohibiting the plaintiff from enforcing in any way the two SBLCs. That order was served on the plaintiff on 24 July 2000 and became final as no appeal was lodged. That order stated the criminal participation of Samuel Lee and Quinton Chew was very likely. It would therefore be grossly unjust and unconscionable for the plaintiff to profit from the wrongdoing of its own officers.

197 Cartone was referred in cross-examination to a brochure entitled “Banking and Financial Services from Italy’s Leading Private Bank” produced and circulated by the defendant to let “everyone know what the Bank is doing in Italy and in other countries” (Cartone’s words). In it, it was represented that the Udine branch, like all other branches, could handle international transactions and that it was advisable to correspond directly with the branches by SWIFT and telex. Cartone said the branches would still have to act according to the defendant’s regulations and as circumscribed by its powers. All correspondent bankers in the world knew that to understand what the branches were authorised to do, other documents had to be looked at. The powers of the persons working in the branches were documented in internal regulations of the defendant which were deposited in the court house. Neither Pigozzo, his office nor the Udine branch ever had the authority to issue letters of credit.

198 Cartone was not aware of the exact number of people in the defendant who had access to the SWIFT key. Not everybody was permitted to use the SWIFT key, which was made up of two personal keys and not merely one. This was to ensure that only authorised messages were sent out. Internal controls existed so that the defendant was not compromised as SWIFT messages committed the bank and were valid if the internal regulations had been complied with.

199 Cartone was of the view that a rational banker, faced with high-risk operations, would verify even when the SWIFT system was used in order to be sure that no errors had been made. High-risk matters included transactions of very, very high amounts such as USD1m, where strange clauses appeared or where the duration was unusually long. If there was fraud, the issuing bank could not be bound as the instrument, ie SWIFT, had been utilised in a fraudulent way. Asked how a recipient bank would know whether there was fraud in any transaction, Cartone replied that it could make verification using the ordinary methods like telex, fax, SWIFT and “all instruments that give you tranquility”. Banks would not verify low-risk transactions. The plaintiff may not know who in the defendant held the keys to the system at any point in time but it knew who had the power to confirm the verification.

200 Asked whether a sending bank was committed if the only fraud that occurred was on the part of one of the officers of the sending bank, Cartone was of the opinion that it was not liable.

…
209 The defendant had a system which monitored all SWIFT messages sent by the defendant on a daily basis. This daily report would be given to the different departments and branches. In the Udine branch, Pigozzo would have received it because he was the person in charge there. The SWIFT code for the defendant’s head office was “XXX” while that for the Udine branch was 601. Pigozzo’s user-ID was “F 601 US 06”.

211 The next witness for the defendant, Maurizio Spinelli (“Spinelli”), was an officer in the auditing department in Milan. His duties included the inspection of client accounts and foreign transactions. He also testified via video conference.

222 Commenting on the SWIFT messages sent by the plaintiff to enquire about the authority of the Udine branch, Spinelli testified that they were received at the defendant’s SWIFT office at Assago, Milan, which received about 3,000 messages a day. From there, on the basis of references or information contained in Field 21 of the message, which referred to the Udine branch, the messages were transmitted there electronically. “BAVE IT MMA XXX” was the defendant’s general SWIFT address. When the Udine branch replied to the plaintiff, so long as the messages were addressed properly, they would go through the defendant’s SWIFT system to the plaintiff directly.

224 Messages sent with the code “XXX” to Assago, Milan were re-routed by the operators at the SWIFT office who would look at the information in Field 21 which had the code of the SBLC in question. The operators were not concerned with the contents of the SWIFT messages or the fact that one of the plaintiff’s enquiries was specifically addressed to the Head, International Department of the defendant.

225 Spinelli agreed that the defendant had very strict controls and security procedure for sending out SWIFT messages to ensure that they were authorised. This was because the receiving banks would act on the messages as they were entitled to assume that they had been sent with authority.

226 The “Message Trace Display” of two SWIFT messages showed a different user-ID was used together with Pigozzo’s on the two occasions.

228 Spinelli maintained that the defendant’s head office never received the plaintiff’s SWIFT messages enquiring about the authority of the Udine branch. They were received by the SWIFT Centre. While the head office was in Milan, the SWIFT Centre was in Assago, at the outskirts of Milan.

229 In normal transactions, two persons were required to send a SWIFT message - one to create the message, the other to verify and send it. Pigozzo could only verify. He could not prepare messages in the SWIFT system. It was possible for Pigozzo to steal another user’s password and use it to prepare a message, then send it using his own password. Two user-IDs should appear in a message together with the numbers of two different computer terminals. Everyone in the defendant’s branches had his own workstation together with his own personal computer which was identified by a number. In some messages, there were two user-IDs but only one terminal’s number. This was abnormal as it meant that the creation of the message and its verification had been done at the same terminal. Spinelli said it was the defendant’s case that Pigozzo had used the password of more than one colleague. He had admitted as much to the Public Prosecutor in Udine.

230 Spinelli felt that the plaintiff ought to have asked the defendant’s head office about the authority of the Udine branch using other means, such as the telephone, followed by a written request.

232 Anthony Beadon Dodd (“Dodd”), the Director of Audit and Risk Assurance at SWIFT since 1994, was the defendant’s expert witness....

233 Dodd had more than 20 years of experience in the international financial services industry. He explained that SWIFT was a limited liability cooperative society wholly owned by its member banks. It was established in 1973 in Brussels, Belgium as a secure messaging service with pre-agreed standards and formats. It evolved over time to providing technology-based communication services across all financial markets through member banks. The relationship between SWIFT and its members/users and among the members/users was described in a number of documents collectively known as the SWIFT User Handbook which provided the standards and guidelines for the usage of the system and eligibility criteria. Both the plaintiff and the defendant were members of SWIFT.

234 Banks had to address three different kinds of risk - credit, market and operational. SWIFT messages were intended to deal with a specific kind of operational risk only. There were agreed text standards for a wide variety of business communications. Receipt of a SWIFT message was no guarantee that the individual sending the message was authorised to do so or authorised for the given amount. Individual institutions had their own internal control systems to ensure, to the satisfaction of their management, that only authorised messages were sent and authorised actions taken on receipt. Only the technical authenticity of the message was guaranteed by SWIFT and not the business appropriateness. It was therefore not correct to say that an authenti-
235 Banks could choose to rely on SWIFT messages without checking on the authority for various reasons such as the sheer volume and impracticality but would assume the risk of doing so. The assumption was that any error, omission or other loss would be resolved between the parties with no undue enrichment because there was a two-way exchange and a presumption of an ongoing business relationship. Thus the vast majority of disputes were settled amicably.

236 In the present case, there were two transactions of relatively high value between two banks which had no normal course of dealing with each other. The SBLCs emanated from a branch in a small town in Friuli in the extreme northeastern part of Italy with a population of some 100,000 people. Udine could therefore be regarded as a small town and minor business centre of only local importance and could not be compared with a large New York bank. Information as to how the major banks of the world were organised could be easily obtained from public domain information such as the Bankers’ Almanac. It would therefore be surprising if the defendant’s head office had delegated its functions fully to or had conferred complete authority on the Udine branch without any limit. If the plaintiff’s argument was correct, then the entire capital of the defendant could be assigned away by the Udine branch via a SWIFT message.

237 The reply from the Udine branch to the queries sent by the plaintiff to the defendant’s head office should raise more questions rather than less in the plaintiff’s mind. The plaintiff could have obtained independent confirmation of the SWIFT messages by a telephone call to the defendant’s head office. SWIFT was ideal for an established relationship and not for setting up a completely new business relationship.

238 Where the technical aspects of SWIFT were concerned, SWIFT was responsible for the maintenance of security within its own network, which meant that SWIFT took responsibility for a message from the time it reached the network to the time it left. The recipient of a SWIFT message therefore had the following assurances: (a) the message came from the particular sending bank/branch; (b) the sender could not repudiate having sent the message which was archived in encrypted form at SWIFT for four months; (c) the message had not been changed in transit; (d) the message had not been copied except where authorised; and (e) the best commercial practice was used to prevent disclosure.

240 Dodd then pointed out a number of technical inaccuracies in the plaintiff’s expert’s affidavit. It was incorrect to say that messages were sent to a switching centre in Brussels as the operating centres were in other countries. The sending bank would not “enter a code” and the “computer” did not recognise the coded message in the way described by Colleran. While the receiving bank could rely on the fact that the message came from the named sending bank, that was not the same as a manual signature from an individual authorised to perform that operation....
to note that it was not seriously in dispute that the tested telexes which came from the Bank of Tokyo only came because some fraudsters managed either to send the messages themselves or trick some employees of the Bank of Tokyo into sending them.

255 The SWIFT system is a more advanced means of communication than tested telexes. Clearly the system was meant to be an improvement over tested telexes in terms of speed and security. SWIFT is bank-to-bank communication and the identity of the individual sender is not an integral part of the message. Two passwords held by different individuals are required for every SWIFT message. These external security measures coupled with the internal technical inviolability of the system ensure that only authentic and authorised communication enters the system and that such communication can be accessed or copied by only authorised persons at the destination. The authentication thus assures the users of the system that what one sees in the system has been introduced into it lawfully.

256 If SWIFT messages have to be further “authenticated” by telephone enquiries, fax or even “snail mail”, one wonders what all the security arrangements are about and what advantage in terms of speed the system offers over other means of communication. Further, if no name appears on the SWIFT message, how would the recipient verify authority? Getting confirmation by the more traditional means of communication is also perhaps more fraught with opportunities for fraud. For instance, making a telephone call to seek confirmation would only be useful if the caller knows the person at the other end or recognises his voice at least.

257 It is my view therefore that SWIFT messages have the legal effect of binding the sender bank according to the contents. The fact that a recipient bank may still wish to protect itself by doing checks on credit standing or other aspects does not detract from this proposition. SWIFT communication is still subject to the general law of contract. For example, if the sender’s message has not been acted upon, there is no acceptance and no contract.

258 What I have said above applies only to the situation where the SWIFT message emanates from the sender as is the case here. If it can be shown that a message was introduced into the system by a third party (eg a hacker) without the fault or collusion of the sender’s employees or agents, then obviously the message cannot be enforced against the sender. Similarly, if the recipient has knowledge or notice of a fraud at the sender’s end before it acts on a SWIFT message, the message cannot be enforced against the sender.

259 It is unrealistic to demand that recipient banks conduct a study of sender banks’ organisation structure by checking on the relevant branch through the Bankers’ Almanac or otherwise each time a legal document like a SBLC arrives. This is even more so in the present commercial age of mergers, acquisitions and constant reorganisation.

260 Even if SWIFT messages do not have legal consequences unless the sender’s authority has been verified, it was plain that the plaintiff did enquire about the authority of the Udine branch. There was no dispute that the plaintiff’s three enquiries were sent to the correct SWIFT address of the defendant. It was certainly no fault of the plaintiff that the defendant’s system automatically or even manually re-routed the enquiries to the Udine branch which replied by SWIFT. It was natural and logical that the plaintiff would include the code numbers pertaining to the SBLCs as a reference point of their enquiries. In the circumstances, it was perfectly reasonable for the plaintiff to assume that the defendant’s head office had somehow directed or delegated the task of replying to the subject branch itself.

261 The defendant suggested through Spinelli that there was a distinction between the defendant’s head office in Milan and its SWIFT Centre at the outskirts of the city. The SWIFT system is concerned with SWIFT addresses, not physical locations. For example, the plaintiff could not plead that its SWIFT Centre was actually in UOB and that SWIFT messages addressed to its main branch actually arrive at a place located some distance from it. These are internal organisational matters of no consequence to its correspondents in the SWIFT system.

262 I now come to the question whether... Samuel Lee [as] involved in the fraudulent acts of Ghosh and Pigozzo.

... 

272 Samuel Lee’s conduct was a lot more questionable. It was apparent from his evidence that he had failed to differentiate personal matters from professional ones, despite his assertions about his ability to do so. He accepted money and benefits from Ghosh for his son and himself. He prepared and signed official letters on his own. Unlike Quinton Chew, he apparently saw no need to consult anyone in the plaintiff about those matters.

273 What was clear, however, was that Samuel Lee had no role where the two SBLCs were concerned other than the obviously insignificant one of getting a copy of the plaintiff’s standard SBLC for Ghosh at his request. …

274 I accepted Samuel Lee’s explanation about the test message from the defendant on 11 June 1999, shortly before the Ghosh SBLC was issued. There may have been nothing wrong with the SWIFT system but Samuel Lee was told that there was a hitch. There was no reason for him to disbelieve Ghosh or Pigozzo then. In any event, the most that could be made of this episode was that Pigozzo, Ghosh and Samuel Lee were trying out the SWIFT system before sending the first of the two fraudulent SBLCs. This hypothesis must then be tested against the rest of the evidence.
The fact that Samuel Lee’s name appeared in the subsequent correspondence pertaining to the SBLCs did not advance the defendant’s case any further. The SBLCs were not sent to Samuel Lee alone. If the intention was to keep him informed of all developments in the scheme, surely it would have been much better to communicate by telephone or by fax rather than to call attention to him by including his name in an authenticated SWIFT message.

Quinton Chew and Samuel Lee were the only officers in the plaintiff accused by the defendant of being involved in the fraud. Having found that neither of them was implicated in any way in the SBLC fraud or in the chequeing fraud, I do not find it necessary to address the plaintiff’s arguments that even if either or both were involved or had knowledge of the fraud, the plaintiff would nevertheless not be precluded from enforcing the SBLCs. It is also unnecessary for me to address the defendant’s arguments that it would be unconscionable for the plaintiff to call on the SBLCs, save to say that such arguments must be premised on the participation of Quinton Chew and/or Samuel Lee in the fraud and, as I have indicated, the fraudulent parties were Pigozzo and Ghosh, whether in collusion with others or not, but certainly not with Quinton Chew or Samuel Lee.

I therefore found that the plaintiff had proved its case against the defendant and ordered that judgment be entered for the plaintiff as claimed. The defendant asked that interest be ordered to run only from 12 February 2000 (the date of demand) to 20 March 2000 (the date of the Italian Decree of Preventive Seizure) as the defendant could not have made payment upon the making of that decree. As it was not the defendant’s position that it would have paid but for that decree, I saw no reason to grant this application. Plaintiff’s claim allowed.

**Question 2-12:** Is the Italian issuer’s defense that it was not obligated or that the Singapore bank could not have reasonably relied on its undertaking? What results if the employee of the Italian bank had exceeded his authority?

**Question 2-13:** What was the rule of the case regarding reliance on a SWIFT message?

**Question 2-14:** Had Samuel Lee been proven to be a co-fraudster, what impact on the result?

**Question 2-15:** While not mentioned in this case, is it conceivable that the defense of mistake might be raised in such situations? How would it operate? Should such a defense be available? The defense of Ultra Vires?
plaint alleges the following three claims: (1) failure of Bank Umum and SCB to honor their obligations under the LC; (2) failure of KeyBank to honor its obligations as an advising bank under the LC; and (3) breach of contract against PT. Only KeyBank and SCB have appeared as Defendants in this action.

Hamilton now moves for partial summary judgment against SCB, and KeyBank moves for summary judgment against Hamilton. In its opposition, SCB also requests summary judgment against Hamilton.

II. Legal Standard

... 

B. Summary Judgment on Letter of Credit Disputes

Actions on letters of credit are well suited to determination on summary judgment because they normally present solely legal issues related to the exchange of documents. See 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) (“[l]etter of credit liability cases are particularly appropriate for judicial resolution without trial because they present solely legal issues.”) (citation omitted); Ocean Rig ASA v. Safra Nat'l Bank of New York, 72 F. Supp. 2d 193, 198 (S.D.N.Y. 1999) (same).

Here, as in Bank of Cochin, the parties generally agree as to the underlying facts of the case, and dispute only the legal significance of those facts.

C. Choice of Law

... 

Singapore, on the other hand, has a strong interest in applying its laws because both Bank Umum and SCB conduct business there, and because the letter of credit at issue here was to be confirmed (and was subsequently dishonored) by SCB’s Singapore branch. Thus, our resolution of this conflict is based on our determination of Singapore law.

... 

As SCB has put forward no other valid reason for its dishonor, we conclude that SCB’s dishonor of Hamilton’s LC was wrongful. Accordingly, Hamilton’s motion for summary judgment on this question is hereby GRANTED. Moreover, as SCB’s dishonor was wrongful, we conclude that KeyBank did not breach its duties as an advising bank by sending Hamilton’s presentation documents on to SCB for consideration. Accordingly, KeyBank’s motion for summary judgment is GRANTED.

C. Damages

We next decide whether Hamilton is entitled to consequential damages as against SCB.

While Section 5111(c) of the UCC and California Commercial Code § 5111(c) limit the liability of a confirming and/or advising bank to damages resulting from the breach only (and expressly preclude the recovery of consequential damages), we conclude that these provisions, and the UCC generally, do not apply to silent confirmations. See Dibrell Bros. Int'l S.A. v. Banca Nazionale Del Lavoro, 38 F.3d 1571, 158082 (11th Cir. 1994) (“[a]lthough it may serve the same end function, a silent confirmation is not the same device as an Article 5 confirmation and clearly falls outside the operation of the UCC. The parties to the silent confirmation differ, as do the rights and obligations under the confirmation agreement.”).

Here, SCB admits that it is a silent confirmer. (Second Lieberman Decl., Ex. 2.) Moreover, we note that the UCP does not address the measure of damages available for a wrongful dishonor. Finally, under the reasoning of Dibrell, we conclude that the UCC does not apply to silent confirmations, such as the one between SCB and Hamilton. Accordingly, there is no reason to preclude Hamilton from recovering the damages which would otherwise be available to it under the common law, including consequential damages.

IV. Disposition

Hamilton’s motion for partial summary judgment seeking a determination as to SCB’s liability for dishonoring the LC is hereby GRANTED. We further find that consequential damages are available to Hamilton, as a matter of law, insofar as the UCC does not apply to silent confirmation transactions. Finally, as KeyBank did not act improperly in approving Hamilton’s presentation, KeyBank’s motion for summary judgment is also GRANTED.

IT IS SO ORDERED.
PER CURIAM:

Dibrell Brothers International S.A. ("Dibrell") brought this civil action against Banca Nazionale Del Lavoro ("BNL") asserting several claims which arise out of BNL's failure to confirm letters of credit issued in favor of Dibrell by an Iraqi bank. On cross-motions for summary judgment, the district court entered a judgment dismissing Dibrell's claims. Dibrell appeals. We affirm in part and reverse in part.

I. FACTS AND PROCEDURAL HISTORY

Dibrell is a Swiss corporation in the business of buying and selling tobacco on the world market. In 1988, Dibrell had the opportunity to sell tobacco to the Iraqi governmental agency that controls tobacco products, the State Enterprise for Tobacco and Cigarettes ("SETC"). However, Dibrell was aware that trading with SETC involved an element of risk due to Iraq's ongoing war with Iran and SETC's possible unwillingness or inability to pay for the tobacco. Although SETC was willing to have its bank, Rafidain Bank (Rafidain), issue a letter of credit in Dibrell's favor, Dibrell perceived that similar risks existed concerning Rafidain's willingness or ability to perform on the letter of credit. Consequently, Dibrell was willing to enter a contract to sell tobacco to SETC only if a reputable, non-Iraqi bank confirmed Rafidain's letter of credit. In the fall of 1988, Donald Crane, a vice-president of Dibrell, learned that the Atlanta agency of BNL was willing to confirm letters of credit issued by Iraqi banks. (Crane Dep., Feb. 27, 1991, at 48-49.) At that time, the Atlanta agency of BNL was in fact confirming letters of credit issued by Iraqi banks. (Crane Dep., Feb. 27, 1991, at 48-49.) Based upon this information, Crane contacted Paul von Wedel, an officer at BNL's Atlanta agency in charge of the letter of credit department. On October 20, 1988, Crane and von Wedel discussed by telephone the particular terms pursuant to which BNL would agree to confirm the Rafidain letter of credit. In that conversation, von Wedel orally committed BNL to confirming the Iraqi letter of credit. (Crane Dep., Feb. 27, 1991, at 135.) Specifically, the two agreed to the following terms: (1) BNL would confirm a letter (or letters) of credit on a silent basis for up to four million dollars; (2) the letter(s) of credit had to be advised through BNL's Atlanta agency; (3) the confirmation(s) would cover payment terms of up to one year from the shipment date; (4) BNL would not discount the letter(s) of credit; (5) the guaranteed amount would be available to Dibrell or any of its affiliated companies at any time; (6) the letter(s) of credit could be issued in the name of any Dibrell affiliated company; and (7) BNL's fee would be one and one half percent per annum of the amount to be confirmed, payable at the time of collection under the letter(s) of credit. (Id. at 71, 81, 83, 130, 136; R.4-61 Ex. A.) On October 24, 1988, Crane telexed a letter to von Wedel, restating the terms on which the two had orally agreed. (R.4-61 Ex. A.) On October 25, 1988, von Wedel telexed a letter to Crane, confirming the agreement reached with Crane in the October 20 telephone conversation. (R.4-61 Ex. B.) Von Wedel's letter indicated that the letter of credit to be confirmed would be issued by the Rafidain Bank in Baghdad. (Id.) Finally, the telex provided that in addition to the one and one half percent fee, a negotiation fee of one-tenth of one percent of the amount to be confirmed would also apply. (Id.)

Dibrell required confirmation on a silent basis because Rafidain refused to request a confirmation from a western bank. Crane speculated that a western bank would calculate the amount of the confirmed letter of credit as part of the total

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1. Because this case involves the grant of summary judgment, we view the facts in a light most favorable to the non-moving party, Dibrell.
3. BNL is a commercial bank controlled by the Italian government. It is made up of agencies rather than branches.
4. “Silent” confirmations result when the beneficiary rather than the issuing bank requests the confirmation. See discussion infra part A-3.
5. This requirement was later dropped.
credit extended to an Iraqi bank. Crane further speculated that the Iraqi bank refused to ask for confirmation in order to maximize the open credit available for its own borrowing outside the letter of credit context. (Crane Dep., February 27, 1991, at 71-74.)

Having made an agreement with BNL to confirm the Iraqi letter of credit, Dibrell entered into a sales contract with SETC in early November. (Crane Dep., Nov. 6, 1991; R.4-61 Ex. C.) On November 10, 1988, Crane advised von Wedel by telephone of the specifics of Dibrell’s sale of tobacco to SETC (“first sale”), including the fact that the sale price and thus the amount of the letter of credit had increased. Crane documented the conversation with a follow-up telex, which reiterated that the sale was to be covered by a confirmation of the letter of credit “under the conditions agreed in our telex of 24 October and your fax of 25 October 1988.” (R.4-61 Ex. D.) On December 1, 1988, Tom Fiebelkorn, another vice president in BNL’s Atlanta agency, faxed a letter to Crane, acknowledging that the amount of the first letter of credit to be confirmed by BNL would be $4,162,500, reflecting the increased sale price. (R.4-61 Ex. E.) This letter also provided that BNL was prepared to confirm additional letters of credit in an amount up to $4,000,000 to cover future tobacco sales by any of Dibrell’s affiliates. (Id.) Finally, the letter established a fee structure for the confirmation and required that the shipments for the covered sales be made in January and February. (Id.) In reliance upon this representation to confirm additional letters of credit, Dibrell agreed to sell to SETC an additional $3,835,000 worth of tobacco on December 18, 1988 (“second sale”). (Crane Dep., Nov. 7, 1991, at 190-191.)

On December 24, 1988, Rafidain Bank issued its first letter of credit in favor of Dibrell in the amount of $4,162,500. This letter of credit was sent to BNL, directing it to notify or advise Dibrell of the terms and conditions of the letter of credit “without adding your confirmation.” (Crane Dep., Feb. 27, 1991, Ex. 30.) On January 10, 1989, BNL sent Dibrell an advice informing it of the issuance and terms of the letter of credit from Rafidain Bank for the first $4,162,500 sale. The BNL advice clearly stated that it was merely an advice and did not constitute an engagement or a confirmation of the Rafidain letter of credit. (R.4-61 Ex. F.) On January 16, 1989, Crane faxed a note to von Wedel acknowledging receipt of the BNL advice on the Rafidain letter of credit and stating, “contrary to what you told me by phone 11 January there is no covering [sic] letter indicating your obligations under this L.C. Please FAX this document to me today.” (R.2-42 Ex. F.) According to Crane, von Wedel had told him that a cover letter, restating BNL’s obligation to confirm, would accompany the advice. When this letter was not immediately forthcoming, Crane faxed another letter to von Wedel and Fiebelkorn again requesting the “promised letter indicating your confirmation of this Letter of Credit.” (R.4-61 Ex. G.) On January 20, 1989, Fiebelkorn responded to Crane’s request and informed him that “your confirmation letter will be coming from Paul [von Wedel]. In the meantime, you already have his oral commitment to confirm this credit and our written undertaking to cover this sale for you.” (R.4-61 Ex. H.) There is no indication that Dibrell ever received a confirmation of the first letter of credit.

On January 29, 1989, Rafidain issued the second letter of credit, which covered the second sale for $3,835,000. On March 27, 1989, BNL sent Dibrell an advice on Rafidain’s second letter of credit and again the advice contained language disclaiming any confirmation liability. (R.4-61 Ex. I.) Apparently, no confirmation letter arrived with this advice or at any time thereafter.

On June 23, 1989, Dibrell made its first shipment of tobacco to Iraq, valued at $1,831,000, under the letter of credit for the first sale. Dibrell presented BNL with shipping documents for this first shipment in accord with BNL’s advice on Rafidain’s first letter of credit. On July 11, 1989, BNL forwarded these documents to Rafidain for payment. Dibrell made a second shipment of tobacco worth $721,500 under the letter of credit for the first sale on August 30, 1989. On September 14, Dibrell presented documents to BNL relating to the second shipment in an attempt to comply with the terms of the first letter of credit. On September 25, BNL informed Dibrell that the documents did not comply with the terms of the letter of credit. Rather than argue with BNL about the alleged discrepancies, Dibrell directed BNL to forward the shipping documents to Rafidain Bank. The final shipment covered by the first letter of credit was canceled although $1,609,500 worth of tobacco remained undelivered under the first contract.8

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6. When a bank issues an advice of another bank’s letter of credit, the advice is merely a notice that the letter of credit has been issued and it does not impose any obligation on the advising bank to pay the beneficiary under the letter of credit. See O.C.G.A. § 11-5-103(1)(e).

7. Both of BNL’s advices on the two Rafidain letters of credit indicated its obligation to accept and transmit such documents to Rafidain Bank for payment under the letters of credit.

8. Dibrell terminated this shipment to Iraq because of executive orders issued by President Bush prohibiting trade with Iraq, which went into effect during the shipment’s trans-Atlantic voyage but prior to the delivery of the tobacco to Iraq. Dibrell was able to resell the tobacco from this aborted shipment at a profit.
There is some disagreement about which shipment was aborted and the value of that shipment. However, we read the depositions and exhibits to mean that the terminated shipment represented the final portion of the tobacco due under the first contract. (See Silvestri Dep., Feb. 6, 1991, Ex. 15.) The value of this unshipped tobacco was presumably $1,609,500.00, the difference between the sale price in the first contract and that already shipped to Iraq under the first contract. (See id.)

Shipments were also made pursuant to the second sale and under the second letter of credit. Dibrell shipped $2,644,000 worth of tobacco on August 7, 1989 and shipped $1,191,000 worth on August 30, 1989 pursuant to the second sale. Dibrell again presented shipping documents in an attempt to comply with the second letter of credit. On September 25, 1989, BNL notified Dibrell that these documents also contained discrepancies. Again, Dibrell directed BNL to forward the shipping documents to Rafidain Bank rather than argue over the alleged discrepancies. Neither Rafidain nor SETC has paid Dibrell on either of the letters of credit.

In early August 1989, federal and state banking authorities raided BNL’s Atlanta agency. A subsequent indictment alleged that BNL’s Atlanta agency manager, Christopher Drogoul, and his assistants, von Wedel and Fiebelkorn, had conspired to enter illegal credit arrangements to finance the export of goods to Iraq. Fiebelkorn and von Wedel subsequently pled guilty.

Following the raid on the Atlanta office, BNL sent a team of employees from Rome to assume management of the office. The new employees took the position that BNL acted only as an advising bank and not as a confirming bank for the Rafidain letters of credit issued in favor of Dibrell. Thus, BNL’s new employees denied the existence of any agreement to confirm the Rafidain letters of credit on a silent basis. BNL notified Dibrell of its position disclaiming confirmation liability in several letters. (See Silvestri Dep., Feb. 6, 1991, at 165; Exs. 15, 17, 18, 19.) Accordingly, after SETC failed to pay for the shipments of tobacco Dibrell had made, BNL denied any liability to Dibrell for the value of the shipments.

Dibrell brought this action against BNL to recover for the loss associated with the tobacco shipments. Dibrell asserts several claims including breach of contract, estoppel, negligence, fraud, and civil RICO. On cross-motions for summary judgment, the district court entered summary judgment for BNL.

II. ISSUES ON APPEAL AND CONTENTIONS OF THE PARTIES

The sole issue on appeal is whether the district court erred in granting summary judgment to BNL. Dibrell contends the court misunderstood the nature of its breach of contract claim and that it erroneously granted summary judgment to BNL on all of Dibrell’s claims. BNL, however, maintains the district court did not err. BNL contends that it cannot be held liable on the Rafidain letters of credit because its transactions with Dibrell fail to meet the requirements of the Uniform Commercial Code necessary to impose confirmation liability.

III. STANDARD OF REVIEW

This court’s review of a grant of summary judgment is plenary and is conducted using the same legal standards as those applied by the district court. Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co., 802 F.2d 1352, 1356 (11th Cir.1986). Summary judgment is properly granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Beal v. Paramount Pictures Corp., 20 F.3d 454, 458 (11th Cir.1994). In reviewing a grant of summary judgment by a district court, we view the evidence in a light most favorable to the non-moving party. Meisler v. Gannett Co., Inc., 12 F.3d 1026, 1029 (11th Cir.1994).

IV. DISCUSSION

The district court based its analysis of Dibrell’s claims on its finding that BNL had not issued enforceable confirmations of the letters of credit at issue in this case. The court apparently concluded that Dibrell could prevail only if BNL had actually confirmed the Iraqi letters of credit. Accordingly, the court applied Georgia’s UCC law on letters of credit, O.C.G.A. § 11-5-101 et seq., to determine whether the transactions between Dibrell and BNL constituted confirmations. The court concluded that the oral and written communications between Crane and von Wedel did not satisfy the UCC requirements for confirmation. Therefore, the court held that BNL was not liable to Dibrell on the Rafidain letters of credit. In its motion for summary judgment and brief on appeal, Dibrell has not argued that BNL failed to satisfy confirmation obligations, but rather that BNL breached a contract to confirm the Iraqi letters of credit. Dibrell further contends that a breach of contract claim is a viable cause of action because Georgia letter of credit law retains common law remedies and

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9. In the statement of the issues in its brief, Dibrell questions whether the district court erred in concluding that BNL did not issue confirming letters of credit to Dibrell. However, Dibrell never argues this issue in its brief and in fact later concedes that BNL did not issue any confirmations.
theories of recovery. BNL argues that allowing Dibrell to assert a claim for breach of a contract to confirm would in effect impose confirmation liability without satisfying the formal requirements of the UCC. BNL further argues that the confirmation requirements of the UCC preclude recovery under any other theory. BNL contends that if the UCC requirements are not satisfied, there can be no confirmation liability.

The district court only addressed the question of confirmation liability and did not appear to discuss Dibrell’s claim that BNL has breached a contract to confirm the Iraqi letters of credit. In fact, the district court referred to Dibrell’s claim of breach of “confirmation agreements” as little more than “artful pleadings.” We disagree. The UCC does not preclude common law recovery for breach of a contract to silently confirm a UCC-governed letter of credit.

A. LETTERS OF CREDIT—AN OVERVIEW

1. The Letter of Credit Triangle

The commercial letter of credit has developed over time as a method of payment used in conjunction with documentary drafts to avoid the risks inherent in selling goods on open account. It is a unique device through which a bank extends credit on behalf of a buyer in a cash sale.

A letter of credit transaction is a three party agreement involving two contracts and the letter of credit. The first contract exists between the buyer and seller, who are respectively referred to as the customer and beneficiary. Pursuant to a provision in this underlying contract, the customer will enter into a contract with its bank, known as the issuer, requesting it to issue a letter of credit in favor of the beneficiary. The letter of credit represents the relationship between the issuer and beneficiary. It is an engagement or pledge by the issuer that it will honor the beneficiary’s drafts or demands for payment upon the beneficiary’s compliance with conditions specified in the letter. O.C.G.A. § 11-5-103(1)(a).

Under this arrangement, the beneficiary is ensured payment after presenting the necessary documents to the issuer and avoids possible nonpayment by the customer after shipment of the goods. After honoring the letter of credit, the issuer’s possession of the controlling documents secures its right to be reimbursed by the customer for payment to the beneficiary under the letter of credit. See O.C.G.A. § 11-5-114(3).

The “independence principle” is an important aspect of the letter of credit arrangement, and it embodies the beneficiary’s reasons for requesting the use of this device. According to this principle, the issuer’s obligation to the beneficiary is independent of performance under the related contracts. The issuer must honor the engagement to pay upon presentation of the proper documents regardless of the beneficiary’s performance on the underlying contract. O.C.G.A. § 11-5-114(1). Additionally, the issuer cannot dishonor its obligation merely because the customer fails to perform under the reimbursement contract. See O.C.G.A. § 11-5-114; John F. Dolan, The Law of Letters of Credit ¶ 2.01 (2d ed. 1991). Thus, the letter of credit can be distinguished from a guarantee because the issuer is primarily liable and cannot assert defenses available to the customer that arise from a breach in the underlying contract.

The nature of the relationship between the various parties dictates the basis of liability and theory of recovery if one party defaults on its obligations. Because a contractual relationship exists between the customer and the beneficiary, any recovery for a failure to perform would be based in contract law. Similarly, the relationship between the issuer and customer is of a contractual nature governed by the reimbursement agreement rather than the letter of credit. See UCC § 5-109, Cmt. 1 (1993); Dolan, supra, ¶ 2.08[1]. The customer is not a party to the engagement running from the issuer to the beneficiary and cannot assert claims arising from it. Any action for wrongful dishonor must arise from a specific contractual promise by the issuer to honor the beneficiary’s demand for payment.

The relationship between the issuer and the beneficiary, on the other hand, is of a statutory nature. Georgia’s Uniform Commercial Code dictates when the letter of credit takes effect and what duties the issuer owes to the beneficiary. See O.C.G.A. §§ 11-5-106(1)(b), 11-5-114. The Georgia Code also offers the beneficiary remedies when the issuer has wrongfully dishonored the demand for payment. See O.C.G.A. § 11-5-115. The beneficiary must use one of these remedies. It cannot assert a breach of contract claim against the issuer because no contract exists between the two; rather, an engagement runs from the latter to the former.

2. Confirmation: Reconfiguring the Triangle

Commercial letters of credit are most frequently used in international trade. When a seller is not satisfied with the credit standing of a foreign bank, the seller may incorporate a term into the underlying contract requiring a local bank to add its engagement to that of the issuing foreign bank. This second engagement, known as a confirmation, is a pledge to honor “a credit already issued by another bank...” O.C.G.A. § 11-5-103(1)(f).

Georgia law requires that the confirmation be in writing and signed by the confirming bank. O.C.G.A. § 11-5-104. Once the formal requirements have been complied with and the letter of credit has been issued, the confirming bank becomes directly liable on the credit “as though it were its issuer and acquires the rights of an issuer.” O.C.G.A. § 11-5-107(2). Thus, the beneficiary may present the required documents to either the local confirming bank or the foreign issuing bank and receive payment.”
lect the local bank, it is the issuing bank that requests the correspondent bank to confirm. The relationship that exists between the two banks then is similar to that which exists between the issuing bank and the customer. The confirming bank is extending credit on behalf of the issuing bank and is granted a right of reimbursement against the issuer as a matter of law. See U.C.C. § 5-107, Cmt. 2 (1993). Thus, the confirming bank obtains a right of reimbursement against the issuer, independent and separate from any contract right, because it complies with the requirements set forth in the UCC. However, because of a lack of privity between the confirming bank and the customer, the confirming bank has no right of reimbursement against the original customer and owes that customer no duty. See, e.g., Dulien Steel Prod., Inc. v. Bankers Trust Co., 298 F.2d 836, 841-42 (2d Cir.1962); Petra Int’l Banking Corp. v. First Am. Bank of Virginia, 758 F.Supp. 1120, 1130 (E.D.Va.1991), aff’d sub nom. Petra Int’l Banking Corp. v. Dameron Int’l Inc., 953 F.2d 1383 (4th Cir.1992). Thus, a new triangular relationship is created consisting of two separate statutory obligations under the UCC and a contract between the two banks.

3. Silent Confirmation: The Triangle Collapses

The silent confirmation is an interesting commercial banking device that does not appear to have been recognized in any published opinion in either state or federal court. A silent confirmation occurs when a bank agrees to confirm a letter of credit, but the agreement to do so does not appear on the face of the letter. See Arthur G. Lloyd, Sounds of Silence: Emerging Problems of Undisclosed Confirmation, 56 Brook.L.Rev. 139, 139 (1990). Rather, the beneficiary of the original letter of credit requests the silent confirmation and a separate agreement is entered into between the confirming bank and the beneficiary. See id. The issuing bank may or may not know about this agreement. Id. According to the American Bar Association Task Force on the Study of U.C.C. Article 5:

A confirmation made without the authority of the issuer is not a true confirmation. While a so-called silent confirmation may itself constitute a new and separate letter of credit, commitment to purchase, guarantee, or other obligation binding on the one making it, vis-à-vis the beneficiary, the silent confirmer does not acquire the rights of an issuer on the original credit and is not a confirmer in any sense of the term. The use of the term “confirmers” in the U.C.C. Article 5 should never be construed to imply a reference to a silent confirmer.

The Task Force on the Study of U.C.C. Article 5, An Examination of U.C.C. Article 5 (Letters of Credit), 45 Bus.Law. 1521, 1565 (June 1990).

We agree with the Task Force. Although it may serve the same end function, a silent confirmation is not the same device as an Article 5 confirmation and clearly falls outside the operation of the UCC. The parties to the silent confirmation differ, as do the rights and obligations under the confirmation agreement.

As noted above, the trilateral nature of the letter of credit arrangement defines the rights and duties of each of the parties. The triangle is reconfigured and the rights and duties are redefined once a confirming bank becomes involved in the transaction, yet the basic nature of the relationship is not destroyed by this addition. When a silent confirmation is injected into the letter of credit transaction, the triangle collapses. Here, the seller acts as both the “customer,” requesting the confirmation, and the beneficiary, receiving the assurance of confirmation. However, here this “customer” is not asking for confirmation of its own engagement, as would an issuing bank in an Article 5 confirmation, but rather for the engagement of another. When a bank has issued a silent confirmation, it does not share the same relationship with the issuing bank and thus is not afforded the rights and duties provided by Article 5. A silent confirmer may owe a contractual duty to the beneficiary who sought the engagement, but no statutory duty is owed to the issuing bank under O.C.G.A. § 11-5- 107 and § 11-5-109. Also, the silent confirmer has no statutory right of reimbursement from the issuer. See U.C.C. § 5-107(2), Cmt. 2 (1993); Perm. Editorial Bd. for the UCC, Rep. No. 2 at 101 (1964).

Additionally, because the silent confirmer is not in privity with the issuing bank, it has no contractual right to reimbursement. Without any right of reimbursement, the silent confirmer’s engagement appears more like a surety agreement rather than an extension of credit.

The silent confirmation may serve a purpose similar to that of an Article 5 confirmation by providing the beneficiary with an additional source of payment. However, it involves different parties and creates different rights and obligations. In fact, there can be a commitment to silently confirm before the letter of credit is issued; however, the letter must be issued before an Article 5 confirmation can arise. Clearly, a silent confirmation is not an Article 5 confirmation and falls outside the operation of the UCC.

B. BREACH OF CONTRACT CLAIM

Any confirmation contemplated by BNL and Dibrell was to be a silent confirmation. Dibrell, the beneficiary, rather than Rafidain, the issuer, requested the confirmation. If BNL had issued the confirmation, it would not have had a duty to Rafidain nor would it have had any statutory or contractual right of reimbursement. As discussed above, any such confirmation would have been operating outside the UCC. Logically, a contract to silently confirm must also fall outside the operation of the UCC. The issue then becomes a question of whether the formal requirements of Article 5, which define
confirmation and the corresponding liability, preclude recovery on a common law breach of contract theory for this non-UCC governed device. We find that they do not.

Georgia’s Commercial Code provides that common law principles of law and equity “shall supplement” the UCC’s provisions “unless displaced by the particular provisions of this title…” O.C.G.A. § 11-1-103. BNL argues that alternate theories of recovery are displaced by the “particular provisions” of Article 5 that define the requirements necessary to impose confirming bank liability. BNL further contends that because Dibrell has not met these requirements, it is precluded from any recovery. (Appellee’s Br. at 34.) We disagree.

We have held that the equitable doctrines of waiver and estoppel apply in a letter of credit case, although not specifically provided for in Article 5. Pro-Fab, Inc. v. Vipa, Inc., 772 F.2d 847, 851 (11th Cir.1985) (citing Barclays Bank D.C.O. v. Mercantile Nat’l Bank, 481 F.2d 1224, 1236-37 (5th Cir.1973), cert. dismissed, 414 U.S. 1139, 94 S.Ct. 888, 39 L.Ed.2d 96 (1974)). Significantly, the Georgia courts have also held that common law remedies are available when the theory of recovery falls outside the confines of the UCC. In First Ga. Bank v. Webster, 168 Ga.App. 307, 308 S.E.2d 579, 581 (1983), a bank customer sued a bank on its misrepresentation that a deposited check was “good.” Although the UCC imposed no statutory duty upon the bank to refrain from such misrepresentations, the trial court allowed the customer’s claim. Id. at 580. The Georgia Court of Appeals agreed, reasoning that “[w]hile the UCC provides a remedy for the negligent violation of the duties it imposes, it does not provide relief from common law negligence such as is alleged to have occurred in the present case. Therefore, appellee was entitled to bring a common law negligence such as is alleged to have occurred in the present case. Therefore, appellee was entitled to bring a common law negligence action against the bank.” Id. at 581. Similarly, in an Article 6 bulk transfer case, the Georgia Supreme Court allowed the plaintiff to pursue common law remedies notwithstanding the remedies provided by the bulk transfer law. Boss v. Bassett Furniture Indus., 249 Ga. 166, 288 S.E.2d 559, 562 (1982). The court held that “[t]he relationship of the plaintiff in this case to the transferee was multifaceted and he may pursue his common law and equitable remedies, if any, against the transferee without reliance on the bulk transfer law.” Id. at 562.

In its brief, BNL distinguishes Webster from the instant case, arguing that the plaintiff in Webster was free to pursue a common law negligence claim because nothing in the UCC defined how the liability at issue was to arise. (Appellee’s Br. at 34.) Here, BNL argues Dibrell’s case. Although the UCC governs Article 5 confirmations, nothing in the UCC defines how liability on a silent confirmation is to arise; therefore, a common law breach of contract action for breach of a contract to silently confirm is permissible. BNL also relies upon Brannon v. First Nat’l Bank, 137 Ga.App. 275, 223 S.E.2d 473 (1976) to support its argument that Dibrell is precluded from asserting common law actions for recovery. In Brannon, a bank sued under theories of unjust enrichment and breach of warranty when it paid on Article 8 governed securities, later found to be counterfeit. Id. at 474. Dismissing the unjust enrichment claim, the court concluded that the warranties were limited to those set forth in the UCC and that to allow recovery under an unjust enrichment claim would render the “specified warranties meaningless and impair the negotiability of securities.” Id. at 476.

The Brannon court’s reasoning is inapposite to this case. The securities in Brannon, unlike the misrepresentation in Webster and the silent confirmation in the instant case, fall within the realm of the UCC and should be governed by its provisions. Furthermore, Article 5 indicates that its provisions are not all encompassing:

This article deals with some but not all of the rules and concepts of letters of credit as such rules or concepts have developed prior to this title or may hereafter develop. The fact that this article states a rule does not by itself require, imply, or negate application of the same or a converse rule to a situation not provided for or to a person not specified by this article.

O.C.G.A. § 11-5-102(3). As discussed above, a silent confirmation is a situation which is not provided for by Article 5. Therefore, we hold that Article 5 does not preclude recovery for breach of a contract to silently confirm on a common law breach of contract theory.

Having concluded that Georgia’s UCC does not preclude an action for breach of a contract to silently confirm, we must address whether Dibrell and BNL have entered into an enforceable contract to confirm. In Georgia, a valid contract requires “a subject matter, a consideration, and mutual assent by all parties to all terms.” Lamb v. Decatur Fed. Sav. & Loan Ass’n., 201 Ga.App. 583, 411 S.E.2d 527, 529 (1991); see O.C.G.A. § 13-3-1 (1982). A valid contract also requires the agreement to “be expressed plainly and explicitly enough to show what the parties agreed upon.” West v. Downer, 218 Ga. 235, 127 S.E.2d 359, 364 (1962). The enforceability of a contract is determined by whether its terms are expressed in plain and explicit language so as to convey what was agreed upon by the parties. Farmer v. Argenta, 174 Ga.App. 682, 331 S.E.2d 60, 61 (1985). No contract exists in Georgia unless the parties agree to all of its material terms and conditions and nothing is left to future agreement. Pelletier v. Zweifel, 921 F.2d 1465, 1503 (11th Cir.1991), cert. denied, 510 U.S. 918, 114 S.Ct. 311, 126 L.Ed.2d 258 (1993).

Viewing the evidence in a light most favorable to Dibrell, we believe a factual question remains as to whether a valid contract existed. Multiple documents may be read collectively to discern the elements and terms of a contract so long as there is no conflict between the documents. Cassville White Assoc., Ltd. v. Bartow Assoc., Inc., 150 Ga.App. 561, 258 S.E.2d 175, 178 (1979). Reading the multiple faxes and telexes that were exchanged between BNL and Dibrell, we
conclude that the terms of a contract to confirm Rafidain letters of credit are discernable.

On October 20, 1988, Dibrell proposed the essential terms of the contract in Crane’s fax to von Wedel recounting their prior telephone conversation. This document was an offer by Dibrell for BNL to accept. A counteroffer was proposed by BNL in their October 25, 1988 fax agreeing to Dibrell’s proposed terms, but noting that an additional negotiation fee would apply. See Crystal Cubes of Stone Mountain, Inc. v. Kutz, 201 Ga.App. 338, 411 S.E.2d 53, 55 (1991) (defining counteroffer). One of the material terms of this agreement, the amount, was altered by Dibrell in a new offer in their fax of November 1, 1988, informing BNL of the new amount of the sale; $4,162,500 rather *1583 than the original $4,000,000. BNL accepted this new offer in their return fax of December 1, 1988, which stated “we agree that the amount of the letter of credit referenced in Paul von Wedel’s letter to you now reads $4,162,500.” (R. 4-61 Ex. E.) In the same document that contained BNL’s acceptance of the new amount, BNL offered to confirm another letter of credit in an amount up to an additional $4,000,000. The offer also provided the fee BNL was to receive in exchange for its promise to confirm a second letter of credit. The offer appeared to be conditioned, however, only to cover shipments that would be made in January and February of 1989. Thus, on remand the district court should decide whether this was a material term of the agreement or whether BNL waived enforcement of this term so that a valid contract existed. We recognize that there are a number of reasons why a bank would be reluctant to commit itself to confirm a letter of credit prior to the time the letter is issued. For one thing, the terms of the letter are important to a confirming bank. In this case, however, a fact finder could conclude that BNL had agreed to confirm prior to the issuance of the letter.

Viewing the evidence in a light most favorable to Dibrell, the following conclusions might be reached. When read collectively, the documents pertaining to the first sale reveal that both parties had a meeting of the minds on the essential terms of the contract and the documents themselves clearly express the terms agreed upon. Consideration existed in the form of mutual promises. Mutual promises to perform are sufficient consideration to support a contract in Georgia. Advance Sec., Inc. v. Superior Surgical Mfg. Co., 197 Ga.App. 769, 399 S.E.2d 488, 490 (1990); Randall v. Norton, 192 Ga.App. 734, 386 S.E.2d 518, 520 (1989). Here, BNL promised Dibrell that it would confirm the Rafidain letters of credit that related to Dibrell’s sales contract with SETC. In return, Dibrell promised BNL that it would pay BNL a set fee in exchange for BNL’s confirmations.

A fact finder need not conclude that this was merely an agreement to agree, as BNL maintains. A fact finder could conclude that this was an agreement on BNL’s part to perform after Dibrell had made the sale to SETC and Rafidain had issued a letter of credit. There was no more “agreement” to be made in the future; the essential terms of the confirmation were already agreed upon by the parties. BNL simply failed to perform after Dibrell relied upon the contract to confirm by entering a sales contract with SETC.

C. ESTOPPEL CLAIM

The district court concluded that Dibrell did not have a separate cause of action for estoppel and therefore entered summary judgment for BNL on this claim. We agree with this conclusion. Under Georgia law, a plaintiff cannot assert a separate cause of action for estoppel. Boral Bricks, Inc. v. Old South Transp. Management, Inc., 198 Ga.App. 678, 402 S.E.2d 777, 778 (1991). A plaintiff may use estoppel as an alternative means of providing consideration to support its contract claim. See Folks, Inc. v. Dobbs, 181 Ga.App. 311, 352 S.E.2d 212, 215 (1986). However, Dibrell did not use promissory estoppel as a consideration substitute, but rather asserted it as a separate cause of action. We affirm the district court’s entry of summary judgment for BNL on this claim.10

V. CONCLUSION

We reverse the district court’s entry of summary judgment on Dibrell’s breach of contract claim and remand for further proceedings. We affirm the district court’s entry of summary judgment on the negligence, fraud, civil RICO, and estoppel claims.

AFFIRMED in part, REVERSED in part and REMANDED.

10. We would be remiss if we did not note our suspicion that the contract may have been breached before Dibrell shipped the tobacco to SETC. Six months passed between Dibrell’s initial request for the confirmation letter (January 16, 1989) and the date of its initial shipment under the first contract (June 23, 1989). If the contract was breached before Dibrell made its shipments, then Dibrell would be “bound to lessen the damages as far as is practicable by the use of ordinary care and diligence.” Leventhal v. Seiter, 208 Ga.App. 158, 430 S.E.2d 378, 383 (1993) (quoting O.C.G.A. § 13-6-5 (1982)).
Question 2-16: What is the advantage to a beneficiary of a confirmation by a bank in addition to the issuer? So-called “Silent Confirmations” are currently widely used with respect to LCs issued by Chinese banks. Why would Chinese banks decline to authorize confirmation of their credits?

Question 2-17: See UCP600 Article 12(a). Does this provision suggest that some “Silent Confirmations” could be LC-type undertakings under UCP600?

Question 2-18: Is there any legal difference between the 20 Oct commitment by Von Wedel and the 25 Oct commitment by Von Wedel? What is the latter undertaking?

Question 2-19: Did BNL issue a “Silent Confirmation”?

Question 2-20: What does the court mean when it states that “[t]he relationship between the issuer and the beneficiary…is of a statutory nature”? In what sense? Is the court correct? Was there no LC obligation prior to the enactment of UCC Article 5?

Question 2-21: Does the court’s conclusion follow from the quoted excerpt from the Article 5 Task Force Report? Assuming that the UCP or UCC Article 5 does not address a silent confirmation, does the conclusion of the Dibrell court that it falls outside UCC Article 5 necessarily follow? What other possible analysis is available?

Question 2-22: How would this court rule on the question of whether UCC Article 5 precludes a common law action breach of a contract to confirm? What difference is there between a contract to confirm and a contract to “silently confirm”?

In Jaffe v. Bank of America, N.A., 2008 U.S. App. LEXIS 11223 (5th Cir. 5 May 2008) (US), the Jaffes applied for a letter of credit issued by Bank of America to finance the construction of a luxury yacht in China by FoShan Poly Marine Engineering, Co. The beneficiary of the letter of credit, however, was the Agricultural Bank of China which had made a construction loan to the manufacturer. It appears that the availability of the LC unfolded in stages, the first being the equivalent of a down payment of US$ 350,000 and the second being an increase to US$ 6,030,500 on the submission of a performance bond by the manufacturer. The litigation ensued when the beneficiary drew on the LC as a result of the failure of the manufacturer to repay the loan. The Jaffes alleged that construction of the yacht had not even begun.

Question 2-23: What are the relationships between the parties to this complex transaction?
Counter Standby / Counter Guarantee Practice: The Problems of Nomenclature

By Professor James E. Byrne

Counter guarantee practice grew out of the murky suspicions in the 1960s and 70s that led Mid Eastern beneficiaries to devise strategies to defeat the attempts of European and North American banks to favour their clients in letter of credit type transactions. The perception, not entirely inaccurate, was that the banks were not prepared to honour their undertakings when their clients complained that the drawings were unfair, abusive, or fraudulent. Moreover, even where the banks expressed the intention of honouring a presentation that complied on its face, local courts were prepared to issue injunctions or stop payment orders on the basis of allegations of letter of credit fraud or abusive drawing.

Although North American banks did not usually issue demand guarantees, they were soon induced to issue an equivalent product, the Counter Standby to complement their standby letters of credit.

The practice is bizarre and results from the oddities of using an instrument named a “guarantee” contrary to the norms of letter of credit practice and ignoring the advantages of a confirmation.1 Instead of following the best practice and tools for beneficiary protection available, Mid Eastern beneficiaries elected to follow the odd European “guarantee” practice that had emerged during this period.

Another difficulty of the practice is the lack of a common nomenclature. In a counter guarantee/standby situation, there are two applicants and two beneficiaries. As a result, it is difficult to understand to which party reference is being made. Unfortunately, none of the practice rules provide any simple solution to this problem.

The Institute of International Banking Law & Practice, therefore, has offered a simple solution that has been accepted by SWIFT in its formatting project and which will become the industry standard. It follows from the relationships starting with the request by the ultimate buyer/service provider for support.

The ultimate buyer/service provider is the “applicant” for a counter guarantee/standby. The counter guarantee/standby is issued by the Counter Guarantor or Counter Standby Issuer. The Counter Guarantee/Standby is issued in favor of the Local Bank that is being asked to issue its Local Undertaking in favor of the Local Beneficiary. The Local Bank is the beneficiary of the Counter Guarantee/Standby and the Local Beneficiary is the Beneficiary of the Local Undertaking. The Local Undertaking can be either independent or dependent. The Issuer of the Counter Guarantee/Standby is the applicant for the Local Undertaking to be issued by the Local Bank.

The question to be asked, however, is why all this complexity. Had the banks resorted to the simple letter of credit practice of confirmation, the Local Beneficiary would be the beneficiary of a letter of credit issued by the

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1. Under virtually every system of law, a “guarantee” is a promise under the law of obligations to answer for the debt of another. It is conditional but the condition is not necessarily documentary. As a result, a true guarantee is not independent on the transactions that give rise to it but dependent on them. The significance of this notion is that defenses that can be asserted with respect to the underlying transactions that give rise to the guarantee can be raised by the guarantor to excuse its obligation.

As a result of a particular perversion of the legal mind, banks began at this time to tamper with the “guarantee” to exclude as a matter of contract drafting the various defenses that could be asserted. The result, which might more properly have been named an “unguarantee” was contractually pseudo independent, that is it would be regarded as independent if a court were prepared to treat it as a letter of credit type instrument. It is this basardy in the birth of the demand guarantee that has led to endless confusion and problems in its character.
Chapter 2 — Obligations: Issuers, Confirmers, Advisors, and Silent Confirmations

entity that would otherwise be the Counter Guarantor and would be the Issuer. Its undertaking would have been confirmed by the Local Bank.

As a result, the Local Beneficiary would be able to look to two entities for payment, the Local Bank that confirmed the undertaking and the Counter Guarantor/Issuer that issued it. The Local Beneficiary would thereby experience no diminution of its rights but an increase.

The Confirmer under a rational approach to these situations would have been the Local Bank under a Counter Guarantee/Standby. It would have been able to look to the Issuer (Counter Guarantor/Issuer under a Counter Guarantee/Standby) for reimbursement. The only different is that there would not have been two undertakings that could readily become misaligned but one. For the bank regulators in countries that are concerned about Counter Guarantees/Standbys, the difference is enormous. Their concern is no longer the right of the Local Beneficiary of the Local Undertaking to be paid but the right of the Local Bank (Beneficiary of the Counter Guarantee/Standby) to be paid. Where there is a confirmation rather than a Local Undertaking, the ability of the Confirmer (Local Bank) to be reimbursed is more certain. Only where the Local Undertaking is not intended to be independent, would this approach be problematic.

However, parties to these undertakings continue to use undertakings that are misnamed subject to rules that are accordingly distorted in a transactional situation that is unnecessarily distorted because the former colonial powers have insisted on applying their own irrational terminology in order to try to elicit some illusive elements of control over the payment process. Why rational beneficiaries agree to this process is a great mystery.

American Express Bank LTD., v. Banco Espanol De Credito, S.A.
597 F. Supp. 2d 394 (S.D.N.Y. 2009)

OPINION BY: Hon. Richard J. Holwell

MEMORANDUM OPINION AND ORDER

Richard J. Holwell, District Judge:

This case is about international demand guaranties, a form of commercial credit used to secure the performance of international construction contracts. In particular, it involves a bank’s attempts to enforce another bank’s counterguaranties, despite the fact that it has refused to pay the primary guaranties on the ground that demand was made in bad faith.

The banks’ dispute originates in two contracts to build power substations in Pakistan. The contractor, a Spanish company, claims that it fully performed the contracts. The purchaser, a semi-autonomous agency of the government of Pakistan, thinks otherwise. A panel of arbitrators appointed by the International Chamber of Commerce (“ICC”) sided with the contractor and directed the Pakistani purchaser to cancel guaranties securing the contractor’s performance. Instead of abiding by the arbitrators’ decision, the purchaser continued to demand payment of the guaranties and initiated an action in Pakistan to set aside the award and enforce the guaranties. Neither the contractor nor the purchaser is a party to this action.

In this dispute between the banks, the Court holds that: (1) the guaranties and counterguaranties are governed by letter-of-credit law; (2) in light of the final, binding ICC award, the guarantor, plaintiff American Express Bank (“AEB”), has no obligation to pay under its guaranties and, therefore, no good faith basis to demand payment of the counterguaranties issued by Banco Espanol de Credito (“Banesto”); and (3) AEB’s request for a declaration that it will be entitled to payment in the event that it is compelled at some future date to pay in Pakistan is not presently justiciable. AEB’s complaint is therefore dismissed without prejudice to the filing of a new action following further developments in Pakistan.

I. BACKGROUND

... 

A. The Underlying Contracts

The contracts required Isolux to install two 220/132 KV substations (the numbers refer to voltage), and to supply and install telecommunication equipment for twenty lower voltage peripheral grid stations. (ICC Award 2.) In exchange, WAPDA apparently agreed to pay Isolux about $35 million. (See ICC Award 11.) In the event of a dispute, the parties agreed to submit their claims to arbitration at the ICC. (See ICC Award 2.) The arbitration clause provided that “any difference, dispute or question arising out of or with reference to this agreement which cannot be settled amicably . . . shall within 60 days from the date that either party informs the other in writing that such difference[,] dispute or question exists, be referred to arbitration of three arbitrators.” (Id.) The clause further provided that “[t]he award of the majority of the [arbitrators] shall be final and binding on both parties.” (Id.)

B. The Guaranties and Counterguaranties

To secure Isolux’s performance, WAPDA required Isolux to obtain two demand guaranties. 1 Such guaranties, which are common in international construction contracts, provide a simple way for a buyer to obtain cash for substitute performance if a contractor defaults. (See generally David J. Barru, How to Guarantee Contractor Performance on International Construction Projects: Comparing Surety Bonds With Bank Guarantees and Standby Letters of Credit, 37 Geo. Wash. Int’l Rev. 51 (2005).) Isolux asked defendant Banesto to arrange the guaranties. (See Compl. Ex. 1.) Banesto in turn asked AEB, the plaintiff here, to execute guaranties in favor of WAPDA in Lahore, Pakistan. (See id.) This kind of arrangement is also common, since buyers frequently prefer to work with local banks, such as the AEB branch in Pakistan, instead of unfamiliar foreign institutions. (See generally John F. Dolan, The Law of Letters of Credit: Commercial and Standby Credits P 1.03[1], at 1-16 (Rev. Ed. 1996) (“Dolan”).) The AEB branch in Pakistan agreed to issue guaranties to WAPDA, provided that Banesto issue counterguaranties in its favor.

1 The record contains many variations on the spelling of “guaranty” and “guaranties.” The Court uses the American spelling without intending any change in meaning.

The following diagram summarizes the legal relationships between WAPDA, Isolux, and the banks. The instruments at issue in this action appear in bold:

[SEE FIGURE IN ORIGINAL]

Banesto and AEB made arrangements for the guaranties in a series of SWIFT messages sent in November 1995. 2 On November 16, Banesto sent AEB a message asking that it issue two guaranties in WAPDA’s favor, both for a total of U.S. $1,778,571.50 and 5,486,500 Pakistani rupees. (Compl. Ex. 1.) The critical undertakings in the guaranties provided:

the surety [i.e., AEB] waiving all objections and defenses under the aforesaid contract, hereby irrevocably and independently guarantee[s] to pay to WAPDA without delay upon WAPDA’s first written demand any amount claimed by WAPDA up to [sic] the sum named herein, against WAPDA’s written declaration that the principal [Isolux] has refused or failed to perform the aforementioned contract. (Compl. Ex. 1 (capitalization normalized).)

AEB, in other words, agreed to pay WAPDA under the guaranties based on a written certification that Isolux had failed to perform. For its part, Banesto agreed to repay any liabilities AEB incurred under the guaranties. Specifically, Banesto’s messages to AEB promised, in banker’s pidgin, that “Our counterguarantee irrevocable unconditional in your favour is valid to receive your eventual claims made under your guarantee that we undertake to pay to you on your first demand notwithstanding any contestation from us or our applicants part [sic] or third party.” (Id. (capitalization normalized).)

2 The acronym stands for “Society for Worldwide Interbank Financial Telecommunication,” a cooperative society organized under Belgian law. SWIFT operates a secure, worldwide financial messaging network that banks use to do business with one another. (See SWIFT, About SWIFT, http://www.swift.com/index.cfm?item_id=41322 (last visited Nov. 7, 2008).)

On November 30, 1995, AEB executed the guaranties. (Compl. Ex. 2.) At Banesto’s request, the guaranties’ expiration dates were extended from time to time, most recently until September 30, 2004. (Compl. Ex. 3.)

C. Contract Disputes

By 2004, disputes arose regarding Isolux’s performance of the contracts and WAPDA’s concomitant payment obligations, the details of which are unimportant here. (See generally ICC Award 2, 11-16.) The disputes provoked legal pro-
Legal proceedings began on February 11, 2004, when Isolux submitted a request for arbitration to the ICC International Court of Arbitration. (Terms of Reference 2.) Isolux’s request sought money damages and an order requiring WAPDA to return all the guaranties issued in connection with the construction contracts. (ICC Award 13.) At the same time that Isolux submitted a request for arbitration, it obtained an injunction from a Spanish court to freeze the status quo. The injunction (1) enjoined WAPDA from demanding payment on the AEB guaranties, and (2) directed Banesto not to honor any requests for payment of any guaranties or counterguaranties related to the construction contracts. (See Auto [Court Order], Juzgado de 1 [degree] Instancia N [degree] 42, Madrid (Feb. 2004), Walker Decl. Ex. H, at 4.)

Five months later, WAPDA informed AEB that Isolux had failed to perform the underlying contracts and demanded payment of AEB’s guaranties. Without having paid the guaranties, AEB on July 15 and July 16, 2004 sent Banesto SWIFT messages demanding payment of the counterguaranties. (Compl. PP 12-13; see Aff. of Farhad Subjally Ex. 5.) Banesto refused, citing the Spanish injunction. (See Compl. P 14; Letter from Antonio Ortega Suarez, International Energy Manager, Isolux Wat, S.A. to WAPDA (Aug. 6, 2004), Walker Decl. Ex. I.)

In February 2005, WAPDA filed a lawsuit against AEB in Lahore, Pakistan to recover on the guaranties. (See Summons and Compl., Pakistan Water & Power Development Authority v. American Express Bank, Ltd., Civil Suit No. 30 of 2005 (Lahore High Court Feb. 10, 2005), Ex. B to Letter from Stephen Marzen to Hon. Richard J. Holwell (June 1, 2007).) The complaint alleged that Isolux failed to perform the construction contracts (id. PP 10-13), that WAPDA had made demand on the guaranties (id. P 16), and that AEB had wrongfully refused to honor them (id. P 19). As relief, WAPDA demanded damages in the amount of the guaranties, plus the costs of suit. (Id. at 4-5.)

In March 2006, an arbitral hearing was held in Geneva, Switzerland. (See Procedural Order No. 4, Arbitration Between Isolux and WAPDA, ICC Case No. 13158/KGA (Jan. 5, 2006) (Walker Decl. Ex. J at 9.) Both Isolux and WAPDA participated fully in the proceeding. (See, e.g., ICC Award, at 17, 19, 25.)

Before the arbitral panel issued its decision, AEB on May 8, 2006 filed suit against Banesto in the Southern District of New York. In its complaint, AEB alleged that Banesto breached its agreement to pay AEB under its counterguaranties, and that Banesto breached the terms and conditions of an account agreement governing a U.S. dollar account Banesto maintained with AEB. (Compl. PP 20, 22.) AEB demanded damages in the amount of the counterguaranties, plus the costs of enforcement. (Id. at 4-5.) On August 16, 2006 AEB moved for summary judgment, and on September 15 2006 Banesto moved to dismiss the complaint. In light of the pending decision by the ICC arbitral panel, the Court dismissed both motions without prejudice to refiling once a decision had been issued by the ICC panel. (See Orders dated March 22, 2007 and April 5, 2007.)

D. The Arbitral Decision and Subsequent Proceedings in Pakistan

While not communicated to this Court in a timely fashion, the ICC tribunal had issued its decision on February 6, 2007. The decision ordered that (1) Isolux pay WAPDA U.S. $196,116.92 and 892,589 rupees; (2) WAPDA pay Isolux 60,632,495.86 rupees; and (3) WAPDA cancel a large number of guaranties and performance bonds, among them the guaranties at issue here. (ICC Award 92-93 & annex 1, at 4.) Under the decision, which called for setoffs to be calculated at the exchange rate prevailing on the date of the award, WAPDA owed Isolux approximately $788,066. Isolux owed WAPDA nothing. According to a report submitted by Banesto and not contested by AEB, the award became final and binding as a matter of Swiss law upon notification to the parties. (Letter from Dr. Michael Scholl to Alvaro Lopez de Argumedo & Dorieto Vicente, at 2-3 (Mar. 5, 2007), Cadarso Decl., Ex. C.)

Undeterred by the arbitral decision, WAPDA continued its efforts to enforce the guaranties in Pakistan. By letter dated May 29, 2007, AEB informed this Court that “WAPDA . . . is not abiding by the award, including the direction to release the guaranties of American Express Bank, and has filed a proceeding in Pakistan to have the award set aside.” (Letter from David Rabinowitz to Hon. Richard J. Howell (May 29, 2007).) In its defense of that action, AEB specifically claims that (1) WAPDA’s demands for payment of the guaranties are mala fide (in bad faith), and (2) AEB has no obligation to pay WAPDA. (See Def.’s Application Under Section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, Pakistan Water and Power Dev. Auth. (WAPDA) v. American Express Bank Ltd., Lahore, Civil Suit No. 30 of 2005 (Lahore High Court Mar. 8, 2005), Ex. C to Letter from Stephen Marzen to Hon. Richard J. Holwell (June 1, 2007).)

On May 29, 2007, the parties renewed their motions for summary judgment and dismissal in this Court. (See Letter from David Rabinowitz to Hon. Richard J. Holwell (May 29, 2007); Supp. Mem. of Law in Supp. of Mot. to Dismiss of Def. Banco Espanol de Credito, S.A. (“Def.’s Third Mem.”)) In the most recent round of briefing, AEB claims a right to immediate payment of the counterguaranties regardless of whether it has paid WAPDA and despite its refusal to do so. (Id.) In the alternative, AEB contends it is entitled to a declaration that if a Pakistani court requires it to pay the principal guaranties, Banesto must pay its counterguaranties. (See Pl.’s
Supp. Mem. in Further Opp. to Mot. to Dismiss, at 5 ("Pl.’s Third Mem.").) Banesto disputes both claims. Thus, the principal issues now before the Court are whether, on the current record, AEB has a right to enforce AEB’s counterguarantees even though it has not paid the principal guaranties, or, alternatively, to a declaration that if it is ordered to pay the guaranties by a Pakistani court, it will be entitled to repayment.

II. DISCUSSION

The Court holds that AEB is not entitled to immediate payment of the counterguaranties or a declaration of its future rights. Before considering the merits of AEB’s claims, however, two threshold issues must be addressed.

A. Choice of Forum Law

First, the parties dispute which forum’s law governs AEB’s claims to payment under the counterguaranties. Citing an account agreement executed in New York and evidence that Banesto and AEB have an “integrated global relationship,” AEB argues that New York law should apply. (See Pl.’s First Mem. 3-5; Pls.’ Mem. in Further Supp. of Mot. for Summ. J. and in Opp. to Mot. to Dismiss 3-4 ("Pl.’s Second Mem.").) Banesto thinks that Spanish law applies, or that if New York law applies, it is not subject to any liabilities here that it would not also be subject to in Spain. (See Mem. of Law in Supp. of Mot. to Dismiss & in Opp. to Summ. J. 14, 20-21 ("Defs.’ First Mem.").)

In light of the conclusions the Court reaches below, there is no need to resolve this issue now. The complaint and the three memoranda of law submitted by AEB assume that New York law applies. If the complaint does not state a claim under New York law, it necessarily fails to state a claim upon which relief can be granted and Banesto’s motion to dismiss must be granted. For the purposes of the pending motions, the Court will therefore assume that New York law applies.

B. Choice of Substantive Law

Next, the parties dispute whether AEB’s guaranties and Banesto’s counterguaranties, assuming New York law applies, are subject to letter-of-credit law, particularly Article 5 of the New York Uniform Commercial Code. Banesto contends that AEB’s guaranties are “functionally and legally equivalent” to international letters of credit, and thus subject to letter-of-credit law. (Defs.’ First Mem. 15.) AEB counters that the instruments are simple contracts, not subject to Article 5. (See Pl.’s First Mem. 5.) The practical significance of the dispute is that if letter-of-credit law applies, Banesto can take advantage of the “material fraud” exception recognized in Article 5. See N.Y. U.C.C. § 5-109 (McKinney 2006). The Court agrees with Banesto, and holds that both the guaranties and the counterguaranties are governed by letter-of-credit law.

By way of background, the typical letter-of-credit transaction involves three legal relationships: (1) an underlying contractual relationship between the party that obtains the letter of credit (the “applicant”) and the party entitled to draw on it (the “beneficiary”); (2) a relationship between the party that issues the letter of credit (the “issuer”) and the applicant concerning the terms and amount of the credit; and (3) a relationship between the issuer and the beneficiary, which “embod[ies] the issuer’s commitment to ‘honor drafts or other demands for payment presented by the beneficiary or a transfer beneficiary upon compliance with the terms and conditions specified in the credit.’” Nissho Iwai Europe PLC v. Korea First Bank, 99 N.Y.2d 115, 782 N.E.2d 55, 59, 752 N.Y.S.2d 259 (N.Y. 2002) (quoting First Commercial Bank v. Gotham Originals, 64 N.Y.2d 287, 475 N.E.2d 1255, 1258, 486 N.Y.S.2d 715 (1985)). See also 3Com Corp. v. Banco do Brasil, S.A., 171 F.3d 739, 741 (2d Cir. 1999) (describing same relationships).

In a standard “commercial” letter of credit, the issuer undertakes to pay the purchase price of goods upon receiving the seller’s invoice and other documents evidencing a right to payment. See Dolan, PP 3.04-3.05, at 3-18 to 3-22. A “standby” letter of credit differs with respect to the documents necessary to draw on the credit. Unlike a commercial letter, a standby typically does not require the presentation of a negotiable bill of lading or other transport document; instead, the beneficiary may collect simply by certifying that the applicant failed to perform its underlying contractual obligations. See Dolan P 3.06, at 3-23.

Both standby and commercial letters of credit create “an obligation wholly independent of the underlying commercial transaction.” 3Com, 171 F.3d at 744. This feature of letters of credit, known as the “independence principle,” has been termed a “fundamental principle” of the law of credits. Id. Because of this principle, it is ordinarily enough to present documents that strictly comply with the terms of a letter of credit to draw on it.

The guaranties and counterguaranties at issue in this case share this essential feature of independence from the underlying contractual relationships, and, therefore, are governed by letter-of-credit law. In the guaranties, AEB “irrevocably and independently guarantee[d] to pay to WAPDA without delay upon WAPDA’s first written demand any amount claim by WAPDA.” (Compl. Ex. 1.) In the counterguaranties, Banesto undertook to pay AEB “on [its] first simple demand which shall be final and conclusive.” (Id.) These provisions plainly reflect the parties’ expectation that WAPDA would receive money promptly if it submitted a facially valid certification that Isolux failed to perform its obligations—a defining characteristic of standby letters of credit.

Beyond this, a leading treatise on the law of credits favors treating instruments such as the ones at issue here as letters of credit. See Dolan, P 1.05[2], at 1-31. As the treatise
explains, “foreign banks and foreign branches of domestic banks have introduced a product that they call a ‘guarantee’ (sic) and to which letter of credit law is quite congenial. ‘First-demand guarantees,’ ‘performance guarantees,’ and ‘simple-demand guarantees’ are the foreign bank equivalents of the standby.” Id.

Lastly, at least one decision of a United States Court of Appeals supports the conclusion that the guaranties and counterguaranties are governed by letter-of-credit law. In Banque Paribas v. Hamilton Industries International, Inc., 767 F.2d 380 (7th Cir. 1985), the Seventh Circuit considered a guaranty that, like the ones here, secured performance of a construction contract. Judge Posner’s opinion for the court labeled the guaranty an “international letter of credit” and applied letter-of-credit law. See id. at 381; 384-86. As the district court in Paribas noted, letter-of-credit law applied because the issuer agreed to pay the beneficiary upon its presentation of a facially valid documentary demand for payment, and described its obligations as “unconditional and irrevocable.” Amer. Nat. Bank & Trust Co. of Chicago v. Hamilton Indus., Intern., Inc., 583 F. Supp. 164, 169-170 (N.D. Ill. 1984), rev’d on other grounds, 767 F.2d 380 (7th Cir. 1985). So too here.

3 The critical undertakings in the guaranties provided: “we the Guarantor hereby unconditionally agrees [sic] to pay ... presentation by payment or delivery of an item of value.” (emphasis added)). AEB’s argument, however, ignores the undertakings in the principal guaranties whereby AEB agreed to pay WAPDA “upon [its] first written demand.” (Compl. Ex. A.) Since the principal guaranties and the counter-guaranties were transmitted to AEB in an integrated document (a SWIFT message), the Court finds it rather obvious that Banesto intended the counter-guaranties, like the guaranties, to be nothing more than documentary credits.

C. Merits

Turning to the merits, AEB contends that it is entitled to immediately enforce the counter-guaranties, and to a declaration setting out Banesto’s liabilities in the event that it pays WAPDA pursuant to a Pakistani court order. Neither contention has merit.

1. AEB Has No Basis To Immediately Enforce the Counter-guaranties

Taking a somewhat extreme view of the independence principle, AEB first maintains that it is entitled to draw on the counter-guaranties regardless of its obligation to pay WAPDA. (See Pl.’s Third Mem. 1; Pl.’s First Mem. 6.) The flaw in this argument is obvious: In view of the ICC award—and as a question of basic contract law, international law, and New York law—WAPDA’s continued demands for payment of the guaranties lack any basis in law or fact. Thus, until the award is modified or vacated, neither WAPDA nor AEB has a “colorable right” to demand honor of the guaranties or counter-guaranties. See N.Y. U.C.C. § 5-109 official cmt. 1.

First, as for contract: The construction contracts’ arbitration clause provides that “[t]he award of the majority of the [arbitrators] shall be final and binding on both parties.” (ICC Award 2.) Cf. Synergy Gas Co. v. Sasso, 853 F.2d 59, 63-64 (2d Cir. 1988) (noting that under Federal Arbitration Act, the “scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission”). WAPDA participated fully in the ICC arbitration, and lost. And the parties here have made no suggestion that there is a colorable ground for vacating the award. In short, on the record before the Court, WAPDA’s continued demands for payment are flatly inconsistent with its contractual obligations.

Second, as for international law: In 2005, Pakistan ratified the New York Convention on the Recognition and Enforcement Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38 (“N.Y. Conv.”). See United Nations Commission on International Trade Law, 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards — the “New York” Convention, http://tinyurl.com/7hsxx4 (last visited Jan. 21, 2009) (noting Pakistan’s date of ratification). Though the convention does not expressly speak to the res judicata effect of an international arbitral award, Stavros Brekoulakis, The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited, 16 Am. Rev. Int’l Arb. 177, 181 (2005), it reflects the principle that until it is successfully challenged, an arbitral award presumptively establishes the rights and liabilities of the parties to the arbitration. Specifically, the convention provides that subject to its enforcement provisions, “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.” N.Y. Conv. art. 3. WAPDA’s continued demands for payment of AEB’s guaranties are inconsistent these international law obligations as well.

Finally, as for New York law: Since at least 1980, New York courts have recognized that a final and conclusive international arbitral award is res judicata as to a party that fully
participated in the proceeding. See Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 406 N.E.2d 445, 452, 428 N.Y.S.2d 628 (N.Y. 1980). To the extent that the bona fides of WAPDA’s and AEB’s demands for payment are judged under New York law, the ICC award precludes WAPDA’s continuing demands for payment.

Thus, under multiple bodies of law, the ICC award presumptively establishes the rights and liabilities of WAPDA and AEB until such time as WAPDA succeeds in having the award modified or vacated by a court. AEB, moreover, recognizes this. In Pakistan, it has argued that all disputes arising out of the construction contracts are to be settled in arbitration; that WAPDA’s demands for payment under the guaranties were made in bad faith; and that it has no obligation to pay WAPDA anything. (See Def.’s Application Under Section 10 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, Pakistan Water and Power Dev. Auth. (WAPDA) v. American Express Bank Ltd., Lahore, Civil Suit No. 30 of 2005, at 3 (Lahore High Court Mar. 8, 2005), Ex. C to Letter from Stephen Marzen to Hon. Richard J. Holwell (June 1, 2007) (“The two claims . . . lodged by the Plaintiff on the Defendant were . . . mala fide and not maintainable.”); id. at 7 (“The dispute between the Plaintiff and Isolux Wat including the issue whether there has been any default, breach or failure on the part of the contractor will be decided in arbitration which is the forum mutually agreed between the Plaintiff and the Contractor . . . .”). By demanding immediate payment under the counterguaranties, however, AEB seeks to have things both ways. Refusing to recognize the validity of WAPDA’s claims in Pakistan, AEB argues in this Court that those very claims (and the remote possibility that a Pakistani court will recognize them at some point in the indefinite future, see infra § II.C.2) justify its demand for immediate honor of the counterguaranties.

Whether or not AEB is estopped from taking an inconsistent position here, its position in Pakistan better reflects the legal relationships at the heart of this case. AEB has no obligation to pay under its guaranties and, therefore, no good faith basis to demand payment of the counterguaranties issued by Banesto. It follows that, on the current record, Banesto’s refusal to honor AEB’s demands for honor is proper. Brenntag Intern. Chems., Inc. v. Bank of India, 175 F.3d 245, 250 (2d Cir. 1999); Recon/Optical, Inc. v. Gov’t of Israel, 816 F.2d 854, 858 (2d Cir. 1987); Ground Air Transfer, Inc. v. Westates Airlines, Inc., 899 F.2d 1269, 1273–74 (1st Cir. 1990); Roman Ceramics Corp. v. Peoples Nat. Bank, 714 F.2d 1207, 1213 (3d Cir. 1983).

2. AEB Is Not Entitled to Declaratory Relief

Anticipating this conclusion, AEB points out that there is nothing illegitimate about WAPDA’s efforts to have the arbitral award vacated in Pakistan. It thus argues that “to avoid possible future circularity of payment,” the Court should issue a declaration that AEB will be entitled to pay-

The first half of this argument is sound. Though WAPDA’s continued demands for payment are unjustified in view of the ICC award, nothing in the award or the law of judgments precludes WAPDA from undertaking legal efforts to have the award vacated. Indeed, though the question is not yet presented, the Court is preliminarily of the view that if AEB pays WAPDA because it has been ordered to do so by a Pakistani court, Banesto will be under an obligation to reimburse it. In such circumstances, AEB could make a good faith demand for honor of the counterguaranties, as the presumption of validity that attaches to the arbitral award would no longer be conclusive. And even if the counterguaranties could not be enforced because of the Spanish injunction, Banesto likely would have an independent obligation to reimburse AEB by virtue of having procured the guaranties from AEB. Cf. N.Y. U.C.C. § 5-108(i)(1) (“An issuer that has honored a presentation as permitted or required by this article . . . is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds . . . .”).

It does not follow, however, that AEB currently is entitled to a declaration of its future rights. The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that “In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration . . . .”

Undeniably, this decision leaves AEB in a difficult position. If Pakistan’s courts order that AEB honor the principal guaranties, AEB honors the guaranties, and Banesto refuses to honor the counterguaranties or otherwise reimburse AEB, ARB will be required to initiate a new action to recoup payment from Banesto. As the Court has already indicated, a demand for honor in the event that AEB was ordered to pay the guaranties would almost certainly be made in good faith. Moreover, Banesto would likely have an independent obligation to repay AEB if AEB paid WAPDA in reliance on a Pakistani court judgment. But this is not the scenario before the Court. And until Pakistan’s courts act, this Court cannot, consistent with the Constitution’s limits on federal jurisdiction, issue a binding declaration of the future rights of AEB and Banesto.

III. CONCLUSION

Banesto’s motion to dismiss [21] is granted without prejudice to the filing of a new action following entry of judgment in Pakistan, AEB’s motion for summary judgment [18] is denied. The Clerk is directed to close this case.

SO ORDERED.