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MESSAGE FROM VICE CHANCELLOR

The launch of the first issue of KDU Law Journal (KDULJ) marks a significant milestone of the Faculty of Law of General Sir John Kotelawala Defence University. The Editorial Committee comprises the senior members of the academic staff of the Faculty of Law, and it is guided by an Advisory Committee consisting of eminent professionals and academics in different fields of Law. Further, the authors and reviewers are of high calibre and potential in their chosen fields. I am convinced that KDULJ contains the best of academic writings in the field of Law and that it will be equally beneficial for professionals, academics and students of Law.

As the patron of the Editorial Committee, I am privileged to be invited to write this message for the first issue of the KDULJ which addresses a diverse range of topics in the areas of Public and Private Law. Furthermore, I believe that, this initiative by the Faculty of Law, as the youngest Faculty of Law in the country, will fill up the existing lacuna in the dissemination of knowledge in new dimensions and developments in the field of Law in Sri Lanka.

I consider it pertinent to note that the Faculty of Law initiated the publication of a Journal in 2015, titled "Sri Lanka Journal of International and Comparative Law", which for some reasons was not sustained. So, I sincerely wish that the Faculty of Law, KDU would be determined to sustain and advance the current Journal, KDULJ encouraging essential research in the field of Law in the future, and I congratulate the Dean and the Staff of the Faculty for their efforts in the publication of the first issue of the Journal. Further, I wish to express my sincere appreciations to the Editorial Committee and the reviewers for their dedicated efforts in completing this valuable work.

Major General Milinda Peiris
Vice Chancellor
General Sir John Kotelawala Defence University
Sri Lanka

FOREWORD

I consider it a great privilege for me to be invited to serve as a member of the Advisory Committee of the KDU Law Journal and to write this forward to the inaugural issue published by the Faculty of Law of the General Sir John Kotelawala Defence University, the youngest Law Faculty in the state universities.

This publication bridges a lacuna in legal academic and professional education among the academics and professionals in the field of Law. Further, this contributes to the expansion of the legal literature for the benefit of all concerned.

I am certainly aware that, the continuation of a scholarly work is much difficult than the initiation of such work, especially by a Law Faculty, while conducting the routine academic matters. However, I have the confidence that the Advisory Committee of this Journal Comprising Sri Lankan legal experts from around the world serving in different capacities will certainly guide the Editorial Committee of the Journal in all the steps.

I wish the Faculty of Law, KDU every success in this significant academic initiative, which it has embarked upon in the interests of all members of the legal community!

Prof. GL Peiris
Minister of Education

EDITORIAL NOTE

The launch of the first issue of KDU Law Journal (KDULJ) marks a significant milestone of the Faculty of Law, General Sir John Kotelawala Defence University (KDU). The Editorial Committee of KDULJ, expects that it would to serve as a forum for discussion of latest development and current trends of the field of law.

Each article is a product of a great deal of work on the part of the authors which will be useful for legal academics, judicial officers, practitioners and law students as a source literature in their respective scopes.

Good legal scholarship has always involved a significant amount of private reflection, research and analysis, and such type of effort is apparent in the articles found in this volume. Hence, we are privileged to be the Editorial Committee of this issue of the KDULJ, which addresses an array of topics in the area of Public and Private Law.

Editorial Committee, wishes to express sincere appreciation for the authors of the articles, Advisory Committee, Reviewers and Staff of the Faculty of Law for their contribution in completing this work.

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TABLE OF CONTENTS

Legal Education and Legal Profession in Sri Lanka: Present and Future

Mohamed Ali Sabry*

Abstract

In Contemporary times, the legal profession is seen as a three-way partnership among judges, practising lawyers and academics. Legal education plays an important role in sculpting the legal profession. The optimal functioning of the legal profession is vital in upholding the Rule of Law in a prosperous and effective democracy. Jurisdictions that are celebrated for developed legal education schemes such as the United Kingdom Singapore and Malaysia seem to have various regulatory measures in place to ensure that the most capable, knowledgeable and skilled members enter the noble profession. In Sri Lanka, in recent years, major concerns had been raised related to the standard of legal education of those who enter the legal profession and the high rate of the number of persons entering the profession. At a time where legal education all over the world is changing to address the current needs for advanced knowledge and skills in commerce, economics, and technology, and social changes, Sri Lanka must also step to the future through the implementation of regulatory measures to address the present issues faced and overcome the barriers which have slowed progress: It is time that legal education in Sri Lanka is uplifted to face the new era of professional standards, knowledge and skills of this noble and ever-developing profession.

* President Counsel, Minister of Justice, Sri Lanka

"The practice of the law is not a business open to all who wish to engage in it; it is a personal right, or privilege limited to selected persons of good character with special qualifications duly ascertained and certified; it is in the nature of a franchise from the State conferred only for merit and may be revoked whenever misconduct renders the person holding the licence unfit to be entrusted with the powers and duties of his office…"

Per Mookerjee J. in *Emperor v. Rajani Kanta Bose*[1]

Introduction

Legal education is a complex study with different emphasis on legal analysis, training for practice and development of professional identity. As asserted by the world-renowned legal scholar and a former Vice-President of the International Court of Justice, C.G Weeramantry, the dynamics of administration of justice has changed in that, in the common law world administration of the law was seen as a function of partnership between practicing lawyers and judges.[2] However, the legal profession is no longer seen as a two-way exchange but a three way partnership in which the academic branches of the profession is by no means less important.[3]

A Brief History of Legal Education in Sri Lanka

The earliest part of entry to the legal profession was

1 26 Cal WN 589: (AIR 1922 Cal 515).
2CG Weeramantry, *An Invitation to the Law* (Stamford Lake 2009), 215.
3Ibid,

established under the British Colonial system and facilitated under the 1833 Charter, Section 17 of which empowered the Supreme Court of Ceylon to "*admit and enrolled as Advocates and Proctors, persons of good repute and of competent knowledge and ability upon examination by one or more of the judges of the Supreme Court*". It had a less formal structure which required that a person endeavouring to enter the legal profession serve a period of apprenticeship with a practicing lawyer and take examinations conducted by the Supreme Court in order to satisfy the Judges of the Supreme Court that the apprentice had obtained the required skill and sufficient legal knowledge to enter the legal profession. The Charter introduced two groups of practitioners, Advocates who equated to the role of Barristers in England and Proctors who equated to the role of Solicitors in England. Their roles of advocacy and litigation were distinctively defined and while Advocates were usually members of the Bar Council, Proctors were members of the Incorporated Law Society of Sri Lanka.

Since 1973 changes were made to the legal structure and legal profession in Sri Lanka. With the coming into operation of the Administration of Justice Law No. 44 of 1973 of the National State Assembly, the two branches of the profession were fused and one group of practitioners was formed as Attorneys at Law. Formal legal education in Sri Lanka came into being with the establishment of the Council of Legal Education (CLE) in the year 1873. The Sri Lanka Law College was established under the CLE, in order to impart formal legal education to those who wished to become Attorneys at Law in Sri Lanka.

Legal Education and the Legal Profession

Legal education plays an important role in sculpting the legal profession. It is the foundation for a career as an Attorney at Law. Thus, there is a close relationship between legal education and legal profession. Deriving from literature, the idea of 'regulative bargain' was emphasized by Justice Saleem Marsoof, P.C. as follows:[4]

> *At the heart of the relationship between the legal practitioner and the State lies the notion of a 'regulative bargain'[5] whereby the State protects professionals from unfettered competition but trusts them to put public interest before their own. In exchange, "the profession promises to select and train carefully its members so that they can provide a competent and ethical service".*[6]

The optimal functioning of the legal profession is vital in upholding the Rule of Law in a prosperous and effective democracy. Judge, Sanji Monageng, the First Vice-President of the International Criminal Court, in a speech delivered at the World Forum Conference Centre, The Hague, Netherlands on 20th November 2012 stated that:

> *...the rule of law and the proper administration of justice, of which an independent judiciary and legal*

4Foreword of the Chairman of the Committee in the Final Report of the Committee Appointed by the Council of Legal Education to Consider the Curricula and Syllabi of Sri Lanka Law College 2012.

5D Cooper and others, "Regulating the U.K. Accountancy Profession: Episodes in the Relation between the Profession and the State."

6Eliot Freidson, *Professionalism Reborn: Theory, Prophecy, and Policy* (Chicago University Press 1994), 202.

profession are prerequisites, play a central role in the promotion and protection of human rights.

It is famously stated that "*The Law is what the lawyers are. And the law and the lawyers are what the law schools make them*,"[7] demonstrating that a scheme of legal education which imparts standardized knowledge, skills and practical training are key to guaranteeing quality and competent legal professionals.

Professional Ethics and Responsibilities of Lawyers

As stated by Dr A.R.B. Amerasinghe,[8] a professional is:

i. identifiable by reference to some register or record,

ii. recognized as having a special skill and learning in some field of activity in which the public needs protection against incompetence the standards of skill learning being prescribed by the profession itself,

iii. holding themselves out as being willing to serve the public,

iv. voluntarily submitting themselves to standards of ethical conduct beyond those required from the ordinary citizen by law, and

7 Letter from Felix Frankfurter, Professor, Harvard Law, to Mr. Rosenwald 3 (May 13,1927) (Felix Frankfurter papers, Harvard Law School)

8A Ranjit B Amerasinghe, *Professional Ethics and Responsibilities of Lawyers* (Lake House Investments Ltd 1993).

v. undertaking to accept personal responsibility to those whom they serve for their actions and to their profession for maintaining public confidence. Thus, competency (knowledge and skill), honesty and integrity, accountability, self-regulation and ethical boundaries set out the very traits of a legal professional.

Institutions such as the Supreme Court, the Incorporated Council of Legal education (ICLE), the Bar Association of Sri Lanka (BASL) and the Sri Lanka Law College (SLLC) which are responsible for producing Attorneys at Law in Sri Lanka, are also robed with the duty to ensure and guarantee standards and quality of legal professionals who enter the field of law.

This can be achieved, firstly, through a process of providing well-rounded legal education which encompasses knowledge and skill development, official credentials, training and ethical standards and; secondly, through standardizing legal education to ensure that that the legal profession would be accessed by, and limited to, those with the minimum requirements and qualifications.

Development of Legal Education and Enhancement of the Legal Profession

The growth and enrichment in legal education leads to knowledgeable, skilful, ethical and capable individuals entering the legal profession, thereby enhancing the standards of the legal profession in Sri Lanka. Thus, the continued progression of the profession of law is

concomitant to the continued assessment and development of legal education. In light of this, it is clear that the future of the legal profession is primarily and predominantly dependent upon upholding the standards of the legal education provided.

In this context, the significant question is whether we are on the right path and whether there is a need for reform. In studying various jurisdictions pertaining to qualification and training requirements, qualification schemes for Attorneys, standardized models of legal education and schemes of continuous professional development etc., three main areas have come into focus.

i. Regulation of entry into professional legal education
ii. Regulation, supervision and improving the standard of legal education provided at the Law College
iii. Introduction of Continuous Professional Development (CPD)

Accordingly, it is important for Sri Lanka to look at and understand the present status quo of these focus areas and enhance the landscape for legal education in Sri Lanka.

The Present Status Quo and Lessons from Other Jurisdictions - *Regulation of Entry into professional legal education*

Jurisdictions which are celebrated for developed legal education schemes such as the United Kingdom (UK), Singapore and Malaysia seem to have various regulatory

measures in place to ensure that the most capable, knowledgeable, skilled members enter the noble profession.

a. Setting up a minimum entry qualification to the profession

The United Kingdom - a student intending to embark on a law degree requires a high grade as the minimum requirement. The Complete University Guide 2017, which is an accredited ranking league table for the UK universities outline that the top 50 universities in the UK require a 'minimum entry criteria' of three B's for Advanced Level and/or its equivalent which has resulted in an automatic imposition of a minimum entry qualification for the profession of law.

*Singapor*e - a similar system had been adopted by setting up a list of approved universities under the Legal Profession Act,[9] read together with the Legal Profession (Admission) Rules 2011 which only recognize degrees from top ranked universities in the world.

b. Requiring a Qualifying Law Degree (QLD) to gain entrance to the profession.

The Bar Standards Board (BSB) and Solicitors Regulation Authority (SRA), being the regulatory bodies governing access of graduates to the legal profession in England and Wales, prescribe graduates to have obtained a minimum

9(Chapter 161) Revised Edition 2009. Original Enactment: Ordinance 57 of 1966.

of a Second Class Lower Qualifying Law Degree (QLD) and/or a Non-Qualifying Law Degree coupled with the Graduate Diploma in Law (GDL) from an approved academic institution.

Furthermore, QLD awarding university programmes or institutions are required to provide specified courses (i.e., Public Law, including Constitutional Law, Administrative Law and Human Rights, Law of the European Union, Criminal Law, Property Law and Equity and the Law of Trusts, Legal Research). Hence, the said requirement of a QLD would ensure that a graduate has the requisite standard of knowledge and skill to proceed to the Vocational Stage of training for the Bar of England and Wales.

This requirement of a QLD for recognition of a foreign degree is a practice adopted in many jurisdictions such as Singapore which requires that a course of study leading to a Law Degree to be a QLD.[10]

c. Requirement of a course structure

Singapore - for example, a course/ programme leading to a law degree cannot be an accelerated course which is completed within a period less than 3 years and the degree must be read as a full time, internal candidate (as opposed to an external degree).

In Malaysian and Indian jurisdictions - it is pertinent to note that specific criteria for recognition of foreign

10"Qualified Person: Approved Universities – United Kingdom" (www.sile.edu.sg) <http://www.sile.edu.sg/united-kingdom-approved-universities> accessed December 15, 2020.

degrees have also been set up. Thus, Malaysia requires that a degree shall be a minimum of 3 academic years and for a full-time study at a university and is required to be completed within a period of 6 years from the date of initial registration.

The recognition of a foreign degree also requires that a degree holder has completed a minimum of 12 substantive subjects inclusive of 6 core subjects (e.g. Law of Contract, Law of Torts, Constitutional Law, Criminal Law, Land Law, Equity and Trust).

Upon examination of these various jurisdictions, it is clear that the aforesaid schemes and regulatory measures, amongst other, have been placed to ensure that a limited number of persons with standardized legal education are allowed access to the profession. The following tables provide data related the UK and Malaysia.

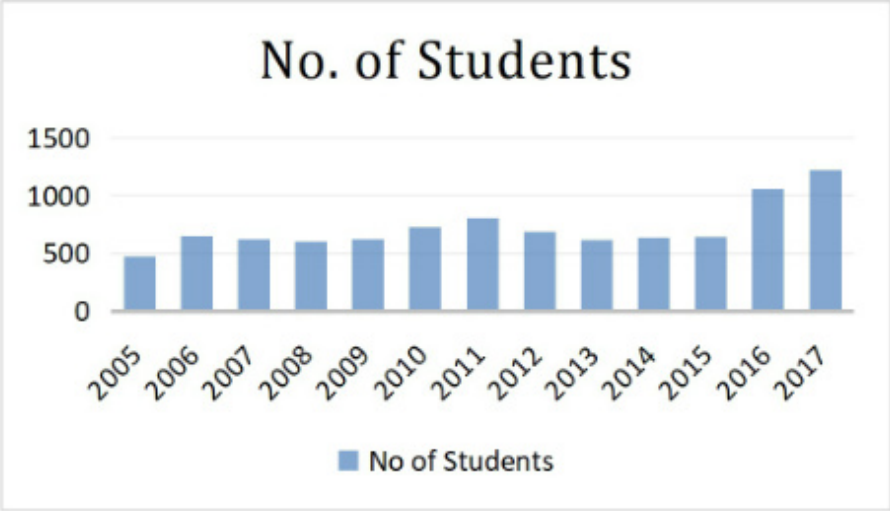
	No. of Law graduates	No. of Barristers who entered the profession
Year 2017/18	32,155	1,351
Year 2016/17	31,215	1,186
Year 2015/16	31, 510	1,300

Data pertaining to UK

In Malaysia local universities annually produced about 1,300 law graduates while another 200 students come into the profession after passing the Certificate in Legal practice.	No. of persons who entered the profession	
	Year 2020	Year 2016
	512	518

In Sri Lanka, the major concerns that have been raised in recent years relate to the standard of legal education of those who enter the legal profession through these pathways and the alarming rate of the number of persons entering the profession. It is alarming that the within a few years, the number of students entering the profession had doubled.

Students who entered the legal profession in Sri Lanka from 2005-2017 years are as follows:



Regulation, supervision and improving the standard of legal education provided at the Law College

Sri Lanka Law College is 'the only gateway to the legal profession in Sri Lanka' and the only institution in Sri Lanka that is vested with the responsibility of educating and preparing those who aspire to enter the profession. It is tasked with the duty to provide legal education with advanced skill and knowledge.

Throughout the years, many recommendations have been

made to advance an uplift the professional education provided. These recommendations include reforms to the curriculum, development of the proficiency in the English language of students, revamping and developing the infrastructure of the SLLC and reforms to the administrative and financing structure, developments in IT facilities etc.

Justice Saleem Marsoof describes the need to change and revise the legal education as follows:

> *Central to these debates about the contents of legal education are questions about the need for revised curricular and syllabi that reflects the increasingly diverse careers of law graduates and the international dimensions that are emerging more often in their work. This by itself is a continuous issue raising questions about whether the mere conferment of credentials by an institution such as SLCC would sufficiently prepare an individual to undertake the challenges faced by the modern legal practice. A combination of legal education that seeks to develop academic abilities (critical thinking, normative values and consciousness of professional ethics and responsibility), while providing practice- relevant training and skills development seems be the need of the day.*

Introduction of Continuous Professional Development (CPD)

Development of legal education can be through Continuous Professional Development (CPD). Many developed jurisdictions in the world have understood that

legal education is a continuous process which requires consistent and continuous updating. CPD refers to activities that enhance skill and knowledge of a professional throughout the legal profession.

In the United Kingdom, CPD is recognized by the Law Society as an important element of being a member of the legal profession and is the key to demonstrating continuing competence as a solicitor within the Solicitors Regulation Authority (SRA's) regulatory framework. The UK's CPD program has been re-designed to include a Continuing Competence (CC) scheme, and it is imperative that legal professionals comply with the said scheme which, *inter alia*, includes participation in courses working towards professional qualifications, coaching and/or mentoring sessions, writing on law or practice, research and development of specialist areas of law.

In New South Wales, CPD is a statutory condition imposed on the Australian practicing Certificate (Section 52 of the Legal Profession Uniform Law, NSW). It requires the certificate holder to comply with applicable requirements of the Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015. Compliance with CPD is administered in terms of these rules. Accordingly, legal professionals are required to complete CPD units each year in the fields of (1) Ethics and Professional Responsibility, (2) Practice Management and Business skills, (3) Professional Skills, (4) Substantive Law.

Legal Education as an Academic Qualification

Legal education obtained through a university or institute provides an academic qualification which open doors for so many career paths in business, public interest, banking and financial sector, research-based careers, political sciences, law firms, law teaching, human resources, governmental institutions, corporate work, international institutions such as the United Nation etc.

However, there is a recurring question as to whether all legal academics in Sri Lanka should become practicing lawyers or whether the available career paths and job opportunities available for legal academics should be followed.

In looking at the experience of the UK and Malaysia, as set out above, it is pertinent to note that most students engage in legal education as an academic qualification which paves the way into fields of accountancy, banking and finance, public service and administration. A recent assessment demonstrates that over a quarter of law graduates working in the UK are law associate professionals, thus they work as law associates to firms, corporations, banks, auditing companies etc. The assessment further demonstrates that 47% of law graduates are employed, while others pursue further education in law and other fields of study.

Future of the Legal Education

At a time where legal education all over the world is changing to address the current needs for advanced knowledge and skills in commerce, economics, technology and social changes, Sri Lanka must also step to the future through implementation of regulatory measures to address the present issues faced and demolish the barriers which has slowed our progress.

In an address to the Harvard Law School community, Dean Martha Minow offered a survey of "*The Past, Present, and Future of Legal Education*." She called the present "a time of innovation and a time of renewal" in legal education and concluded with a discussion of her views on where legal education is headed in the near future. She predicted that lawyers will have opportunities to play new and important roles in response to dramatic economics, technological, and social changes presented by new communications technologies, new biological and bio-technology research, and globalization. They will deal with: integrating economies; legal and professional services; biological and computer viruses, cultural trends fostered through world-wide networks of exchange; resource scarcity and global climate change; and mass migrations of people, due to economic, political, and environmental changes.

Accordingly, it is clear that the possibilities for legal professionals are infinite. In the backdrop of globalization, advancement in technology and innovation, law as a part

of society keeps expanding and the opportunities are expanding. In such times it is important for the future of legal education to provide advanced knowledge and skill in order to access these opportunities. Hence, it is time that legal education in Sri Lanka is uplifted to face the new era of professional standards, knowledge and skills of this noble and ever developing profession.

Fraud Unravels All; Do Fraudulent Documents Invalidate A Letter of Credit?

Chathura Warnasuriya*

Abstract

Over the centuries, the banks and trade practitioners have developed practices and techniques for use in letters of credit in international trade finance. Those practices and were subsequently standardized by the Uniform Customs and Practice for Documentary Credit 600 (UCP 600). However, many aspects of Letters of Credit operation including fraud are not codified under the UCP. Diversified nature of National Laws in different countries can be source of confusion and problem when applying such rules. English law vigorously upholds the principle of autonomy in relation to letter of credit. Only exception to this is the 'Fraud Rule' which has been subject to various interpretations. This paper identifies applicable laws surrounding fraud exception while examining issues associated with it. Comparisons are made to applicable jurisdictions with particular emphasis on the provisions of the UCP 600. It is further aimed to identify flaws in existing legal regimes. Finally, a discussion is made to find possible avenues to redress any existing shortcomings with recommendations.

Introduction

It is a well-known fact that international trade contracts bear inherently more risk than the trade contracts entered into by parties from the same country. This is due to the differences in business methods and practices trade cultures of the parties involved, laws and regulations in

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the respective jurisdictions. Under these circumstances, it is very important for the seller to have the assurance that he will receive the payment for the goods dispatched and for the buyer to receive the goods has been ordered. One effective way of having such an assurance is to rely on a letter of credit as an international payment method.

Letters of Credit

As an important method of payment which facilitates international trade transactions, letters of credit (herein after also referred to as "the Credit") have been described by English Judges as "the life blood of international commerce".[11] It is the most preferred way of payment in international trade.[12] It is believed that this method of payment was formulated over 3000 years ago.[13] These transactions are mainly preferred over single, short cross-border sales transactions, where the respective traders are unknown to each other.

In practice, where the parties have agreed to pay by way of a Letter of Credit, the buyer will apply to a bank for the issue of a Letter of Credit in which the seller is named as the beneficiary. The Letter of Credit will specify which documents must be furnished by the seller in order to

11 R D Harbottle Limitedv National Westminster Bank [1977] 2 All ER 862.

12 Hans Van Houtte, The Law of International Trade (2ndedn, Sweet & Maxwell 2001) 8.02.

13 It is believed that the Phoenician merchants used letters of credit in extending their commerce to cities in the Mediterranean and The merchant bankers of Venice, Genoa, Florence, and other commercial cities of Europe freely used letters of credit in the fourteenth century - Mitchell J William, „Letter of Credit Applicant has no implied time limit to bring wrongful honour claim", (2012) 71 St. John's Law Review 7.

obtain payment by the bank.

The bank undertakes to make payment of a specified sum of money on presentation of the specified documents. There may be additional banks involved, such as the buyer's local bank, the advising bank or the confirming bank.

The documents will be presented and will commonly include the bill of lading or other transport documents, the insurance policy and the commercial invoice. Unfortunately, the presented documents can be forged and be fraudulent or can record details inaccurately. Such inaccuracy might be serious enough for the bank to reject their presentation and refuse the payment to the seller.

The Uniform Customs and Practice for Documentary Credits (UCP 600)

Over the centuries, the banks and trade practitioners have developed practices and techniques for use in letters of credit in international trade finance. Those practices and customs were subsequently standardized by the International Chamber of Commerce (ICC), by publishing the Uniform Customs and Practice for Documentary Credits (UCP) in the year 1933. The current version of the UCP was approved by the Banking Commission of the ICC at its meeting held in Paris on the 25th October 2006 and it came into effect from 1st of July 2007. The application of the UCP comes into effect, only if the

parties to the credit incorporate them into their contract.[14] Under the English law, the UCP does not have the force of law[15] and it can only be applied, if the parties have incorporated them into their contract.

However, as a practice, the British banks often incorporated the UCP into their contracts and consequently, the English Courts are familiar with the rules of the UCP and frequently interpret them.[16]

Throughout the period when letters of credit came into usage, the law applicable to letters of credit has been based on two major principles.[17] From time to time, the interpretation of the law applicable to these principles became subject to minor changes. However, the core elements of these two principles still remain untouched.

Doctrine of strict compliance

When documents are presented to the bank by the beneficiary for examination, the bank checks whether the documents satisfy the requirements stipulated in the terms of the credit. A minor discrepancy may tempt the bank to reject the presentation and refuse the payment.[18] The

14 Uniform Customs and Practice for Documentary Credits 600, Article 1.

15 Royal Bank of Scotland V Cassa di Risparmio [1992] 1 Bank L.R. 251.

16 Leo D"Arcy, Carole Murray and Barbara Cleave, *Schmittoff's Export Trade, The Law and Practice of International Trade*' (10thedn, Sweet & Maxwell 2000) 168.

17 Carole Murray, David Holloway and Darren Timson-Hunt, Schmitthoff's The Law and Practice of International Trade' (12thedn, Sweet & Maxwell 2012) 194.

18 Paul Todd, "Discrepancies between Bills of Lading and Letters of Credit" in Letters of Credit Update (Government Information Service, USA) 474. Where it says, the original common law position is that the triviality of a defect was irrelevant.

adherence by the bank to examine the documents strictly to ascertain whether the documents are in compliance is called the Doctrine of Strict Compliance. Over many years, the yardstick which measures the strictness of document examination standards had always been subject to controversy. The definitions given by the UCP in respect of this principle were often vague and were the cause of contention between parties. Whilst the majority of Courts have applied this principle in the strictest possible manner, some Courts have tended to take a much more lenient view by applying the substantial documents complying standards.

The Principle of Autonomy

Article 4(a) of the UCP 600 makes provision to cover this principle. In terms of this principle, letters of credit are totally separate from and independent of underlying sales contracts.[19] Article 4(a) of the UCP 600 states that;

'a bank which operates a credit is in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit'.

The buyer cannot ask the bank or a Court to stop payment to the seller even if it is found that the goods delivered do not

conform to what had been stated in the underlying contract. The only exception to this is that, banks can

19 HamzehMalas v British Imex Industries Limited [1958] 2QB 127.

and/or a Court may interfere to stop the payment if it is satisfactorily proved that, despite the fact that documents are in compliance with the credit, the document(s) submitted are fraudulent and the seller was involved in such act.[20]

However, it has to be cautious, when relying upon this concept, because, it may minimise the significance of Letters of Credit as a method of payment, if it supersedes every dispute arising under the underlying contract. It is often questioned, whether it is sufficient enough to rely only on documents regardless of the commitment laid in the commercial contract. In this context, the strict adherence to the rule is also often criticised as the „Autonomy Principle" may pave the way to promote false calls, abuse and fraud.[21]

This examines the exceptions to the principle of autonomy in documentary credit transactions. Its conceptual nature arises because the credit contracted is said to be autonomous to the underlying contract or transaction upon which it is based.[22] This paper adopts an approach that is analytical and not simply descriptive of the issues discussed. It critically examines the research topic and the issues raised there in, by principally analysing case laws, statutes and other legal instruments

20 Schmitthoff"s (n7) 194.

21 H Stewart, „It is Insufficient to Rely on Documents' (2002) Journal of Money Laundering Control 225.

22 HamzehMalas& Sons v British Imex Industries Ltd. [1958] 2 QB 127, Howe Richardson Scale Co. Ltd v Polimex-Cekop [1978] 1 Lloyd's Rep 161; R D Harbottle (Mercantile) Ltd. v National Westminster Bank Ltd [1978] QB 146.

related to the issues under consideration. It also makes an extensive use of other secondary literature related to the topic.

To facilitate the discussion necessary to deal with the topic, the paper analyses:

(a) The fraud exception to the principle of autonomy in documentary credit;
(b) The reason why it established itself as a defence capable of displacing the autonomy doctrine;
(c) Arguments in support of and against their recognition and whether their recognition in any way affects documentary credit practice;
(d) An optimal set of rules related to the fraud exception that can be applicable all over the world.

The Fraud Exception

Fraud exception penetrates the heart of letters of credit, as it allows banks to withhold payment even where the presented documents appear on their face to comply with the credit. Neither the UCP nor any other set of rules recognise this rule as an effective force. Roy Goode explains[23] the reluctance of the ICC to include any provision regarding the fraud exception in the UCP as follows: -

23 Roy Goode, „Abstract Payment Undertakings in International Transactions: Symposium New Developments in the Law of Credit Enhancement-Domestic and International" [1996] Brooklyn Journal of International Law 4.

"*Although the ICC operates as an international organization, it is not a law-making institution despite its organizational representation in world business and finance. The UCP's rules do not bear the force of law unless, as the rules themselves expressly provided, the parties to contracts incorporating them as terms of their contracts. Therefore, UCP has been made not to deal with such matters as the effect of fraud on a beneficiary's right to payment.*"

Under these circumstances, this exception is considered as one area where controversies and confusions remain.[24] It is also important to note that there are no clear standards that can draw a line between the fraud rule and the principle of autonomy. It is not well established when, where and under what conditions the fraud exception should be applied.

Despite the lack of empathy to understand the importance of this exception by the ICC, the fraud rule has been playing a major role in letters of credit transactions for almost a century as custom and/or practice among banks and legal systems. If a banking system in a country has a custom and/or practice which can stop the payment on suspicion of a fraud and these practices are continuously used by them, there should be a discussion at the ICC on identifying optimal standards which can be applicable

24 Ross P. Buckley and Xiang Gao, "Fraud in the transaction, Enjoining Letters of credit during Iran Revolution" (93 HLRV L. REV 992,995 The Development of the Fraud Rule in Letter of Credit Law) <https://www.law.upenn.edu/journals/jil/articles/volume23/issue4/BuckleyGao23U.Pa.J.Int'lEcon.L.663(2002).pdf> accessed 10 October 2020.

worldwide.

In the light of the above, this discussion will not go so far as to suggest that the powers vested in the Courts to determine whether a fraud has been committed or is imminent should be transferred to the bank. However, there should be measures that a bank can take to minimise or deter the seller taking unfair advantage, which can subsequently amount to a fraud or an unfair request by the buyer to hold the payment on the ground of an alleged fraud.

The Fraud Exception under the English Law

In the United Kingdom, the fraud exception has not been codified as a rule. However, Courts generally tend to apply the rule where it is necessary. The traditional approaches taken by the Courts imply the reluctance of the Courts to interfere with the autonomy principle.[25]

The narrow approach taken by the British Courts and their reluctance to interfere was greatly demonstrated in the judgment ***Hamzeh Malas and Sons v British Imex Industries Limited***[26] where the Court of Appeal explained that;

'it is clear enough that the opening of a letter of credit confirms a bargain between the banker and the seller which makes the bank obliged to honour the payment

25 R D Harbottle (Mercantile) Ltd. v.National Westminster Bank Ltd [1977] 2 All E.R. 862(QB).
26 [1958] 2 QB 129.

irrespective of any dispute between the parties over the performance of the sales contract'.
In light of the above-mentioned view, it is clear that, due to the general non-interference approach by the Courts in the United Kingdom the plaintiff has been saddled with the onerous responsibility to prove the cause of action in the case of a fraud.[27]

This position is further established by the judgment made in ***Edward Owen Engineering Limited V Barclays Bank International Limited[28]*,** where it was stated that, „to the general principle of independence, the only exception would be the established or obvious fraud to the knowledge of the bank".

However, this traditional non-interference approach by the Courts has been fading away as time passed by. For example, in ***The United Trading Corporation SA and Murray Clayton Ltd v Allied Arab Bank Limited[29]*,** the standards of evidence required to prove a fraud were scrutinized. The principles laid down in the judgment of this case serves as a formula, which can be utilised in respect of any dispute relating to fraud.[30] Lord Justice Ackner in his judgement, by way of obiter dicta, specified the standard of evidence as follows;
'The evidence of fraud to be clear, the Court would also

27 Ross Buckley and Xiang Gao, „The Development of the Fraud Rule in Letter of Credit Law: The Journey so Far and the Road Ahead" (2002) 23 University of Pennsylvania Journal of Economic Law 689.
28 [1977]1 All E.R. 976(C.A).
29 [1985] 2 Lloyd"s Law Reports 554.
30 Turkiye IS Bankasi AS v Bank of China [1996] 2 Lloyd"s Law Rep 611.

expect to give opportunity to parties involved to answer the allegations. If the Court is satisfied with the materials before it, then the buyer has made out a sufficient case of fraud.'

In the case of ***United City Merchants (Investment) Limited V Royal Bank of Canada***[31], Lord Diplock acknowledged the emphasis on fraud exception by stating, to the general acknowledgment on Independence principle, there is one exception where the seller for the purpose of receiving money on the letter of credit fraudulently submits the confirming bank documents that contain expressly or by implication, material representations of fact that to his knowledge are false. This exception has been well established in the USA as provided by the decision made in ***Sztejn v. J. Henry Schroder Banking Corporation***[32] and the fraud exception on the part of the beneficiary expecting to avail himself of the credit is a clear application of the *maxim ex turpicausa non orituractio*[33] or 'fraud unravels all". The Court will interfere to stop the process being used by a dishonest person to carry out a fraud[34]. At the conclusion, it was stated that, **"the beneficiary's knowledge about the fraud is the key in determining either to apply the fraud exception or not".**

31 [1979] 1 Lloyd's Law Reports 267 (QB).
32 [1941]31 NYS 2d 631.
33 Legal doctrine which states that a plaintiff will be unable to pursue legal remedy if it arises in connection with his own illegal act. Particularly relevant in the law of contract, tort and trusts.
34 [1983] 1 A.C. 168.

It appears that the British Courts adopt a different approach when the buyer brings an action to stop the payment over an allegation of fraud. If it is needed to apply for an injunction to prevent the bank from paying the beneficiary, the evidence to be placed before the Court must be sufficient enough to establish the fraud. If the bank has stopped the payment to the beneficiary on the basis of a fraud, the bank has to justify its decision to the Court with evidence that satisfy with the balance of probabilities that the beneficiary was guilty of fraud. Therefore, it can be stated that, under the English law, the application of the fraud rule is very narrow as against the Autonomy principle. In summary, under English law, to establish a fraud, the plaintiff is required to establish before the Court a **clear and obvious**[35] fraud which the bank **must have knowledge** of and a mere allegation of fraud is not sufficient enough.[36] In addition, the **beneficiary must have knowledge of the fraud**[37] at the time of presenting documents to the bank for examination. Finally, to prove the fraud, the allegation must be supported with **strong corroborative evidence**[38], usually in the form of contemporary documents.

General guidelines to determine frauds

It is important to note that, irrespective of the fact that the

35 Edward Owen Engineering Ltd v Barclays Bank International Ltd. and Another [1978] All ER 986.

36 Discount Records Ltd. v. Barclays Bank Ltd [1975] 1 Lloyd"s Law Reports 448.

37 United City Merchants (Investment) Limited v Royal Bank of Canada [1983] 1 A.C. 184.

38 United Trading Corporation (n18) 561.

UCP does not recognize the fraud exception, the rule still applies to the cases where the respective letters of credit were issued subject to the provisions of the UCP. The lack of cover provided by the UCP leaves a vacuum over the issue of how a bank should act when a complaint is made regarding a fraudulent document. Due to that reason, various methods are used by banks to decide whether to hold the payment when a suspicion is raised. There was no reported case, where the court had refused to apply the fraud rule citing the reason that the UCP does not recognize it. Therefore, it must be acknowledged that the Fraud Exception has become a part and parcel of the law relating to letters of credit.

This paper suggests that, banks should have a set of standardized general guidelines as to steps they should take when they are presented with a suspicious document or fraud claim. However, it is suggested that, the application of fraud exception should be limited only to the documents submitted for the examination. The reason behind this is to leave any dispute over the performance of the underlying sales contract outside the purview of the banker's duties. In Addition, it is not suggested that banks should hold inquiries on the performance of the sales agreement and act as a Court house. The only element suggested by this article is the measures that can be taken to prevent the bank from making payment to the beneficiary on forged documents or to prevent banks claiming that documents are forged when the beneficiary has nothing to do with the alleged fraudulent act. In addition, this will help to minimize the amount of

erroneous interpretation on fraud exception.
The suggested guidelines-

A) If a presentation of a document for examination appears, on its face, to be strictly complying with the terms and conditions of the letter of credit, but it is clear to the issuer that such document is forged and the fraudulent document has been presented with the knowledge of the beneficiary and thereby honouring such presentation would facilitate the fraudulent act committed by the beneficiary, the issuer shall not honour the demand of payment.

B) However, the issuer shall honour the presentation if the demand is made by:[39]

(a) A nominated person who has given value in good faith and without notice of forgery,

(b) A confirmer who has honoured its confirmation in good faith,

(c) A holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person, or

(d) An assignee of the issuer or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or

39 Extracted from Article 5- 109 of the Uniform Commercial Code (USA).

nominated person

It must be noted that, the pursuit of certainty, while preserving a legitimate and crucial aspect of letters of credit law, need not completely disregard the consideration of fairness. This research paper has made an endeavour to argue that there should be a standard set of rules to determine fraud when alarms are raised. The courts should be motivated by fairness to avoid irretrievable injustice. The decisions made by courts, which seek to preserve and promote the legitimate expectation of commercial parties, most often run contrary to established authorities. They also remind us the need of a flexible approach to the autonomy doctrine and its exceptions. It has been stated that, the autonomy doctrine as an assurance of payment inflexibly detached from the underlying contract upon which it is based would sometimes present situations where the approach does not live up to commercial realities.[40] Unless, the existing perception of the autonomy principle is discontinued, it would hinder the smooth operation of letters of credit as a viable method of payment in international trade.

40 Chumah Amaefule, „The exception to the principle of autonomy of documentary credit" (University of Birmingham Research Archive, August 2011)<the exceptions to the principle of autonomy of documentary credits (bham.ac.uk)> Accessed on 14 October 2020.

A Critical Analysis of the Laws Regulating Credit Card Facilities in Sri Lanka Focusing on Consumer Protection

Dulanjali Ukuwela*

Abstract

This paper critically analyses the legal framework regulating Credit Card facilities in Sri Lanka, focusing on the aspect of consumer protection. The research identifies the existing legal framework in relation to Credit Card facilities and critically evaluates the same through a comparison with the relevant International Standards and the exiting legal framework for banking and financial regulation in United Kingdom and Unites States of America. The overall research is based on the positivist paradigm and the doctrinal research method was primarily used for the research to obtain an in-depth knowledge of the existing legal regimes. Qualitative data gathered from both primary and secondary sources were used for the research. The researcher identified several flaws in the existing legal framework including lack of cohesion and uniformity in laws, lack of proper monitoring and enforcement mechanisms due to the absence of a dedicated authority responsible for regulation and enforcement of the law, lack of financial literacy and failure of the law to address the pressing issues faced by the consumer in the relevant industry.

Introduction

The banking and financial sector in Sri Lanka (hereinafter called SL) underwent a rapid advancement in the last decade due to the boom of trade and commerce in the country. Day by day the number of people utilizing the services of credit facilities increases and credit cards

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(hereinafter called CCs) are at the forefront of these services[1].Commercial banks in SL commenced issuing CCs in 1989 and presently there are 14 banks and 3 finance companies[2] licensed to issue CCs.

With the rise in demand for CCs the competition among Credit Card (hereinafter called CC) issuers to promote their CC has increased. However, it is significant that in obtaining such facilities card issuers have a higher bargaining power and the customer invariably must agree with the terms and conditions of the service provider. Hence, there is evidence that the service providers resort to unethical practices in relation to provision of CCs and recovery of CC payments[3]. In the circumstances a proper legal framework regulating CC facilities have become essential.

Legal Framework in Sri Lanka Regulating Credit Card Facilities

The regulatory framework in relation to CC facilities can be categorized into several segments.

I. Legislation governing the general regulation of

1 Credit Card users have increased from 1,854,103 in 2019 to 1,892,205 in 2020 (1st Quarter). Statistics obtained from the Central Bank Payments Bulletin 2020.

2 Central Bank Payments Bulletin 2018(As at 31st March 2018) Payments and Settlements Department Central Bank of Sri Lanka, "Payments Bulletin", First Quarter, 2018.

3 Bandula Sirimanne, 'New criteria for CCs as default rate rises' *Sunday Times* (Sri Lanka, 23 December 2007) ;'Brutal Attach by Debt Collectors' *The Sunday Times* <www.sundaytimes.lk/180930/business-times/brutal– attack-by-debt-collectors-313530> accessed 22 July 2019.

the banking and financial sector[4]. Legislation regulating CC facilities in Sri Lanka[5].

II. Legislation addressing consumer protection[6].

Analysis of the existing legal framework will be done in categorization of the above stated for clarity.

I. Legislation governing the general regulation of the banking and financial sector

(a) Monetary Law Act (hereinafter MLA)[7]

The MLA authorizes the establishment of the Central Bank of Sri Lanka (hereinafter called CBSL) which is responsible for the regulation and supervision of the monetary, financial and payment systems in SL. The Monetary Board (hereinafter called MB) is established[8] as the authority to determine the monetary policies to be adopted under MLA and is responsible for management and operations of the CBSL.

4 Monetary Law Act No.58 of 1949(as amended), Banking Act No. of 1988 Finance Business Act No. of 2011, Banking Charter - Banking Act Direction No. 8 of 2011, Financial Consumer Protection Framework - Finance Business Directions No.01 of 2018, Debt Recovery Act No.2 of 1990.

5 Payment and Settlement Systems Act No.28 of 2005, Payment Cards and Mobile Payment Systems Regulation No.01 of 2013, Service Providers of Payment Cards Regulation No. 01 of 2009.

6 Consumer Affairs Authority Act No.9 of 2003.

7 Monetary Law Act No.58 of 1949

8 Ibid-section 8

(b) Banking Act (hereinafter BA)[9]

As per the long title of the BA, the purpose of the BA is the introduction and regulation of the procedure for licensing of persons who are carrying on banking business and business of accepting deposits and investing such money and matters connected thereto.[10]

The BA provides that the banking activities cannot be carried out without a license and a license will only be granted upon submission of specified documents to the satisfaction of the MB. A bank that is licensed under the BA will be subject to constant supervision by the Department of Banking Supervision.

Both the MLA and the BA simultaneously deal with the regulation of the banking sector in SL. The MLA deals with the broader aspect of regulation of the banking sector, through determination of financial policies in the country and operation and administration of the CBSL[11].The BA addresses the specifics by catering to the specific needs of the banking sector. Hence, the consumer protection aspect is not given much attention. It is noted that there is no other authority established to specifically cater to the protection of the financial consumer.

On the other hand, the study of the US and UK systems reveals that financial regulatory systems in those countries comprise of different authorities that are responsible for

9 Banking Act No. 30 of 1988

10 Banking Act No. 30 of 1988 Long title.

11 Monetary law Act 1959, Section 8.

different sectors in the financial system[12] and specific authorities have been set up to cater to the needs of the financial consumers. These authorities include consumer protection as their primary objective and work towards achieving that goal.

(c) Finance Business Act (hereinafter FBA)[13]

The FBA deals with the regulation of finance companies. Under the FBA obtaining a license is mandatory to carry out a finance business[14]. The act empowers the MB to give directions in the manner of conducting the finance business[15].The MB is empowered to make rules regarding any matter connected to licensing of finance companies[16].

It is noted that Sri Lankan system makes a separation in regulation between banks and other institutions providing financial services. However, in the UK and USA the regulation is based on the type of financial service that is provided and not on the nature of the service provider[17] ensuring that any financial product or service provided by any type of service provider is subject to the same regulatory framework.

12 In UK there is the Financial Policy Committee, The Prudential Regulatory Authority, and the Financial Conduct Authority and in US there is the Federal Reserve and the Consumer Financial Protection Bureau

13 Finance Business Act No. 42 of 2011

14 Ibid-section 2

15 Ibid-section 12

16 Ibid-section 16

17 While Financial Services and Markets Act regulate both banks and non-bank financial service providers in UK the Dodd Frank Act regulates the banks and non-bank financial service sector in the US. Dodd-Frank Wall Street Reform and Consumer Protection Act, July 21, 2010.

(d) Customer Charter for Licensed Banks (hereinafter The Charter)[18]

The Charter specifies certain key standards of fair banking practices envisaged by customers when they undertake transactions with licensed banks and provides guidance to the licensed banks to adopt a 'Code of Conduct (hereinafter called COC)' on customer protection. The COC to be prepared and adopted is to address the key areas covered in the Charter[19].The Charter requires the banks to issue a COC to the agents employed by them for various functions. The COC is to cover areas such a harassment of customers, employing abusive debt collection practices and disclosure of customer information to third parties.

The Charter covers a wide area of matters that are required to be fulfilled in a financial consumer protection framework. It covers areas such as disclosure, transparency, understanding of terms and conditions in order to make informed decisions, information and availability of dispute resolution mechanisms and financial literacy.

18 Banking Act Direction No. 08 of 2011

19Ibid- required to ensure that the customers fully understand the products/services provided to them article 2(a), Making available a Key Facts Document with respect to products or services in a language preferred by the customer-article 2(b), prohibited to make misleading advertisements and are required to provide factual information in promotional material-article 2(c), Banks are required to display certain information in the banks which includes the contact details of the Financial Ombudsman and the CCC- article 2(e) iv

The Charter is created as a guideline for the preparation of a COC for banks. Banks are required to implement the procedure within 6 months from the date of the Charter. The Charter itself lacks any authority and does not specify any penalty for the failure to follow the guidelines specified in the Charter. As the Charter has been issued under the BA any enforcement action should be taken under the BA[20].

(e) The Financial Customer Protection Framework (hereinafter FCPF)[21]

The FCPF is issued to ensure protection of rights of customers of finance companies. The FCPF contains provisions similar to the Charter. The FCPF makes consumer protection an integral part of corporate governance, culture and strategic decision making[22]. To ensure disclosure and transparency, the framework requires the customer to be given clear, concise, accurate and not misleading information about the financial products/services and fully understand the terms and conditions of the products[23].The FCPF also addresses the area of customer education and awareness[24]. The FCPF regulates the business conduct of the employees and agents of the company requiring them to act with due care, skill and diligence when dealing with the customers[25].

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20 Banking Act No. 30 of 1988, Section 76(J)(5), Section 46(A)

21 Finance Business Direction No.01 of 2018, issued in terms of section 12 of the Finance Business Act No. 42 of 2011.

22 Ibid-article 2.1.

23 Ibid-article 3.1.

24 Ibid-article 3.2.

25 Ibid-article 3.3.

Areas such as access of customers to adequate complaint handling mechanisms[26] and protection of customer data and privacy[27] are also addressed in the FCPF.

The compliance period has been reduced to three months under the FCPF[28] and non-compliance would result in the MB taking action against the finance company[29].

Both the Charter and the FCPF have been issued for the purpose of creating an effective mechanism for financial consumer protection. The Charter is more detailed with regard to the requirement while the FCPF lays down the basic guideline. The FCPF is more in line with the international standards[30] addressing all the required areas. The Charter fails to address the areas of equitable and fair treatment of customers and data protection and privacy. Data protection and privacy is considered a major concern in provision of financial services and the failure to address the issue can be considered a serious lapse.

It is noted that, by enacting separate guidelines for banks and finance companies, the regulator has created a disparity within the system where providers of same financial services are subject to different rules and regulations.

Since the USA and the UK regulatory systems

26 Ibid-article 3.4.
27 Ibid-article 3.6.
28 Ibid-article 4.1.
29 Finance Business Act No. 43 of 2011 section 25.
30 Good practices in Financial Consumer Protection 2917, OECD G20 High Level Principles of Consumer Protection.

concentrate on a financial product or service there are several enactments that address the areas covered in the Charter and the FCPF. The areas addressed in the Charter and the FCPF[31]are addressed by the Financial Services and Markets Act (hereinafter FSMA) in UK. Areas such as disclosure, transparency, conduct of business, data protection and privacy are regulated by the Financial Conduct Authority Conduct of Business Handbook (specified in many sourcebooks) in combination with other legislation such as the Consumer Credit Act 1974(hereinafter CCA), Unfair Terms in Consumer Credit Regulation 1999(hereinafter UTCCR) and the Data Protection Act 2018 (DPA). The FSMA also provides for the dispute resolution mechanisms. The compliance to the rules and regulations is monitored by the Financial Conduct Authority (hereinafter FCA).

In USA similar to the position in UK, the Dodd Frank Wall Street Reform Act 2010 (hereinafter DFA) regulates the area of responsible business conduct[32] in combination with acts such as the Truth in Lending Act 1968(hereinafter TILA), Fair Credit Reporting Act 2012(hereinafter FCRA), Fair Debt Collection Practices Act 1977(hereinafter FDCPA), CARD Act 2009 and Fair Credit Billing Act 1974 (hereinafter FCBA) which will be dealt with in detail with specific reference to CC. The main authority monitoring compliance of the law is the Consumer Financial Protection Bureau (hereinafter CFPB)

31 Disclosure and transparency, responsible business conduct, equitable and fair treatment of customers, financial literacy, data protection and privacy

32 Unfair deceptive, abusive acts and practices, disclosure, access to information, complaints, and inquiries

together with Federal Trade Commission.

The significant matter to be noted in respect of the above systems is the existence of a specific authority set up for the specific purpose of consumer protection having the power of enforcement of the regulations.

(f) Debt Recovery Act (hereinafter DRA)[33]

The DRA provides lending institutions a quicker procedure for recovery of debts (including CC debts) higher than Rs.150,000/- through summary procedure. The DRA is greatly weighted towards the lenders as the lenders can obtain a decree nisi upon establishing that a debt is justly due by the debtor without the debtor being present in court[34]. The debtor has to thereafter obtain leave of the court and show cause as to why the decree nisi should not be made absolute. Before appearing in court, the debtor is also required to furnish security in a sum mentioned in the decree[35].

Study of the debt collection practices in the UK reveals that the debt collection is carried out by specialized third party debt collecting agencies. Debt collectors have to be registered and are required to adhere to fair debt collection practices specified under the FCA. The FCA has issued the Consumer Credit Source Book[36] specifying the

33 Debt Recovery (Special Provisions) Act No. 02 of 1990.
34 Debt Recovery Act No.4 of 1990, Section 4(2).
35 Ibid-Section 6(2).
36Consumer Credit Sourcebook, Chapter 7, Arrears, Default and Recovery (Including Repossession), August 2019.

procedure to be followed in debt recovery.

In USA debt collection is governed by FDCPA which will be dealt in detail with specific reference to CCs.

II. Legislation regulating credit card facilities

(a) Payment and Settlement Systems Act (hereinafter PSSA)[37]

The PSSA deals with the area of regulation, supervision and monitoring of the payment, clearing and settlement systems[38]. The PSSA empowers CBSL to take necessary action in the event it is of the opinion that the financial service provider is resorting to or about to resort to unsafe, unsound, or unfair practice or if contravening or about to contravene provisions of the act or any regulation, instruction, directive issued thereunder[39] and CBSL is responsible for preparation of a plan for national payments systems[40]. Section 43.2(1).a of the act empowers the minister to make regulations for protection of customers.

(b) Payment Cards and Mobile Payment Systems Regulation (hereinafter PCMPSR)[41]

37 Payment and Settlement Systems Act No. 28 of 2005.
38 Ibid-Section 2.
39 Ibid-Section 12.
40 Ibid-Section 4.
41 Divinaguma Act No. 01 of 2013

Under PCMPSR[42] the CBSL is appointed as the regulatory and supervisory authority for payment cards and mobile payment systems. Under the PCMPSR, obtaining a license is mandatory to function as a service provider of payments systems[43].

The PSSA and the PCMPSR regulate the CC service providers in SL. CBSL is the regulatory authority responsible for monitoring and supervising the payments systems. A noteworthy mention about the PCMPSR is that the specific mention of protection of customers in relation to issue of directions by the CBSL.

In USA the DFA regulates the payments and settlements system[44].Under the UK legal regime the FCA[45] is the licensing authority and the applicant and its management is thoroughly scrutinized before a license is granted to operate a payment service[46]. No such strict licensing requirements can be observed under the Sri Lankan regime[47].

(c) Credit Card Operational Guidelines (hereinafter CCOG)[48]

42 Issued under the Payment and Settlement Systems Act 28 of 2005

43 Ibid-Section 4

44 Dodd Frank Act section 801[12.U.S.C 5301] Title VIII-Payment, Clearing and Settlement Supervision Act of 2010

45 Financial Services Act 2012, amendment Financial Services markets Act-section 1H

46 <https://www.fca.org.uk/firms/authorisation/how-to apply/lending> accessed on 08August 2019

47 Payment Card and Mobile payment Services Regulation - 6

48 Sri Lanka Deposit Insurance Scheme Regulations No.1 of 2010.

The CCOG[49] is a fairly comprehensive piece of legislation covering majority of the areas relevant to financial consumer protection. The CCOG covers the areas of marketing focusing on disclosure of benefits and incentives[50], clear communication of terms and conditions in preferred language of the customer[51]. The CCOG prohibits making false claims on features of the services and providing misleading and unethical information[52]. The CCOG also requires the terms and conditions of CCs to be published in the issuer's website[53] and prohibits the issue of unsolicited cards[54]. The card issuer has the responsibility to ascertain the credit worthiness of the customer and asses the credit risk of the customer[55] Guideline 6.3 prevents physical or verbal harassment of customers in debt collection. CCOG also addresses the maintenance of confidentiality of customer information[56] and dispute resolution mechanisms[57].It is noted that non-compliance to the CCOG would entail compliance charges being imposed by the CBSL[58].The perusal of the above noted section reveal that the CCOG at a glance covers the identified areas of disclosure and transparency,

49 Service Providers of Payment Cards Regulation. No. 01 of 2009 which was repealed by the Payment Cards and Mobile Payment Systems Regulation No.1 of 2013 Payment Cards and Mobile Payment Systems Regulations No. 1 of 2013.

50 Credit Card Guidelines No: 01/2010, 2.2.

51 Ibid - 2.3 and 3.10.

52 Ibid -2.5 and 2.6.

53 Ibid-Guideline 2.3.

54 Ibid-Guideline 3.4.

55 Ibid-Guideline 3.5.

56 Ibid-Guideline 7.1.

57 Ibid-Guideline 8.

58 Ibid-Guideline 10.

fair treatment and responsible business conduct and dispute resolution mechanisms.

In the UK while the FSMA lays down the basic framework for conduct of the business in financial sector, the CCA specifically addresses consumer credit services including CCs. The CCA prescribes the form and content of the agreement[59], the signing process[60] and requires the executed agreement to be given to the debtor or hirer[61]. The act also provides protection to holders who purchase faulty goods through a CC[62]. While under the CCOG issuing an unsolicited CC is prohibited, the CCA goes to the extent of making it an offence[63].

The CCOG is silent with regard to the form or content of the agreements nor does it require a copy of the agreement to be given to the consumer. In fact, in SL the financial institutions do not have the practice of giving a copy of the executed agreement to the customer. This is greatly disadvantageous due to the fact that most customers only see or go through the agreement minutes before signing. As CC agreements are fairly long and drafted in legal language it precludes the consumer from properly understanding the terms and conditions therein.

The Unfair Contract Terms Act[64] provides for the avoidance of liability under the contract in SL. However,

59 Consumer Credit Act 1974, section 60.
60 Ibid-section 61.
61 Ibid-section 63.
62 Ibid-section 75.
63 Consumer Credit Act 1978-section 51(3).
64 Unfair Contract Terms Act No.26 of 1997

the act does not by any means provide the extensive protection granted by the UTCCR[65] in respect of unfair terms. The UTCCR deals extensively with terms that can be considered unfair in a contract. As per the regulation a standard form contract where the terms are not negotiated and been drafted in advance and creates and imbalance in the rights of the parties are considered unfair[66]. CC agreements in SL are generally drafted in advance and the consumer does not have any ability to make any changes to the standard format. Most of the consumers are not aware of the terms and conditions and the marketing personnel are not willing to take the time to explain the terms and conditions.

The Consumer Credit Source Book (CCSB)[67] extensively address the area of debt recovery under the UK system. As per the regulation the identification of the caller and the purpose for calling is a must when[68] a call is placed to a debtor. In addition, contacting debtors at unreasonable times[69] and disclosure of debt to 3rd parties[70] is prohibited. The manner of contacting the debtor[71], rules applicable for visitations[72], visiting the debtor at the workplace[73] are also areas addressed.

65 Consumer Credit Regulation 1999, Unfair Terms
66 Unfair Terms in Consumer Credit Regulation 1999, Section 5.
67 Consumer Credit Source Book-Chapter 7, Arrears, Default and Recovery (Including Repossession).
68 Ibid-section 7.9.1.
69 Ibid-section 7.9.4.
70 Ibid-section 7.9.6.
71 Ibid-section 7.9.7.
72 Ibid-section 7.9.12.
73 Ibid-section 7.9.15.

US law also includes similar provisions to protect the debtors. In USA the combination of CARD Act, FCBA, FCRA and FDCPA complete the legal regime regulating the CC facilities. Under the CARD Act a minimum of 45 days' notice[74] should be given before an amendment is made to the agreement while in SL its' a mere 10days[75].In addition, the CARD act provides that if the due date of payment falls on a weekend or a holiday the payment can be made on the next business day without any surcharge[76]. The CCOG only requires special mention of the date if it falls on a holiday.

FCBA requires prompt crediting of payments[77]. There is no such requirement under the Sri Lankan legal regime. Although the CC bills can be settled through third party collectors there are so many instances of delayed crediting and the consumers being demanded payment even after the payment has been made.

Under the FDCPA very strict rules are set for debt collectors. The debt collectors are prohibited from informing the third parties about the consumers debt, consumers can only be contacted at specific times and not when the consumer is at his employer's premises, consumer and the spouse (parent in case of a minor) executor and administrator are the only persons that can be contacted[78].The act provides that repeated calling and

74 CARD Act, Section 101
75 Credit Card Operational Guidelines 4.2 & 4.4
76 Ibid
77 Fair Credit Billing Act -section 164 [15U.S.C 1666c]
78 Fair Debt Collection Practices Act, Sections 805[15 U.S.C 1692c]

calling without identifying the caller is harassment[79]. Although the CCOG addressed harassment there are no details on what amounts to harassment.

It is significant that both the FCA and the CFPB have websites open to the public where the public can make a complaint online about any financial issue that arise. This makes access to justice much easier for consumers. However, such a system is still not in place in SL[80].

It is apparent from the above analysis that the main document that address the CC services in SL requires much improvement. Although the basic framework has been set, the specifics addressing the pressing needs such as regulation of the agents, harassment by the debt collectors have to be addressed in a more detailed manner.

Another significant issue that can be identified is that although CCOG is the key document addressing CC services in SL, it is a mere guideline. It is noted that both in the UK and USA, the relevant legal regime comprises of acts[81] and the enforcement ability of the same is high. In addition, the CCOG puts the burden on the specific financial institutions to adopt appropriate measures in many areas[82]. Although this may be suitable since the CC issuing is done by both bank and non- bank financial

79 Ibid-Section- 806 [15 U.S.C 1692d]

80 Under the Financial Ombudsman Scheme in Sri Lanka although information is provided on the website there is no procedure available for making a complaint online.

81 Consumer Credit Regulations 1999, Except the Unfair terms.

82 Credit Card Guidelines No: 01/2010, "Dispute Resolution-8, Design of technical systems"12.7 and 12.12.

institutions this may result in different rules being applied to a single category of financial product. Although the CBSL is entitled to impose non-compliance charges[83] the vagueness of the guideline may lead to lack of objectivity and different treatment between similar financial institutions. Systems in the UK and USA have not made such differentiation between the types of financial institutions but enacted legislation applicable to all types of financial institutions providing a particular financial product/service.

(d) Payment Devices Frauds Act (hereinafter PDFA)[84]

PDFA is the legislation which addresses the aspect of CC frauds in SL. Section 2 specifies that the act is applicable to CC frauds. A wide range of actions are considered as fraudulent actions under the act[85]. Under section 15 of the act the card issuer or any other person incurring a loss due to a CC fraud will be compensated. The High Court has been given the jurisdiction to hear the matters under the act and the punishments include imprisonment of 10 years for persons found guilty[86].

The PDFA can be considered as a fairly satisfactory act with respect to providing solutions for many issues existing in the area of CC fraud in SL. However, it is noted that the PDFA has focused on the fraudulent acts

83 Credit Card Guidelines No: 01/2010, 10.

84 Payment Devices Frauds Act, No. 30 of 2006

85 Ibid section 3

86 Ibid section 3(2)

and the criminal process in relation to fraud and less on the aspect of protection of the consumer who is the victim of fraud.

In the UK, the CCA is the relevant act addressing CC fraud which places the burden of the stolen CC on the card issuer and limits the cardholder's liability to a maximum of £35 before reporting upon reporting the theft no liability is placed on the card holder. Under the Consumer Protection (Distance Selling) Regulations[87] a consumer is entitled to a refund when her CC has been used fraudulently[88].

Under the FCBA the liability of a card holder an unauthorized use of the card is limited to $50.

In considering the above comparison of the different legal regimes, it can be confidently stated that the PFA provides a satisfactory protection to the consumer in relation to CC fraud.

(iii) Legislation on Consumer Protection

(a) **Consumer Affairs Authority Act (hereinafter CAAA)[89]**

The CAAA is the main legislation concerned with the protection of consumer rights in SL. The only specific

87 Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334)

88 This regulation has now been replaced by the Consumer Contracts (Information, Cancellation and additional charges) Regulations No.13. However, for transaction before 2014 the distance selling regulations apply.

89 The Consumer Affairs Authority Act No 09 of 2003

reference to banking and financial services in the CAAA is in the interpretation section[90] where banking and financial services are included under the services. Section 30 of the CAAA enables the consumer to take action in the event the trader resorts to misleading or deceptive practices.

Although the CAAA covers banking and financial services the majority of the provisions address regulation of price, standard, and quality of goods.

Similar to the CAAA the Consumer Rights Act (hereafter CRA)[91] of UK does not specifically address the financial services but it specifically covers digital content unlike the CAAA. The CRA also deals with unfair contract terms and transparency in contracts which has a bearing on CCs[92].

90 Consumer Affairs Authority Act 2003, Section 75

91 Consumer Rights Act of 2015

92 Consumer Rights Act 2015, sections 62 and 68

Dispute Resolution Schemes - Financial Ombudsman of Sri Lanka (hereinafter FOS)

The FOS is a dispute resolution mechanism available for consumers of financial products or services set up by the CBSL. It is a voluntary scheme established by the banking industry, the registered finance and leasing companies and primary dealers. The objective of the Ombudsman scheme is the satisfactory settlement and resolution of complaints/disputes by customers of banks and other financial institutions covered by the scheme. The Ombudsman has the power to make monetary awards binding on the participating financial institutions. The Ombudsman is not bound by strict rules or procedures and can make just and equitable decisions[93].

The DFA establishes an Agency Ombudsman[94] which is more of an informal and voluntary method of dispute resolution. In the UK the Ombudsman system was established and is regulated by the FSMA. There is a compulsory jurisdiction in some matters as well as voluntary jurisdiction[95]. The Ombudsman under the FSMA has the legal authority to require production of documents, failure of which will amount to contempt of court[96]. Under the FOS in SL the Ombudsman does not have such authority and operate in a more informal and a voluntary environment.

93 Accessed at http://www.financialombudsman.lk/rules.php#proc on 18/08/19
94 Private Education Loan Ombudsman Dodd Frank Act-section 1013.a.5
95 Financial Services and Markets Act 2000 -sections
96 Ibid-sections 231 and 232

Data Protection

Data protection is a major concern in CC services as there is a large amount of personal information stored in electronic form. However, there is currently no data protection legislation in SL. The CCOG provides that the card issuer is responsible for the confidentiality of the information used by marketing personnel, agents and outsourced service providers[97] while the FCPF makes reference to protection of data of customers[98]. There is ad hoc reference to secrecy and confidentiality[99] in several acts but no proper legal framework in place.

International Standards

The Good Practices Report[100] has identified certain key principles that should considered in creating an effective legal and regulatory framework for financial consumer protection. They are;

1. A dedicated licensing authority overlooking the financial services having the authority to create binding laws and regulations and to enforce the laws.

2. A regulatory framework addressing;

97 Credit Card Operational Guidelines - 7.1,7.2 and 9.3

98 Finance Business Direction No.01 of 2018, issued in terms of section 12 of the Finance Business Act No.42 of 2011, Section 3.6

99 Monetary Law Act Section 45, Banking Act Section 77, Finance Business Act section 61.

100 Good Practices for Financial Consumer Protection 2017 The World Bank Report at p.174.

(a) Disclosure and Transparency in advertisements, sales material, consumer agreements and requirement of key facts statement to be given to the customer;

(b) Fair treatment and business conduct relating to unfair terms and practices, product suitability, customer mobility[101], conduct of agents and continuous monitoring of agents and debt collection practice;

(c) Data protection and privacy; and

(d) Proper dispute resolution mechanisms including trained personnel for dispute handling and out of court informal dispute resolution mechanisms.

The above noted factors have to be addressed in drafting laws regulating the financial sector in order to effectively provide the necessary protection to the financial consumer. As already discussed, some of the said concepts have been infused into the SL laws. However, there is a lack of uniformity and cohesion between different legislation.

Conclusion

The comparison of the international standards, the legal frameworks in UK and USA in relation to CCs reveal that the Sri Lankan legal framework requires much

101 Ability of customer to cancel the service and transfer to another product or service provider

improvement in many areas. The lack of a dedicated regulatory, supervisory and enforcement authority in relation to financial service providers, lack of enforcement power for violation of the law, failure to focus on the pressing needs such as unfair contract terms, consumer harassment and data protection, lack of effective informal dispute resolution systems and low financial literacy can be considered as areas that require further attention. Although the basic framework has been laid down the laws need to be fine-tuned and remedies sought for the flaws noted above in order to transform the existing system to a system that can provide effective protection to the financial consumer.

A Crime against Nature: Legal Responses to Illicit Wildlife Trading

Chethana Karunatilaka*

Abstract

Human beings aided trading and trafficking of endangered wild fauna and flora across the geographical borders of the countries has become a paramount legal concern all around the world, especially for countries like Sri Lanka that has a rich biodiversity. Several attempts were made to prohibit and regulate the trading of such articles through multilateral environmental agreements signed by states. In response to these international obligations, Sri Lanka has enacted laws, established authoritative institutions and undertaken policy measures to combat cross border wildlife trade. These laws have been amended from time to time in accordance with the requirements resulting in increase of sanctions for violations. This review had utilized the doctrinal methodology in assessing the prevailing legal framework in Sri Lanka, relating to unregulated wildlife trade. The effectiveness of the legal measures is still in question as the illicit wildlife trade is still happening at an uncontrollable rate. Therefore, the existing legal regime calls for reforms in order to preserve endangered wild life from illegal trading in Sri Lanka.

Background

Sri Lanka is an island well known to be a biodiversity hotspot among the global community. Bio-diversity hotspots are 'the places where exceptional concentrations of endemic species are undergoing exceptional loss of

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habitat'. In simple words the earth's most biologically rich territories that are threatened with extinction are known as biodiversity hot spots. There are two key pre-requisites to become a biodiversity hotspot: Firstly, include at least 1,500 varieties of endemic plants.[1] Secondly, only 30 percent or less of its original vegetation must be leftover.[2] Currently, there are around 36 bio-diversity hotspots identified including Sri Lanka[3] . Therefore, the protection of endemic wildlife in the country and conservation of the precious natural ecosystem for future generations had become a *sine qua non* for the government of Sri Lanka.

Illicit trade in wild fauna and flora is recognized as one of the major illegal activities that threaten the existence of biologically valuable wildlife in the world. Many countries that are in rich bio-diversity try to combat these activities through the regulation of these activities. The statistics provided by the United Nations Environment Program (UNEP) and the INTERPOL illegal wildlife trade is the third-largest illegal trade activity that takes place in the world.When considering the theoretical reasoning behind boost in illegal wildlife trade (IWT), two major causes can be recognized; traditional reasons and contemporary reasons. Consumption of wild animal meat as a source of

1 N Myers, RA Mittermeier, CG Mittermeier, GAB da Fonseca & J Kent, 'Biodiversity hotspots for conservation priorities' (2000)

2 N Myers, RA Mittermeier, CG Mittermeier, GAB da Fonseca & J Kent, 'Biodiversity hotspots for conservation priorities' (2000) Nature. 403 (6772), 853.

3 JB Izzy, 'PC Pets for a Price: Combating Online and Traditional Wildlife Crime Through International Harmonization and Authoritative Policies' (2010) 34(3) William and Mary Environmental Law and Policy Journal<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1021&context=wmelpr>accessed 02 May 2020

protein, use of wild life for traditional indigenous medicine, pet trade and mythology of keeping certain parts of animals for good luck are some traditional reasons of increase in IWT. Increase in the global buying capacity, ability of earning high income, population growth, tourism, industrialization, trade liberalization and globalization are some of the modern reasons that have caused the IWT to enhance. Owing to the above grounds, IWT is occurring all around the planet at an alarming rate that will ultimately create a negative impact on the endangered species in the world in near future.

What constitutes illicit wildlife trade?

It can be simply explained as an environmental crime related to the trading of living or dead fauna and flora, parts of such fauna and flora or any product made from such parts without following the proper legal measures. This process of illegal trading has several negative impacts on the whole planet such as the creation of biological imbalance and the frustration of intergenerational equity. Further to that, this could also lead to several indirect illicit activities such as money laundering and terrorist financing that can threaten the national security and economy of a country. Due to the ample amount of biodiversity enriched in the country and due to the geostrategic location of the country, Sri Lanka has become a paradise for illegal wildlife smugglers during the past few decades.

Combating this crime against nature has become a

complex challenge for Sri Lanka as well as for many countries.

Global Cooperation, powerful domestic legal regulations, appropriate policy measures and strong institutional framework are required to battle against this wildlife crime. Focal purpose of this study is to critically analyze the legal regulations adopted by Sri Lanka in combating illegal trading of ecological resources. The study utilized a doctrinal approach of legal research in examining the written body of legal principles in Sri Lanka. International Multilateral Environmental Agreements, Parliamentary Acts and Ordinances and other legal regulations were used as primary sources, while Books, Journal Articles and Many web-based resources were utilized as secondary resources.

International Involvement of Sri Lanka

United Nations Convention on the International Trade in Endangered Species (CITES) 1973 came in to force in 1975 after obtaining ratification of ten countries. The fundamental objective of this instrument is to promote global cooperation in the regulation and management of the illegal wildlife trade.

A significant feature to be noted is that CITES does not ban all wildlife trade, nevertheless, it regulates the overexploitation of wild fauna and flora through illegal trading activities. This convention also provides that people and states, as trustees of the planet, must be conscious about the value of wild fauna and flora and

must conserve them for the generations to come[4].

The convention identifies endangered wild fauna and flora in three separate appendixes in the Convention text. Appendix I include all species that are currently threatened with extinction which may be affected by trade. Importation, exportation, and re-exportation of such species is strictly regulated and shall be allowed only in exceptional circumstances such as essential scientific research[5]. Appendix II includes all species that are not necessarily threatened under the current status thus may become threatened unless the trading of such species is restricted. The utilization and over-exploitation of such species need to be controlled for the purpose of protecting the existence of the list of species under Appendix II[6]. Appendix III includes species that are identified by state parties as categories of wildlife that needs protection within their countries and they seek the assistance of other state parties to conserve these wild fauna and flora through restriction of its commercial use[7]. CITES offers different levels of protection to the species identified in the above mentioned three appendixes.

Under the CITES provisions, every state party is under an obligation to undertake appropriate actions to implement and to rule out trade in protected wild species in

4 Convention on International Trading of Endangered Species 1975, Preamble.
5 Convention on International Trading of Endangered Species 1975, Article II (1).
6 Convention on International Trading of Endangered Species 1975, Article II (2).
7 Convention on International Trading of Endangered Species 1975, Article II (3).

accordance in accordance with the provisions of CITE[8]. It requires that the state parties should enact local legislation, create authoritative bodies, and implement tracking/penalizing mechanisms to regulate international trading of endangered species in their respective countries. Many state parties to CITES had taken necessary steps to enact domestic legislation to regulate import, export, and transition of illegally traded specimens of endangered wild fauna and flora.

Though Sri Lanka became a signatory to the CITES in August 1979, no specific domestic legislation is enacted in attempting to bringing in the Sri Lankan law in line with the international standards. Consequently, smuggling incidents are happening continuously throughout the past decades, especially regarding sandalwood, rosewood, indigenous medicinal plants, live birds, butterflies, elephant tusks, star tortoise, bird feathers and products made of wild animal parts, etc. Even fisheries and aquaculture resources such as protected sea turtles, lobsters, seashells, shark fins, live ornamental fish and corals are subject to illegal possession and trading at domestic as well as at international level.

Sri Lanka had worked hand in hand with the International Criminal Police Organization, which is commonly known as INTERPOL in order to track international criminals and networks involved in illegal wildlife trade. In 2013, when the Sri Lankan Customs seized a consignment of elephant tusks, the technical assistance was provided by

8 Convention on International Trading of Endangered Species 1975, Article VIII (1).

the INTERPOL in recognizing the origin of the tusks. The DNA extracted from the tusks was sent to INTERPOL for testing. When the country of origin is identified, it is convenient to track down the criminal networks engaged in the business[9].

Recently, Sri Lanka once again worked in collaboration with the INTERPOL and World Customs Organization. The world's largest ever wildlife operation, code-named '*Operation Thunderstorm 2018*' which was initiated by the Wildlife Crime Working Group of the INTERPOL, became a successful operation due to the coordinated work of police, customs, wildlife authorities of 92 participating countries.

Domestic Legal Regulation of Sri Lanka

Though Sri Lanka has not enacted any enabling legislation to go in line with the CITES, many other legislative provisions can be utilized for the purpose of fighting this wildlife crime. Common legislative enactments are addressing all wild fauna and flora; thus, Sri Lanka does not have any species-specific legislation except for fisheries.

9 INTERPOL, 'INTERPOL testing of tusk DNA from seized ivory in Sri Lanka to help combat wildlife crime' (2013)<https://www.interpol.int/en/News-and Events/News/2013/INTERPOL-testing-of-tusk-DNA-from-seized-ivoryin-Sri-Lanka-to-help-combat-wildlife-crime>accessed on 18 March 2020 was involved in this operation as a participating country for capturing the smugglers and criminal networks to combat wildlife trade and trafficking

The above diagram shows the variety of stages in which the illegal wildlife trade happens in a country. It is important to have a legal system that addresses all such significant points in order to combat these wildlife crimes. The existing legislative structure on the illegitimate wildlife trade is discussed below.

Fauna and Flora Protection Ordinance

One important piece of legislation is the Fauna and Flora Protection Ordinance No. 02 of 1937 as amended (FFPO). One of the main objectives of the FFPO as amended in 2009, is to protect bio-diversity in Sri Lanka and to prevent the commercial and other exploitations of the recognized endangered fauna, flora and their habitats[10]. After the amendment of 2009, FFPO includes eight schedules of protected and not protected wild fauna and flora in the text of the legislative enactment as follows;

Schedule I – Mammals and Reptiles (Not Protected)
Schedule II – Strictly protected Mammals and

10 Fauna and Flora Protection Ordinance (as Amended in 2009), Act No 2 of 1937, Preamble.

Reptiles Schedule III – Birds (Not Protected)
Schedule IV – Strictly protected Birds Schedule V -
Amphibians (Not Protected) Schedule VI -
Protected Fish
Schedule VII - Protected Invertebrates
Schedule VIII – Protected Plants

Any wild animals listed in schedule I, III and V are not under the protection of this act. This implies that such wild fauna can be hunted anywhere outside a national reserve *or sanctuary*. Different degrees of protection are offered by the FFPO to the wild animals and plants identified in these schedules.

Section 6 and 7 of the FFPO as amended in 2009, lists out several prohibited activities within the limits of a national reserve and a sanctuary. Accordingly, hunting, shooting, killing, wounding, taking away, keeping alive or dead animals or their parts in the possession and taking, destroying any egg or nests of a bird, reptile or any wild animal is prohibited. In addition to that, burning, destroying, taking, collecting, removing, or keeping a plant or a part of such plant in possession is also prohibited by the law[11]. Any person who contravenes the provisions in section 6 will be held criminally liable and if the person is subsequently convicted for the same offence, a higher criminal sanction will be imposed for

11 Fauna and Flora Protection Ordinance (as Amended in 2009), S. 6(1) d & S. 7(1) (c)(i)

repeating the offence[12]. For the commission of any other offenses under section 6A or 7, the offender will be liable under the provisions of section 10 of the FFPO. Special provisions

are provided for the protection of elephants under Part II of the FFPO, even when they are outside the national reserves and sanctuaries. These provisions are provided for regulating the very first step of illicit wildlife trade, namely the illegal removal of the endangered fauna or flora from its original environment with the intention of obtaining a commercial benefit. Despite having the legal provisions to protect endangered wild fauna and flora in national reserves and sanctuaries, confiscation of wildlife is still a common phenomenon in these areas.

Carrying out a business of selling, offering to sell or transportation of an endangered wild animal, dead or alive or any parts of such an animal, without a license constitutes an offence under section 49 of FFPO. In addition to that, protected and endemic plants also cannot be sold or displayed for selling under section 42 of the FFPO. Although buying, selling, and engaging in a business of trading endangered wild fauna and flora in the local market is strictly prohibited by the legal regulations, many incidents are reported relating to such activities. Recently, three suspects were arrested by the Police, while they were carrying 100-star tortoises to Colombo for the purpose of handing them over to a dealer for

12 Fauna and Flora Protection Ordinance (as Amended in 2009), S. 6 (4)

exportation.

Regulation of domestic activities of illicit wildlife trade would not be sufficient in order to eradicate this globally established business. Therefore, the FFPO also offers provisions for regulating cross-border transactions related to wildlife. Both importation and exportation of endangered and protected animals and plants are regulated through the provisions of the FFPO. Importing of an endangered wild animal (protected and non-protected) into Sri Lanka without a license[13], exporting or re-exporting of an animal (protected or non-protected) from Sri Lanka without a license[14] and sale, offer to sell, import, or export any protected plant species[15] would be considered as criminal offences under the FFPO.

Special provisions are provided for the elephants/ tuskers in the country under FFPO, as the elephants are closely related to the history, religion, and the culture of Sri Lanka. According to Section 12 of FFPO killing, hunting, injuring, and taking away an elephant out of a National Reserve or Sanctuary is banned. It further offers protection against the unlawful commercial exportation of the Elephants, Tuskers out of the Country by regulating such activities[16]. Section 19A bans the exportation of any elephant tusk, a part of such tusk and an item made with

13 Fauna and Flora Protection Ordinance (as Amended in 2009), S.37
14 Fauna and Flora Protection Ordinance (as Amended in 2009), S. 40
15 Fauna and Flora Protection Ordinance (as Amended in 2009), S. 42 & S. 45
16 Fauna and Flora Protection Ordinance (as Amended in 2009), S. 19(2)

tusk or item containing ivory. Regardless of having a firm and comprehensive legal rule prohibiting the illegal cross-border transfer of endangered wild fauna and flora, many individuals tend to get involved in this illegal business of trading species as it has become a lucrative trade in the global context. The most recent incident reported was an individual arrested at the Bandaranayake International Airport while attempting to smuggle 200 live scorpions out of Sri Lanka in January 2020. Later the suspect was produced before the Magistrate and a fine of Rs, 100,000 was imposed for violating the FFPO.

Criminal sanctions imposed for any offenders who commit wildlife crimes, including trading of endangered species, include fines and/or imprisonment. However, the Fauna and Flora Protection (Amendment) Act No. 22 of 2009 drastically increased the criminal sanctions that were imposed by the original FFPO. Though the criminal penalties were increased, there is no evidence of a decline in the unlawful wildlife trade activities.

Fisheries and Aquatic Resources Act No. 02 of 1996

The Fisheries and Aquatic Resources Act (as amended) attempts to offer special protection for the marine fauna and flora by prohibiting the catching, transporting, buying, selling, and possessing such protected categories of fisheries[17]. International trading of Fisheries and aquaculture is regulated through section 30 of the Act, where it makes it essential for individuals to adhere to

17 Fisheries and Aquatic Resources Act No 2 of 1996 , S. 29

legal regulations when protected aqua resources are sent out or brought in to the country. In addition to that, export Management Regulations. No. 2023/51 dated 15.06.2017states that all exports, imports, and re-exports of protected species of aquatic fauna and flora must be carried out in accordance with the CITES provisions[18].

The Sri Lanka Navy arrested an individual with approximately 660kg of Thresher Shark in Negombo on the 16th March 2020. Thresher shark is a type of shark that belongs to Alopiidae family and listed as threatened with extinction and therefore is forbidden to be fished. These fish were found to be dead and without fins. It can be assumed that the fins of these sharks were traded to be sent overseas, since sharks fins have a high demand in foreign markets. This incident could be considered as a piece of evidence as to the fact that the catching and trading of endangered aqua resources are still happening in Sri Lanka, though strict regulations are in place.

Imports and Exports (Control) Act No 1 of 1969

Imports and Exports (Control) Act also offers several legal regulations relating to the carriage of goods from and into the country. The importation or exportation of any goods, unless under the authority of license or conditions, is banned by section 04 of this Act. Since the act should be interpreted and construed together with the

18 Fish and Fishery Products, Export, Import and Re-export Management Regulations .No. 2023/51 -15.06.2017, S.04

Customs Ordinance[19], provisions related to the regulation of trading, if endangered fauna and flora shall be applicable for Imports and Exports (Control), Act as well.

Customs Ordinance

Many of the above-mentioned statutory provisions are also considered as a part of the Customs Ordinance as it empowers the Customs Department in regulating the international carriage of unlawfully obtained wildlife in and out of the state. Customs Ordinance No.17 of 1869 is a heavily amended piece of legislation that provides regulations regarding the import and export activities of the country. Certain types of wild fauna and flora are identified by the Schedule B to the Act and they are being prohibited from importing to the country and exporting from the country[20]. If a person export or attempts to export any goods listed in schedule B of the Act, in violation of the provisions of this Act, the Customs is empowered to seize such items and destroy or dispose of them.[21] Further to that any suspect who possesses or smuggles any prohibited item can be arrested under the section 127 of the Act and would be submitted before a Magistrate for committing a criminal offense under the law of Sri Lanka[24]. Once these sections are read jointly with the rules in FFPO, the Sri Lanka customs is provided with greater authority to deal with illicit wildlife

19 Import and Export (Control) Act No. 01 of 1969, S.21
20 Customs Ordinance, Act No 83 of 1988, S. 12 (1)
21 CITES, 'STATUS OF LEGISLATIVE PROGRESS FOR IMPLEMENTING CITES' (NOVEMBER)

smugglers who try to transport endangered fauna and flora from and to the country.

Though many laws are in place to protect the rights of the voiceless wild fauna and flora, the unlawful activities are still taking place. According to the CITES National Legislation Project, the above-discussed laws do not meet the international standard requirements of implementing the CITES. Therefore, Sri Lanka is yet again being categorized under the Category III during the 18th Conference of Parties that was held in Geneva, Switzerland in 2019.

Institutional and Policy Framework

The main Institutional body that is responsible for the conservation of wild fauna, flora, and their habitats under FFPO s the Department of Wildlife Conservation (DWC). The vision of the DWC is to preserve the biodiversity and natural resources for the betterment of the future generations of the country. Especially regulating international trading of wildlife, issuing of import license, and issuing of an export license under the CITES provisions are carried out by the DWC in Sri Lanka. The DWC together with experts in multiple disciplines had developed a Wildlife Policy with the objective of sustainable utilization of wildlife, maintenance of biodiversity and forest cover. This policy also can be utilized as a document in encouraging legitimate wildlife trade while eliminating the illegal trading of biological resources.

DWC recently launched an electronic-based management system called e-CITES to enhance the protection provided to the threatened flora and flora due to illegal trading. The system allows issuing electronic permits for import, export and transit activities allowing the authorities to closely monitor the trading activities through an electronic platform. It facilitates networking among CITES authorities of other countries placing an opportunity for tracking and monitoring in collaboration with them. It will further aid in controlling the activities and networks involved in the business of the illegal trading of wildlife.

Department of Fisheries and Aquatic Resources is another government institution, established for the purpose of promoting rational use of fisheries and aquatic resources while preserving the same for the generations yet unborn. Implementation of the trade, import/ export provisions under FARA and related regulations on the protection of fish species and marine ecosystems is one of the main tasks of this Department. Monitoring and surveillance of fishing vassals for the purpose of tracking illegal trading of fish is one significant contribution done by the Department.

Sri Lanka Customs is protecting the endangered wildlife at all entry/exit points of the country, being the frontline protectors of Bio-diversity. A special body called Biodiversity Protection Unit (BPU) was established in 1993 as the main unit under the Customs Department that specialized in monitoring and detecting illegal

biodiversity trafficking from and to Sri Lanka. After a reorganization in 2010 the Unit is now called as Biodiversity, Cultural and National Heritage Protection Unit and is working in cooperation with many national and international organizations in order to eradicate unlawful smuggling of endangered wildlife across the country borders. The dedicated effort of Sri Lanka Customs had backed in uncovering illegal smuggling activities and international criminal networks that are engaged in illicit wildlife trade.

Discussion

An analysis of the above mentioned legal, institutional and policy framework shows that Sri Lanka has not imposed specific legislation to implement the provisions of CITES. However, the legal system is enriched with several legislations that afford safeguard measures to endangered species against illegal trading at varying degrees of levels. Despite having a comprehensive legal framework, Illegal commercial exploitation of wild fauna and flora is still a constant phenomenon.

One reason for this can be, the laws that regulate this area are too complicated and confusing, making it difficult for the layman to understand the consequences of violating the provisions. The simplicity of the black letter of law a country is a critical factor in bringing the law closer to the citizen's hearts.

The sanctions imposed for such offenses are extensively outdated and do not match with the present-day scenario.

As the profits that the offenders earn from the illicit wildlife trade outweigh the risk being exposed, they are not reluctant to get engaged in such illegal activities. As IWT had become an extremely lucrative business in the global market, the sanctions imposed for offenders also must be proportionate with the possible profit that they earn.

Sri Lanka is not only recognized as a country of origin; the ports can be identified as transit hub for transporting of illegally traded endangered species by maritime means. Therefore, there is an urgent necessity to impose specific legal regulations to scrutinize and detect illegal wildlife articles in transit in Sri Lanka.

According to CITES obligation, every state party must undertake to establish an authoritative institution to specifically manage the illegal trading activities and to cooperate with other state agencies. In Sri Lanka, no single authoritative body that deals with matters of such nature. Many governmental and nongovernmental institutions work on an individual basis. Therefore, there is a need of establishing a single body that specifically deals with matters of illegal wildlife trade, which also has the power to coordinate with other local and global institutions. Eradication of malpractices such as undue political influence, bribery and corruption from these institutions is another important prerequisite.

The status of human and physical resources available for detecting illegal wildlife trading activities is not satisfactory. Awareness and fundamental understanding

of botany, zoology and legal framework are of the essence in implementing the action plans related to the conservation of protected species. Employees who lack a comprehensive knowledge regarding the legal rules and biological importance of the endangered species need to be adequately equipped and trained to detect wildlife crimes at the local and trans-boundary level. Modern equipment and strategies could also be used at all exit and entry point to Sri Lanka, for the purpose of uplifting the monitoring capacity of incoming and outgoing cargo. It would improve the surveillance of the legal wildlife trade activities and provide the opportunity to diminish illegal trade.

Inability and delay in protecting the species that are threatened with extinction by regulating domestic and international trade would frustrate the principles of sustainable development as well as inter-generational equity. Thus, public awareness on the matters of such nature must be raised. Especially many local inhabitants are arrested for collecting/ taking/removing/ transporting or trading as first-hand offenders since they do not know it is illegal to catch and sell protected species. The significance in conserving endangered species for the generations yet unborn must be explained to them.

Conclusion

The above doctrinal analysis on the legal framework of regulating IWT clearly point out that having a comprehensive legal regime does not necessarily provide

a solution to certain problems. The strength of such legal principles, awareness of such principles, and effective execution of such principles are also significant in achieving the objectives of such laws. Analysis of the above work constructs the reality that Sri Lanka is still in the actual necessity of imposing stringent legal rules in order to combat wildlife crimes. Apart from that the need for a strong legal and institutional framework and active community involvement in eradicating the illicit trading of wild fauna and flora, also marks a vital point. As IWT is a global black-market business, the global corporation among nations and effective adoption of international obligations are of utmost importance for developing countries rich in bio diversity. Subsequently, Sri Lanka would be able to create a sustainable eco-system with global cooperation.

Legal Translation: Facile or Arduous?

Anuththara Nagodawithana*

Abstract

Legal translation is considered as one of the most challenging fields of translation. Legal language inherent to the field and the differences in legal practices combined with the respective cultures create a conundrum to the translator. The study focuses on problems encountered by translators during the process of translating legal documents such as affidavits, judgments, deeds, and law reports from English to Sinhalese and vice versa. A comparative analysis of selected texts of law and their translations was conducted to discern the problems of translation. Further, informal discussions with professionals involved in the field of legal translation were carried out to augment the outcome. The garnered data were classified into three subcategories as Syntactic, Semantic and Cultural. Under each category, a plethora of difficulties was were identified. Unusual sentence structures, word order, model verbs are few problems recognized under the syntactic category whilst semantic issues included terminology, wordiness, redundancy, loan words, neologisms and the lack of an established terminology. The culture entwined with the legal system of the respective country or community was also identified as an area of asperity due to the differences in traditions, norms, faiths and doctrines.

Introduction

The significance of translation on everyday lives has substantially grown since the worldwide integration of nations and global interaction proliferation the proliferation of global interaction. The extensively

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multidimensional phenomena aids in constructive communication between individuals to pluralistic nations within the globalized setting. Generally, translation involves rendering a written text from a source language to its' its equivalent in the target language. Edmond Cary defines translation as a "process which attempts to establish equivalents between two texts expressed in two different languages. These equivalents are, by definition, always dependent on the nature of the two texts, on their objectives, on the relationship between the two cultures involved and their moral, intellectual and emotional conditions".[1]As the definition suggests, achieving equivalence in translation has become a daunting prospect for translators.

One of the most demanded types of translations in the field of translation involves translating legal documents. Legal documentation has become part and parcel of each individual's life, for from birth to death and every action in between involves legal steps, thus making it an integral share of everyday life. Unlike most other disciplines, legal actions are recorded and documented in a language inherent to the subject field. Peter Tiersma in the paper titled 'The nature of Legal Language' states that the Legal language is a product of its history.[2]

1 Anthony Pym and Nune Ayvazyan, 'The Case of The Missing Russian Translation Theories' (2014) 8 Translation Studies
<https://www.researchagte.net/Anthonyp2/publica tions/276527825> accessed 5 October 2020.

2 Peter Tiersma, 'The Nature Of Legal Language' (*LANGUAGE and LAW*) <https://www.languageandlaw.org/NATURE.HT M> accessed 1 October 2020.

The Anglo-Saxons of the west pioneered in constructing a distinctive legal language of which the following lexicons survived to date and are still in vogue: *Bequeath, Goods, Guilt, Manslaughter, Murder, Oath, Right, Sheriff, Steal, Swear, Theft, Thief, Ward, Witness, and Writ.* Besides the vocabulary, alliteration is a remnant characteristic of Anglo- Saxons which is widely employed in legal parlance. For instance, 'to have and to hold', 'rest, residue and remainder', and 'any and all and each and every' appear in legal texts in abundance. Other than the impact of Anglo- Saxons, the influence of Latin derivatives could also be succinctly discerned in legalese. The very practice of employing Latin '*versus*' instead of 'against' in case names could be traced to Latin origins. Scandinavians left another profound and persisting influence on the English legal language. The word 'law' itself could be traced to the Norse word for 'lay', which interprets as 'that which is laid down'. Furthermore, the terms such as 'attorney', 'bar', 'defendant', 'plaintiff', 'plea' and 'verdict' were coined according to the French grammars and are seen in almost every legal context.[3]A combination of facts decide the legal language formation and evolution: official languages of the states, political, economic situations, and the conflicts amongst social classes prevalent during such times.

The legal system in Sri Lanka that has been moulded to its existing model is influenced by many reasons. According to Aquinas V. Tambimuttu, "the ethnic and religious

3 ibid.

diversity of the nation, and also its colonial history, have a direct bearing on aspects of the legal system in Sri Lanka".[4] The mixed legal system of Sri Lanka is a culmination of linguistic, cultural, and religious diversity discerned within the island and the invasions from the West. The conquest of Maritime Provinces of the island by the occidental nations could be considered the initial step towards establishing a legal system in Ceylon. The Dutch, who succeeded the Portuguese in the seizure of coastal areas, were avant-garde introducing a legal system to Ceylon, the Roman-Dutch law. "Roman-Dutch law has withstood many a tide of legal and political changes to remain as the foundation of Sri Lanka's general and common law". Concurrent to the well- structured Roman-Dutch law, the Dutch attempted to codify the customary laws subsisting amongst ethnic groups. For instance, '*Thesawalami*', the laws and customs practiced by the Tamil populace of the North, was codified in 1707. The British, pioneers in establishing a unitary system of administration and justice in Ceylon, however, continued to employ the existing laws granting prominent status to the Roman –Dutch law. Thus, the legal system in Sri Lanka is a conglomeration of Sinhalese law, Buddhist law, Hindu law, Tesawalami law, Islamic law, Mukkuwa law, Roman-Dutch and English law. H. W. Tambiah describes the intrinsic nature of the Sri Lankan law as follows:

4 Aquinas V Tambimuttu, 'Sri Lanka: Legal Research And Legal System - Globalex'(*Nyulawglobal.org*,2009) <https://www.nyulawglobal.org/globalex/Sri_Lanka.html> accessed 29 September 2020.

In Sri Lanka, there are five systems of private law. The Roman –Dutch law, as modified by statutes, and interpreted by the courts, is the general law of the land. English common law applies to commercial contracts and commercial property and has been tacitly accepted in many matters. English law was also introduced by statute and, as such, forms that statutory law of the land. The Thesawalamai is both a personal and local law…Similarly, Kandyan law applies to the Kandyan Sinhalese, and the Muslim laws, to the Muslims... in [matters relating to] marriage, divorce, [alimony] and inheritance. Private law governs issues between individuals. It consists of the law of persons, property, obligations, and delicts or torts.[5]

5 H.W. Tambiah, 'Sri Lanka', *Encyclopedia of Comparative Law: National Reports* (MartinusNijhoff Publishers 1987).

The evolution of the legal system of Sri Lanka adds a few significant as well as inherent features to the language of the legal practice of the island. Although initial adaptation was of foreign nature, the long-standing history of continuation combined with the native features born of the ethnic and cultural diversity has culminated in a legal language exhibiting traits of both localization and foreignization. The natural elements create a subtle yet indomitable challenge to the translator. Hence, translating legal documents, for example, from a Birth Certificate to End-of-Life plans, create a myriad of issues for legal translators. Hence, the study focuses on the problems encountered by translators when translating documents from English to Sinhalese and vice versa.

Methodology

As the present study attempts to identify the problems encountered by translators of legal documents, a content analysis of selected texts such as Affidavits, Deeds, Law Reports and their respective translations was conducted to identify the areas of difficulty. Informal conversations with professionals involved in legal translation was carried out to determine their perspectives on the problems encountered in legal translation and augment the outcome of the study.

Results and Discussion

The information garnered through the comparative analysis of legal documents and their respective translations provides ample instances of difficulties encountered by translators during translating legal texts and associated documents. For a comprehensive outlook of the problems, the problems are classified and discussed under three different study categories. The subcategories are **syntactic**, **semantic,** and **cultural** differences.

Difficulties encountered in Syntactic Level

Although an infinite number of words exist to express our thoughts and opinions, only a limited set of orders exist in a particular language to produce accepted sentences and utterances. The scope of syntax focuses on the rules, principles, and procedures that govern a sentence structure. In other words, syntax prioritizes the word order and how a sequel of words is connected in an efficient way to make a meaningful sentence.[6]

One of the biggest concerns a translator has to face in legal translation is the unique and atypical sentence structure followed in legal texts. The sentences in legal texts are characteristic of long and intrinsic word orders with few phrases embedded into one sentence. For instance, the residuary clause extracted verbatim from an individual will be stated as follows:

I give, devise and bequeath all of the rest, residue and remainder of my property which I may own at the time of my death, real, personal and mixed, of whatsoever kind

6 Noam Chomsky, *Syntactic Structures* (2015).

and nature and whatsoever situate, including all, property which I may acquire or to which I may become entitled after the execution of this will, in equal shares, absolutely and forever, to ARCHIE HOOVER, LUCY HOOVER, his wife, and ARCHIBALD HOOVER, per capita, to any of them living ninety (90) days after my death.[7]

If the sentence with its numerous phrases and clauses is surmised, in its entirety explains 'I give the rest of my estate in equal shares to Archie Hoover, Lucy Hoover, and Archibald Hoover, assuming they survive me by at least 90 days'. Hence, it is evident that the construction of legal sentences is much more different, inundated with a writing style compromising intricate patterns inherent to the legalese. In transferring such sentences, the translator has to overcome the elaborate surface sentence structure and complex nature. However, at the same time, maintaining coherence throughout the translation, sans any astray is significant in dealing with sentences of such intricate nature. For example, if the translator is translating a sentence from a murder report describing the incident, despite the complicated nature of the text, the translator should be consistent in the order of actions as of the words.

Apart from these phrases and clauses, a distinctive feature of the legal language is complicated –prepositional phrases.

According to Bhatia, complex prepositional phrases

7 Tiersma (n2).

follow the grammatical structure P.N.P. (Preposition + Noun + Preposition). 'By virtue of', 'in accordance with', 'for the purpose of' could be given as examples.[8] In translating the aforementioned clusters to the target language, the translator faces the dilemma of opting for a verb or verb(s) in the target language to transfer the precise meaning.

Furthermore, almost all the legal texts are compiled in Passive voice. Stanojevic claims that "Legal drafters instinctively stick to it, so both laws and court decisions generally contain a verb in the passive, especially when obligation or condition is imposed. They tend to create the impression that such rules are infallible as they occur without the influence of the human agent".[9] Hence, mostly passive voice is employed to add an impersonal and formal note to the tone of the text. In translating the text, the translator must stick with the source text sentence pattern and continue, although sentences written in indirect(passive) are challenging than the active.

Using formal words is another striking lexical feature in Legal English which a translator has to spend consider. According to Malinkoff (1963), the frequent use of the 'formal words' was initially done for completeness and perfectness. Examples for these Model verbs include; "shall" over "will". "liable" for "responsible" as well as

8 BourasAmel and Zouari A Ahmed, 'Difficulties Of Achieving Terminological Equivalence In Legal Translation' (University of KasdiMerbha Ouargla 2014).

9 Ibid

"deem" instead of "consider".[10]In such instances, the translator has to be cautious with the placement of such modal verbs, the role, and their tenses.

Difficulties encountered in Semantic Level

Whereas syntax deals with the proper sequence of wording, semantics concentrate on the meanings of the linguistic units. In other words, from the form to the meaning. Each and every notion and nuance behind units formulating logical sentences are examined under study field of semantics. The analysed data of the study indicates that the semantic aspects of the legal texts generate problems of much higher magnitude to the legal translator.

Although it is near impossible to achieve equivalence in translation, a translator attempts to reach word for word-level equivalence in translation. In achieving the meaning–balance in legal translation, one of the gaps translators has to bridge is finding functional and lexical equivalences in the target language, which can transfer the notion of the source text without any distortion to its meaning. According to the analysis, apropos to this, the problems translators encounter includes translating technical words, inability to use synonyms, contextual matters, loan words, neologisms, and the lack of an established terminology.

Legal language consists of jargon inherent to and confined within legal texts. M. Teresa Cabre defines

10 Ibid

terminology; "as a discipline, the terminology is a subject which is concerned with specialized terms; as a practice, it is the set of principles oriented toward term compilation; finally, as a product, it is the set of terms from a given subject field". [11]Therefore, in translating technical terms, the translator should be aware of the conceptual as well as the referential meaning it generates within the source text, and following that, he/she has to select the precise term from the target language.

In selecting the best possible terminology, the inability to employ synonyms is another issue the translator has to overcome. In a literary translation, the translator can prefer any appropriate word as he deems fit. However, this practice could not be executed in the domain of legal translation. For instance, although there is a myriad of synonyms available for the terms 'husband and wife', or the term 'innocent', the translator has to employ the exact term employed in the legal jargon of the target language.

Furthermore, the translator must be aware of the contextual meaning in searching for the equivalents in the target language. Contextual meaning refers to the circumstances which create the setting for the action to take place. For instance, the word 'bar', in a corpus, signifies few different meanings. In daily usage, a bar

11 Nematullah Shomoossi, 'Problems in The Translation of Legal Terms From Persian Into English' [2011] The International Journal - Language Society and Culture <https://www. researchagete.net/publications/2688133331> accessed 2 October 2020.

refers to an inn or a pub where drinks are served. However, in the legal jargon — the term implicates a group of lawyers that has a separate, specific term in the target language. Likewise, 'bench' has quite a few different meanings in the legal context, such as a metonym to indicate the judiciary members separately, while in common parlance, 'bench' is a wooden chair or only a piece of furniture.

On the other hand, English legal texts are abundant in loan words or borrowings from different languages, which have influenced their legal language formation. It contains an extensive account of foreign words, notably, words of Latin and French origin. For example, Latin borrowings such as '*Res judicata*', '*Bona fide*' and '*Mala fide*' as well as the French derivation of suffix 'ee' denoting an individual as the receiver of something, i.e. "lessee" meaning "the person leased to" could be seen in legal texts. Without the competence of these foreign languages, a translator has to overcome the conundrum of finding the exact technical meaning within the target language.

Another problem encountered by translators involved in legal translation as of the present study is the lack of established vocabulary. In such instances, the most noticeable feature is that the vocabulary is not up to date. Hence the translator must refer to multiple sources and persons before choosing a defined equivalent in the target language turning the translation process into a laborious and arduous activity.

Difficulties encountered in Cultural Level

From the meals prepared to enrich one's taste palate to clothing donned, social institutions, and communication styles —

culture is entwined with the very existence of human beings. Christina De Rossi interprets 'culture' as follows: "Culture encompasses religion, food, what we wear, how we wear it, our language, marriage, and music, what we believe is right or wrong, how we sit at the table, how we greet visitors, how we behave with loved ones, and a million other things".[12]A culture reflects characteristics inherent to a respective community and is specific to the particular community. Newmark defined culture as "the way of life and its manifestations that are peculiar to a community that uses a particular language as its means of expression".[13] The legal system of a country is also rooted in the culture of the respective community. As a result, the scope of legal practices adopted in different countries or communities vary accordingly. The history, evolution, factors affecting the diversity - all combined -influence the overall legal system practiced in a country. British legal system is built on common law the French have

12 Kawa Mirza Salih, 'Difficulties and Challenges of Translating Legal Texts from English into Arabic' [2018]<https://www.researchgate.net/publication/303765841_Difficulties_Encountered_in_Translating_Some_Legal_Texts_from_Arabic_Into_English>accessed 10October 2020.

13 Peter Newmark, *A Textbook Of Translation* (Prentice-Hall International 1988).

developed their legal system on statute law. On the other hand, the legal practice adopted in Sri Lanka is an amalgamation of Roman-Dutch law, English law, and customary law. The laws built upon different faiths and doctrines and different traditions and norms contain practices inherent to their own community whilst they showcase attributes that are untranslatable. In such cases the target language lacks a term to interpret the meaning of the legal concept within the source language. When such problems are encountered, the translator has to be circumspect about four aspects. (1) the cultural equivalent should provide a concise and clear justification to the source language legal term born from their inherent cultural heritage (2) the equivalent should make sense – telling, in the target culture and context (3) it should be in parallel with the legal practice of the target legal system. Most importantly (4) the cultural equivalent should not be influenced by individual judgments, opinions or perceptions. For example, the translator's perspective on the marriage customs of the source culture in consideration could not be an influential factor in deciding the cultural equivalent in the target language. Likewise, the cultural attributes of the respective legal systems pose a challenge to the translator.

Conclusion

Translation of legal documents is not a facile task. The translator has to adhere to a set of strict guidelines in the process. At the same time, the translator should be well-

versed and well equipped with the knowledge of the legal practices of the source and target texts in consideration. Additionally, the translator must be familiar with the legal practices and languages pertinent to the legal system. The culture entwined with the legal system has a profound impact on the translation. Therefore, the translator should be aware of the respective legal system, the legal language, and the culture native to them.

Furthermore, the translator with all the in- depth knowledge, should be objective. He/ she should manipulate the legal language as it suits and creates a remarkable output. It all depends on the translator's intent — his decisions and designs on the final production. At the same time, he/she should be objective - translation of legal documents should be conducted passively without allowing individual perspectives to shroud the writings. Most significantly, the translator should be accurate, precise, and concise while being impartial.

Legal Framework on Information Transparency in the Discharge of Public Projects; A Comparative Analysis in the SAARC Region

Chandana Jayalath*, Geethika Somarathana and Dinusha Jayathilake*****

Abstract

Making the particulars of public construction contracts is one proven way to help citizens to get what they are searching for in the discharge of public projects. There is considerable evidence that information transparency is potentially a powerful tool to reduce the impact of corruption. This research is to explore the legal patronage given to uphold the concept of information transparency and deepen the understanding of the level of information transparency in public sector projects in the SAARC region. The research entailed a thorough desk review on the existing legislative provisions for information transparency. It was proffered that transparency is driven by a gamut of factors and the level of transparency is found to be widely varying even with the region. The legislations have been observed to hold out solutions to some extent, but not without challenges.

Introduction

Transparency is one of the core principles of good governance. Information regarding public projects should be readily available to the interested parties such as parliamentarians, taxpayers as well as the general public. The notion is that there are a lot of hidden costs in the

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discharge of public funded projects and the process of contracts award, fund allocation, fund release is not that transparent. With this backdrop, one of the main legislations namely, Right to Information (RTI) Act No 12 of 2016 came into effect in Sri Lanka. However, there is no recorded comparison made to detect in terms of how each country has given emphasis. As such, this research problem is **"what extent the existing laws are efficacious in ensuring transparency in respect of their domestic public construction projects?"**.

Aim

The aim of the research is to find the ways of improving the information transparency of public sector projects in Sri Lanka. The

following objectives were set out in achieving this aim:

- Identify project information that are legally required to be released to the public as per the Right to Information Act 2016;
- Identify the regional benchmarks concerning information transparency in public sector projects;
- Map the information transparency requirements specified in the existing legislative provisions (mainly considered 5 South Asian countries, namely India, Pakistan, Bangladesh, Nepal and Maldives) and determine whether these requirements have been adequately met in the Sri Lankan legal arena.

Research Methodology

This research started with a qualitative method of desk review on the Right to Information Act 2016 of Sri Lanka with regard to public access of information and benchmarks of information transparency established in neighbouring countries. This desk review wholly depended upon the government published data online and the government websites that are mostly free to access and contains most prominent information.

Novelty of the research

The aim of this study is to examine whether laws related to information access indeed foster active transparency in its strictest sense and not just responsiveness. This paper details the findings from a qualitative research on the project information that are legally required to be released to the public followed by a discussion on regional benchmarks widely acclaimed in the SAARC region. Despite some obvious contextual differences between countries, there is no a priori reason to believe the outcomes will be different. The study will shed more light on the information disclosure, specifically across the different stages of construction projects. It will show the current level of adherence to information transparency. The work is novel providing meaningful insights into conceptual basis for a future detailed empirical analysis. Being a pioneering study, further research tailored to compare the approaches towards information

transparency in various sectors of the Sri Lankan economy would be novel. It also provides an impetus for necessary legal reforms in future.

Research limitations

This research is focused on the issue of transparency in the access, exchange and dissemination of information related to public funded projects exclusively from the public perspective. The nature of the research is review and explanatory without an empirical analysis to support the discussions. The results may not be generalized on a broader context of public procurement, either.

Literature survey

Freedom of Information (FOI) laws are the legal backbone for creating and safeguarding a basic level transparency. It is an essential right for every person[1]. FOI- type laws have been adopted by most countries across the globe[2].
Transparency is 'the availability of information about an organization or actor allowing external actors to monitor the internal workings or performance of that organization'[3]. This definition is generally in line with

1 David Banisar, *Freedom of information around the world 2006: A global survey of access to government information laws* (Privacy International 2006)
2 Jeannine E Relly and Meghna Sabharwal, *Perceptions of Transparency of Government Policymaking: A Cross-National Study* (Government Information Quarterly vol 26, 2009)
3 Stephan Grimmelikhuijsen and Albert Meijer, *'Effects of transparency on the perceived trustworthiness of a government organization: Evidence from an online experiment'* (Journal of Public Administration Research and Theory 2014) p129

how transparency is defined in the literature. A systematic literature review on 187 studies on transparency[4] reveals that most definitions address some core components, such the availability of information to 'outsiders', who use openness mechanisms to gain an insight into decision-making processes, operations, budgets or performance of a governmental body.

Providing information directly to a single requester is a rather narrow view of transparency. Generally, transparency refers to broader public and pro-active access to information. This can provide insight into how effective the chain of request to response is and offer a snapshot of the strength of openness culture within an organization. So far only the Worthy experiment included both of these critical elements of transparency: measuring public access via the law as against a non-legal ask, and also measuring the quality of the response to see if the organization goes further than the law requires.

With regard to public construction works, there is a strong case for governments to publish critical documents in the public contracting, including the contracts themselves. Such "open contracting" can improve decision making within the government, level the playing field for contracting firms, increase trust and competition, reduce prices, and ultimately improve the value for

4 M Cucciniello G Porumbescu and S Grimmelikhuijsen , *'25 Years Of Transparency Research: Evidence And Future Directions'* (Public Administration Review vol 77 2017)

money of outcomes[5].While the contract itself is only one document in the cycle of contracting, it holds critical details about the terms of the deal: what goods, services, or assets were bought or sold and for what price, and who the contractor is.

As Oyegoke[6] explains, transparency in procurement processes and procedures is essential because of the restrictions placed by national security, complex and continuously changing needs of government as well as the need for openness, competitiveness, accountability and non-discrimination. According to OECD (2003), transparent procurement procedures can contribute to a more efficient allocation of resources through increased competition, higher quality procurement and budgetary savings for governments and thus for taxpayers. Having the details of contracts in the public domain can improve competitive tendering by attracting bidders and demonstrating that the outcome is fair. This is critical for achieving value for money. Further, Oyegoke[7] elaborates that, procurement transparency is important in creating business excellence. The researcher highlights that, business excellence is satisfying the related stakeholders and by being transparent at both public and private sector procurement, organizations can achieve business excellence as well.

5 Kenny, Charles and Jonathan Carver, *'Publish What You Buy: The Case for Routine Publication of Government Contracts. CGD Policy Paper 011'*

6 Deng X and others, *'Transparency in The Procurement of Public Works'* (Public Money and Management 2010) p23

7 Ibid

However, the emphasis given to various elements in project progress varies globally. For example, UK procurement regulations and sample projects mainly focus on transparency during the competitive elements of procurement e.g., prequalification and tendering as opposed to transparency during the initial project identification and later post-completion project review phases[8]. There is a close relationship between the construction contract bonding system and transparency in public works, which policy-makers and officials need to be more aware of Xiaome et al, 2003. Well-organized works procedures, strict enforcement of rules and regulations, and transparent management of a project are important elements to discourage corruption[9]. Whereas, the EU public procurement rules seek to ensure that public sector bodies award contracts in an efficient and non-discriminatory manner. The directive imbibes the principle of equality and non- discriminatory. Moreover, for a system to be transparent, it should be accessible and generally available. Oyegoke[10] explains the EU procurement regulations where in Article 42 stipulates that all communication and information exchange chosen must be generally available and thus not restrict economic operators' access to the tendering procedure. Therefore, the tools to be used for communicating by electronic

8 M Dickson and others, *'Transparency in UK public construction procurement'* (CIB World Building Congress 2010)

9 Rumaizah, *'Transparency Initiatives (TI) In Construction: The Social Psychology of Human Behaviours'*, (ASEAN Conference on Environment-Behaviour Studies 2012)

10 Ibid 9

means, as well as their technical characteristics, must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use.

When elaborating the literature, it is evident that governments world-wide have adopted access-to-information laws. Especially with regards to public projects to demonstrate efficiency in government for the purpose of attracting investment critical to economic development. However, scholars have argued on the definition of transparency and it is evident that information transparency is being undertaken as an important aspect in public projects by world-wide governments.

Desk review

A desk review was undertaken to find out existing legislative provisions on Right to Information Act 2016 in Sri Lanka and the relevant information Acts in SAARC countries. The reason of selecting SAARC countries is because the sameness in social, cultural and economic background and most of the public project are undertaken more or less similar to Sri Lanka. Table 1 below shows the salient provisions cited in the RTI, 2016 in championing the right to information among citizens and fostering a disclosure friendly administrative culture among public authorities.

Table 1: Summary of right to Information Act 2016 in Sri Lanka

Article	Short title	Descriptor
3.1	Right of access to information	Every citizen shall have a right of access to information which is in the possession, custody or control of a public authority
5.1	When right of access may be denied	Personal information, the disclosure of which has no relationship to any public activity or interest, unwarranted invasion, undermining defence, territorial integrity or national security, is likely to be seriously prejudicial to Sri Lanka's relations with any State
7	Public authorities to maintain and preserve its records	It shall be the duty of every public authority to maintain all its records duly catalogued and indexed in such form as is consistent with its operational requirements
8.1	Ministers duty to publish a report	It shall be the duty of subject Minister to publish

		biannually a report in such form as shall be determined by the Commission as would enable a citizen to exercise the right of access to information granted under section 3 of this Act.
9.1	Duty of the Minister to inform public about the initiation of projects	It shall be the duty of the subject Minister, to communicate, three months prior to the commencement of a given project, to the public generally, and to any particular persons who are likely to be affected by such project all information relating to the project that is available with the Minister
23.2	Appointment of Information officers and designated officers	Every information officer shall deal with requests for information and render all necessary assistance to any citizen making such request to obtain the information
24.1	Procedure for obtaining information	Any citizen who is desirous of obtaining any information under this Act shall make a request in writing specifying the particulars of the information requested for.

27.2	Manner in which information is to be provided	Where an information officer is unable to provide the information in the manner requested for, it shall be the duty of such officer to consult the citizen and render all possible assistance to the citizen to determine an appropriate alternative means of providing access to the information and to facilitate compliance with such request
27.3	Entitlement	A citizen, whose request for information has been granted, is entitled to (a) inspect relevant work, documents, records; (b) take notes, extracts or certified copies of documents (c) or records; take certified samples of material; (d) obtain information in the form of diskettes, floppies, tapes, video cassettes or any other electronic mode or through printouts where

		such information is stored in a computer or in any other device
39.1	Offences	Every person who (a) deliberately obstructs the provision of information or intentionally provides incorrect, incomplete or inaccurate information; (b) destroys, invalidates, alters or totally or partially conceal information under his or her custody, or to which he or she has access to or knowledge of due to the exercise of his or her employment in such public authority; (c) fails or refuses to appear before the Commission when requested to do so by the Commission; (d) appears before the commission, and fails or refuses to be examined by the Commission or to produce any information which is in that person's possession or power or deliberately provides false

		information under oath or affirmation; (e) fails or refuses to comply with or give effect to a decision of the Commission; (f) resists or obstructs the Commission or any officer or other employee of the Commission, in the exercise of any power conferred on the Commission or such officer or employee, by this Act; (g) discloses any information in contravention of the provisions of section 12(7) of this Act, commits an offence under this Act.

Findings and discussion

Requirements that enhance information transparency were mapped with the existing Right to Information Act 2016 against the regional benchmarks (5 South Asian countries) and determined whether these requirements have been adequately met in the Sri Lankan law. Table 2 shows the pattern of existing Right to Information Act 2016 with the regional benchmarks.

Table 2: Comparison of Benchmarks

	Short Title	Sri Lanka	India	Nepal	Pakistan	Bangladesh	Maldives
1	Right to Information						
2	When Access is denied						
3	Public Authority						
4	Publishing of Records						
5	Appointment of Officers						
6	Process of Obtaining Information						
7	Protection of Individuals	x	x	x	x	x	x
8	Declaration of Public Record						
9	Computerization ad Voluntary Disclosure of Information		x	x		x	x
10	Excluded Organizations	x		x	x		
11	Compensation for incorrect information	x	x		x	x	x
12	Information Correction	x	x		x	x	x

13	Partial Disclosure	x	x	x	x		x
14	Offenses			x		x	

It seems few important aspects with regard to transparency have not been addressed by the Right to Information Act in Sri Lanka. None of the countries emphasizes on individual protection via Right to Information Acts.

The implementation of Right to information Act is mainly focused a transparency, accountability and good governance to ensure the rights of the citizens of the country. It shows country driven by democratic principles. With this environment, recently introduced Right to Information (RTI) Act No 12 of 2016 came into effect. This research is focused on the issue of transparency in the access, exchange and dissemination of information related to public funded projects exclusively from the public perspective.

Conclusions and Recommendations

Transparency is defined here as providing insights into matters that are relevant for the parties involved. Parties such as public and private clients, general contractors and subcontractors can, with the right information, make well-founded decisions with regard to the transactions that they agree with one another. Moreover, the transparency contributes to being answerable to the government and the general public. In this article we focused on the

transparency issues between public clients and executing parties in the Sri Lankan construction sector.

Gauging the perception of industry practitioners as to sufficiency of information transparency requirements specified in local laws in achieving "transparency" could be a further research in order to locate whether the legal requirements have not been met, the barriers to be dealt with and what kind of initiatives to be taken up. This could be the centrepiece of the next analytic process, because it allows moving from simple description of the theory to explanations of why the public interests matter at all times. A questionnaire survey helps validate the findings and in addition, a series of in- depth face to face interviews and group discussions could be conducted, where appropriate, with selected key informants and stakeholders in the construction sector and public procurement regime, in order to identify the barriers and initiatives to remedy the situation.

The Doctrine of Indefeasibility of Title in Sri Lanka: A Comparative Study with The Law of The United Kingdom and Australia

Maleesha Fernado*

Abstract

A definite title to one's land is essential before a person can reap the full benefits of such land. In order to obtain a definite title to a land, a landowner must register such land legally in order for him to fully enforce his rights to such land. The title registration system in Sri Lanka introduced by the Registration of TitleAct No. 21. of 1998 aims to provide such secure land titles to proprietors by obtaining an indefeasible title to land. The research explores the doctrine of indefeasibility of title in Sri Lanka with special reference to the doctrine's application in the United Kingdom and Australia. The main objective of this research has been to ascertain as to what extent the judicial and legislative developments in Sri Lanka concerning title by registration has achieved the indefeasibility of title principles that are intrinsic to the Torrens system of land registration and whether such system secures a proprietor's title. The methodology employed uses a mix of both doctrinal research methods such as the reviewing of relevant literature, laws and policies in Sri Lanka in comparison to the United Kingdom and Australia, and empirical research methods to collect data and other information on the title registration process via the use of interviews with officials from relevant government departments. The study will then propose relevant legal and administrative solutions to counteract the obstructions that are hindering the enforcement of the doctrine of indefeasibility of title in Sri Lanka.

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Introduction

Article 17 of the Universal Declaration of Human Rights declares that: "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property". One of the major challenges Sri Lanka faces as a developing nation at present is to transform its economic policies to create a positive and sustained economic growth that will facilitate Sri Lanka to ward off financial calamities, eradicate poverty and lead to the nation's prosperity. This research is concerned about one of the most significant obstacles to economic progress in Sri Lanka which is none other than the turbulent and unjust state of the land market, which is further promulgated by and disguises itself under the protection of an outdated law under the deeds registration system in Sri Lanka under the Registration of Documents Ordinance Act No. 23 of 1927.

In order to address the challenges posed by land registration, the Registration of Title Act No. 21 of 1998 (hereinafter referred to as the Title Registration Act) was enacted to not only promote the three principles embodied by the doctrine of indefeasibility of title, namely the Mirror Principle, Curtain Principle and Insurance principle, but to also provide a simple, secure and systemized land title registration scheme. An indefeasible title to land essentially signifies that title in such property cannot be defeated, made void, cancelled by any past event, error and/or omission in the title. The research also addresses the concern that whereas the Title Registration

Act may have succeeded in unifying the land registration process, whether this unification has enhanced efficiency, transparency and accountability in title registration in Sri Lanka.

The doctrine of indefeasibility of title was brought in by the Registration of Title Act of 1998 and has not been as successful as its predecessor models such as the Torrens Title registration system in Australia. The lack of proper implementation of the law and the presence of countless loopholes in the law could render the whole doctrine of indefeasibility quite useless. The malfunction of this market is not only an obstacle for the state's economy but also for the ordinary citizens whose sustenance is affected by legal uncertainty and fraudulent claims.

By reviewing relevant literature, laws, policies and the practical approach to indefeasibility of title in Sri Lanka as well as the United Kingdom and Australia this research will explore and investigate the title registration in Sri Lanka and its implementation in practice to ascertain whether it has attained its objective of being a unifying land registration scheme that ensures an efficient, secure and simple system of registration of title of lands in Sri Lanka. The study will also propose and recommend legislative and policy measures and amendments to the Act that are necessary to ensure that Sri Lanka has a transparent and cost-effective land title registration regime.

The Doctrine of Indefeasibility

The doctrine of indefeasibility of title is the core of land title systems which incorporates three principles; commonly referred to as, the mirror principle, which holds that the register is an accurate and up to date mirror of the state of the land title, the curtain principle, which embodies the principle that the need for a purchaser to investigate the history of the past dealings of a land or title depicted in the register is dispelled with, and the insurance principle, where the state is said to guarantee the accuracy of the register and any person suffering a loss as a result of an inaccuracy in the register due to fraud or error is compensated by the state.

These three principles together form the doctrine of indefeasibility of title and is the apex of the land title registration systems. The Torrens' system is a system that operates as such. The doctrine of indefeasibility is a central part of the Title Registration Act of Sri Lanka as a result of the Title Registration Act, which is based on the Torrens system of land registration.

Literature Review

Genesis of the Doctrine of Indefeasibility

In prescribing for a land titles system, Sir Robert Torrens anticipated that all interests could be entered on the registry for each piece of land to which they applied,[1] making each title indefeasible. Despite his vision, the first time "indefeasibility of title" was used to describe the profound effect of land titles registration in the practise of conveyance and substantive real property law emerged in 1859, after South Australia's legislation had been adopted. Thereafter, Torrens used the term when describing the Real Property Act in pamphlets.

Origin of the term 'Indefeasibility'

The Torrens title claims to be indefeasible, however the term "indefeasible title" was not widely used in the inception of the Torrens title registration system. The three associated principles of indefeasibility of title, the mirror principle, curtain principle and insurance principle has not been codified in any early enactments by neither Australian nor English statutes. There has been much speculation as to the origin of the term, Theodore Ruoff an Englishman who later went onto be the Chief Registrar of the English land titles system is credited with first using the term "indefeasibility of title", however

1 Rosalind F Croucher, *''Inspired Law Reform or Quick Fix?' Or, 'Well, Mr Torrens, what do you reckon now?' A Reflection on Voluntary Transactions and Forgeries in the Torrens system'* [2009] 30 Adel L Rev 291.

maintained that the term originated in the Canadian Supreme Court decision of *Canadian Pacific Railway v Turta*[2]. Ruoff was given much of the credit as it was, he who popularized the term "indefeasibility of title" and coined the terms mirror principle, curtain principle and insurance principle.[3]

The Mirror Principle

Ruoff describes this principle in his book as "the proposition that the register of title is a mirror which reflects accurately and completely and beyond all argument the current facts that are material to a man's title."[4] Ruoff states that the register book is a reflection of facts that are material to a land owner's title[5], however he goes onto later affirm that although the register claims to be 'correct and complete' that it is not always the case.[6] Ruoff identifies that while the land register is of paramount importance and should be a mirror reflection of an owner's land, one should not completely rely upon it.[7]

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2 *Canadian Pacific Railway Company v Turta* [1954] SCR 427; Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 8, 9.

3 Kim S Korven, *The emperor's new clothes: the myth of indefeasibility of title in Saskatchewan* (University of Saskatchewan, 2012) 28 <https://harvest.usask.ca/handle/10388/ETD- 2012-10-522> accessed 20 May 2018.

4 Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 8.

5 Ibid 16

6 Ibid 17

7 Ibid 81

The Curtain Principle

As per Ruoff the curtain principle ensures "simplicity in the general operation of the Torrens system" To prove his point Ruoff draws judicial conclusions from two cases[8], stating that:

"The register was not to present a picture of legal ownership trammelled by all sorts of equitable rights in others, which those who dealt with the registered proprietor must take into account"[9]

Furthermore, Lord Watson in *Gibbs v Messer*[10]affirmed that:

"the main object of the Act is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity."[11] Thereby simplifying the duties of a disponee or his legal adviser by impeding out dispensable information from their view.[12]

8 *Wolfson v RG of New South Wales* [1934] 51 CLR 300 [308], quoted in Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 8,9; *Gibbs v Messer* [1891] AC 248 [254] quoted in Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 28.

9 *Wolfson v RG of New South Wales* [1934] 51 CLR 300 [308].

10 *Gibbs v Messer* [1891] AC 248 [254].

11 Ibid

12 Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 28.

The curtain principle does not act as a complete barrier in itself as it allows parties to look into documents behind a title such as the survey plans to ascertain the genuineness of the title.[13]

The Insurance Principle

As per Hogg[14], England and Ireland use the term 'insurance fund' in their land registration statutes, whereas the Torrens system in Australia uses the term 'assurance fund' in their land registration statutes[15], however Ruoff chose to label the third principle of the Torren's system as the 'insurance principle' substituting insurance for assurance. Ruoff has been criticized for not being able to distinct between the 'insurance principle' and the assurance fund and its implementation.[16]

The Torrens system in its initial stages of adoption received a lot of hostility by its critics this is mainly because there was always the possibility that innocent owner could be deprived of their land rights surreptitiously as the system could be manipulated by exploitative individuals.[17] Therefore, the assurance fund

13 Kim S Korven, *The emperor's new clothes: the myth of indefeasibility of title in Saskatchewan* (University of Saskatchewan, 2012) 28.
14 James Edward Hogg, *Registration of Title to Land Throughout the Empire* (Toronto: Carswell, 1920) 385.
15 Theodore BF Ruoff, *An Englishman Looks at the Torrens system* (Sydney: The Law Book Co of Australasia Pty Ltd, 1957) 32.
16 Kim S Korven, *The emperor's new clothes: the myth of indefeasibility of title in Saskatchewan* (University of Saskatchewan, 2012) 34
17 John Baalman, *The Torrens system in New South Wales* (Sydney: The Law Book Co of Australasia Pty Ltd, 1951) 58.

was adopted with the purpose of assuring – not insure- land owners and interest holders that they would not suffer losses as a result of the Torrens system.[18]

Korven notes that contrary to what Ruoff claims, the Torren system never 'carried on literally as an insurance undertaking' often requiring the party who was benefitted out of the other party's loss to provide for the indemnity.[19]

Thereby, as per the Torren's system not everyone suffering a loss could claim from the fund as the Torrens system does not instil an insurance fund:

Once the collection of funds for the Assurance Fund by New South Wales has ceased in 1941, over 750,000 pounds has been paid into the fund whereas payments out of the fund has not exceeded 21,000 pounds. In roughly eighty-five years less than three percent of the funds have been paid to the claimants.[20] The remainder was transferred to the government's general revenues. Even though the government continued to assure it would fund claims from its general revenues given the figures the likelihood of it happening in any substantial amount was very small.[21]

As pondered upon by Korven, one of the reasons why the

18 Kim S Korven, *The emperor's new clothes: the myth of indefeasibility of title in Saskatchewan* (University of Saskatchewan, 2012) 35 <https://harvest.usask.ca/handle/10388/ETD- 2012-10-522> accessed 20 May 2018.
19 Ibid
20 Ibid 36
21 Ibid

funds remained solvent was because the Land Title's staff was stringent in the examination and acceptance of any instruments.[22] Additionally, the written policy which states that staff should act to avoid errors and claims against the fund ensures that very few substantial errors are made in registration.[23]

Findings and Discussion

Legislative and Judicial developments in Sri Lanka concerning the Doctrine of Indefeasibility of Title

The Doctrine of Indefeasibility of Title in Sri Lanka

In Sri Lanka registration is said to confer an indefeasible title which is free from adverse claims and encumbrances not stated in the register. The registered title is guaranteed by the state to be good against the world in the absence of fraud or other circumstance as laid down by the Title Registration Act. The doctrine of indefeasibility is incorporated within the provisions of the Registration of Title Act No. 21 of 1998 Sri Lanka. Due to the absence of a statutory definition or case law pertaining to the concept of indefeasibility and title registration in Sri Lanka, it relies on definitions followed in Australia[24]

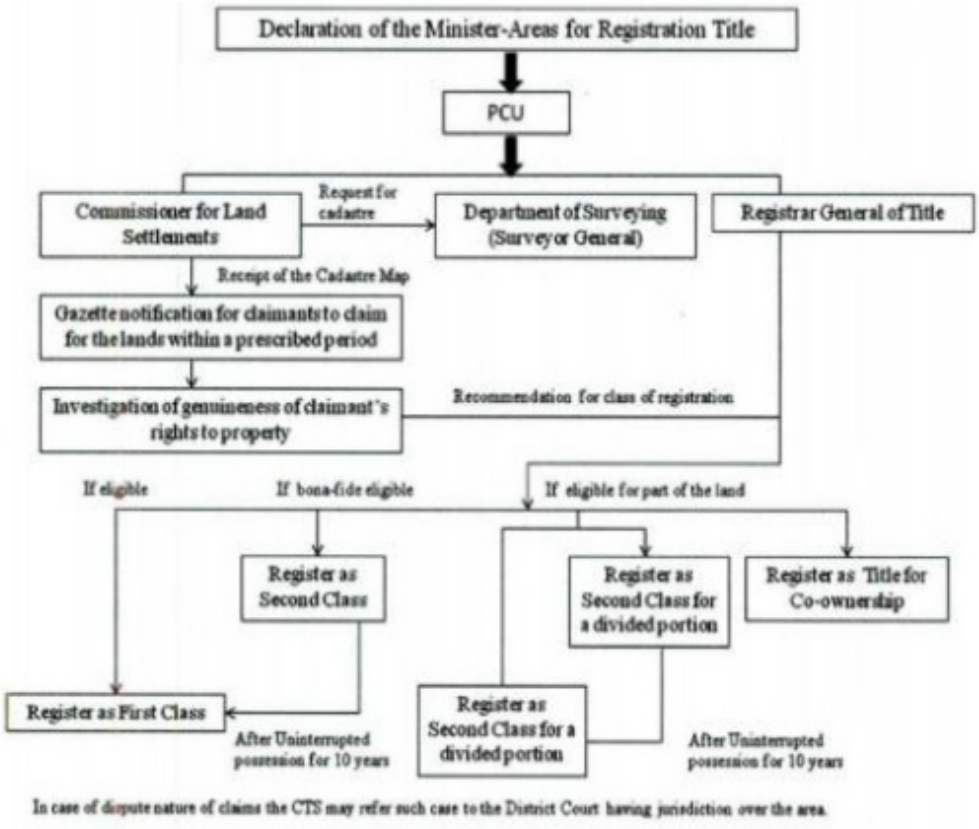
22 The Land Titles Act 1906 Saskatchewan, s 78; *Ibid* 37.

23 ES Collins, *Land Titles in Saskatchewan – a guide to registrars and their staffs* (Regina: Land Titles, 1966) 23.

24 Fernando, Face to face interview with Dharmapala, Commissioner of Title Settlement, Department of Land Settlement, Sri Lanka in consultation with Silva, Legal Officer, Department of Land Settlement, Sri Lanka (Land

which in turn relied on the New Zealand case of *Frazer v. Walker*[25]which describes that (indefeasibility of title is): "the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration".

Title Registration Process Figure 1.1



Source: Perera, 2010

The register of titles in Sri Lanka includes all encumbrances relating to a plot of land and the key

Commissioner General's Department Battaramulla, 23 July 2018).

25 [1967] AC 569

features such as all interests in a property, including transfers, leases, mortgages, covenants, easements, resumptions and other rights in a single Certificate of Title thereby acting as a perfect mirror of the title as expected by the doctrine of indefeasibility. Thereby, the need to look beyond that register is not felt in the Sri Lankan context which makes the Sri Lankan title registration scheme also in line with the curtain principle. However, with regards to the insurance principle the Sri Lankan Title Registration context practically does not include the insurance principle as a core element, even though it is recognized in the Act as so. When examining the provisions of the Act – Sections 58, 59,60 and 62 read together - focussing on the insurance principle it can be clearly seen that the Act explicitly recognizes an assurance fund to provide for any indemnities that may occur in the part of the state as a result of the title registration and further recognizes that such indemnities will be curbed via the assurance fund.

However, even though the Act clearly stipulates as to the existence of such 'assurance fund' in the present scenario as stated by the Assistant Commissioner of Title Settlement in the Land Settlement Department such fund does not exist thereby the insurance principle embodied via the concept of indefeasibility in the Act (through the operation of Sections 58, 59, 60 and 62) is not in practice in the practical scenario. So, this brings out the very pertinent issue as to how a person in such a scenario will be indemnified. With the only available option to a victim who loses their land due to an error in registration or

fraud being the ability to apply to the land settlement for a change in the title and this change can occur after an investigation Registrar General can amend the register to the correct position or if it is an error in the survey process survey general can amend the map as so, otherwise the option of going to courts (District Court of Sri Lanka) is available for the change is the registrar sought for or against a fraudster who committed the title fraud.

The Sri Lankan government is unable to maintain a separate fund as an assurance fund much like the Torrens system on which the Title Registration Act is based on. So currently if a party fraudulently deprived an innocent purchaser of property, the only available remedy for such party is to file an action against such fraudulent party in a court of law (ideally in a District Court of Sri Lanka) and thereafter seek indemnification through such fraudulent party or apply to the Land Title Settlement department to have such title reverted back to its original status, thereby the register will be amended to its earlier position. However, if the error or omission occurred due to the registrar as per Section 58 of the Act, in the absence of an assurance fund, it is not possible for a victim who suffered a Section 58 loss to be indemnified if the title cannot be reverted back to the original owner.

The Sri Lankan Act is also not clear as to whether a person registered under title registration obtains immediate indefeasibility or deferred indefeasibility, although what is now currently being used in practise is

immediate indefeasibility. The Sri Lankan Act on title registration much like its Australian counterpart does not specify on whether indefeasibility extends to all terms in a registered document such as covenants once it is registered. The Sri Lankan Act is silent as to this matter but if any doubt were to arise the Australian position on extending indefeasibility to registered documents would prevail as discussed under the subheading of 'The Doctrine of Indefeasibility of Title in Australia' which is a subheading under this chapter.

With regards to the application of adverse possession in title registration, title registration based on prescription is recognized in Sri Lanka and via the operation of the Title Registration Act, two types of titles have been recognized, namely, 1) Absolute Title 2) Possessory title, and a person successful in claiming for title registration based on a 10 year prescription period will obtain a possessory title and not the absolute title, and only after obtaining such possessory title can a person apply for the absolute title which will be granted automatically after 10 years passing of such application made for absolute title provided that no disputes to the contrary arises during that period of time.

The enforcement of the Doctrine of Indefeasibility of Title in Sri Lanka in comparison to other jurisdictions such as the United Kingdom and Australia.

The Doctrine of Indefeasibility of Title in Australia

Land tenure systems dealing with ownership of land in Australia include:

General Law ('Old System') Title, Torrens ('Real Property') Title, Strata Title, Native/Aboriginal Title and Maori Title, and Possessory Title,[26]the focus of this study is however on the Torrens title and more specifically on the principles of indefeasibility incorporated in the Torrens title. In Australia a contract of sale for real property does not suffice in itself to transfer the property. After the contract has been signed, the transaction between the parties needs to be registered in the state or territory of the relevant land title office where the property is located. Once registration is completed, the property transfer is finalized.[27]

The Torrens System has simplified the process of transacting with land, as it depends on the doctrine indefeasibility of title, where a registered interest is given priority over all other interests. Thereby, allowing property purchasers to rely entirely on title registration to ascertain ownership or interest in the real property. Therefore, the need to investigate whether the prior transfer was valid is dispelled with, providing a higher level of security in real property transactions reinforcing the mirror and curtain principle.

In Australia there are exceptions to the concept of indefeasibility of title, which differ from each state and

26 Legal Vision, 'What is indefeasibility of title' (Legal-Vision Australia) <https://legalvision.com.au/q-and-a/what-is-indefeasibility-of-title/> accessed 23 June 2018.

27 Ibid

territory. Some of the exceptions include: fraud; forgery; prior registered interests; prior certificates of title; or false descriptions. Therefore, if a title can be proved to have been obtained by fraud, the court can reverse such registration thereby ensuring the insurance principle.

Australia too follows the principle of immediate indefeasibility much like Sri Lanka as enumerated in Section 45 of the Real Property Act 1900.As to whether all terms in a registered document would become indefeasible upon registration, it was discussed in the Australian case of *Mercantile Credits v Shell Co of Australia*[28] that if a term is closely linked to the estate or interest (that is to say it is part of the interest), the indefeasibility of the registered instrument will thereby extend to the term. On the other hand, if the term is a personal term that does not affect the estate or interest (such as in the case of a covenant of guarantee), the indefeasibility will not extend, this was further affirmed in the case of *Karacomiakis v Big Country Pty Ltd*[29]where the court held that the covenant to pay rent is an indispensable part of the interest created at the time of registration.

With regards to adverse possession, in Australia, there have been divergent approaches to adverse possession (both with regards to the common law system for lands and title by registration). Currently, the Australian approach

28 (1976) 136 CLR 326.
29 10 BPR 18, 235.

to adverse possession is diverse, contradictory and incomplete. Even within a state, irregularities exist. For instance, in New South Wales Australia it is possible for a person to acquire title by adverse possession (as statutorily modified), however, is barred from acquiring a prescriptive easement over Torrens title land,[30]although in South Australia it is challenging for an adverse possessor to acquire Torrens title land, it is however possible to acquire a prescriptive easement.[31] Such inconsistencies do not herald well for the implementation of the doctrine of indefeasibility.[32]

The Doctrine of Indefeasibility of Title in the United Kingdom

The United Kingdom has its own land registration practises and is governed by the Land Registration Act of 2002.The difference between the Torrens system of land registration in Australia and the law in the England and Wales is not very vast. The land law in the United Kingdom does not ensure full indefeasibility unless and until - especially in the context of overriding interests – all interests and encumbrances are registered. In the United Kingdom an overriding interest is an interest in a piece of land that need not be registered to bind a new owner although in conveyancing all interests and rights

30 *Williams v State Transit Authority of New South Wales* [2004] NSWCA 179; [2004] 60 NSWLR 286.

31 *Golding v Tanner* [1991] SASC 3013; [1991] 56 SASR 482.

32 Marcia Neave, *'Towards a Uniform Torrens System: Principles and Pragmatism'* (1993) 1 Australian Property Law Journal 114; Susan MacCallum, *'Uniformity of Torrens Legislation'* (1993) 1 Australian Property Law Journal 135.

over a piece of land have to be written on the register entry for that land.

One of the aims of the Land Registration Act 2002 is to reduce the number of overriding interests and to replace as many as possible of them with register entries. This is in line with its overall objective of making the register a complete record of title as practicable.

With regards to adverse possession, it is to be noted that, adverse possession has been statutorily constrained in the English title- by-registration system. The situations in which an adverse possessor may have an opportunity to become the registered proprietor notwithstanding the issuance of a counter notice is subject to three exceptions.[33]Whilst the adverse possessor must prove adverse possession for 10 years and the application of one of the three exceptions.[34]

The first exception is where attempting to disposes the applicant by the registered proprietor would be unreasonable due to equity by estoppel and the situation is such that the registered proprietor ought to be the applicant.[35]The exception is however subject to the nature and extent of the law of estoppel in the course the application was submitted. Taking into consideration the fluidity of estoppels in English law, commentators are of the view that is not quite clear whether an adverse

33 Land Registration Act 2002 (UK) chap 9, sch 6, para 5(2)-(4).
34 Land Registration Act 2002 (UK) sch 6 para 1 and 5.
35 Land Registration Act 2002 (UK) chap 9, sch 6, para 5(2).

possessor would succeed.[36]Further, the minimum equity requirement could signify that a remedy for an applicant will be awarded through monetary compensation over registration, as the legislation states that the applicant must be registered.

The second exception applies when the applicant is entitled to be registered as the proprietor of the estate due to different reasons.[37]The Law Commission was of the opinion that this would arise in instances such as when the applicant was already entitled to the land under a will or intestacy, or the applicant was the purchaser of the land who had moved onto the land but the legal estate was not transferred to him or her.[38]

The third exception applies when a reasonable mistake has been made by a neighbour with regard to a boundary of a particular land.[39] The law allows an owner occupying a land that was not of his/her belonging, where he/she mistakenly and reasonably believed for even a minimum of 10 years that the exact boundaries of that particular plot of land has been fixed, to be registered as the proprietor of that plot of land.[40]

The Land Registration Act 2002 safeguards the interests

36 Martin Dixon, *Modern Land Law* (Routledge, 7th ed, 2010) 429.

37 Land Registration Act 2002 (UK) chap 9, sch 6, para 5(3).

38 Law Commission (UK) and H M Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, (Law Com No 271, 2001).

39 Land Registration Act 2002 (UK) chap 9, sch 6, para 5(4).

40 Kevin Gray and Susan Francis Gray, *Elements of Land Law* (Butterworths,2001) 192.

of the registered proprietor by providing means to repossess the land in such instances. In the past, adverse possession was mainly used to address disputes relating to boundaries,[41]the first two exceptions thereby serve no purpose. The two exceptions are a repetition of the position before the Act was passed. The effective application and operation of estoppel outside property law;[42]and the second exception which guards a possessor who has a legitimate source of entitlement outside legislation, the protection afforded to the registered proprietor will not override a possessor, where a possessor has a legitimate source of entitlement outside the legislation, the protection of the registered proprietor will not incapacitate such entitlement.

Most commentators are of the view that the statutory scheme of adverse possession has been accepted as a mean to adjust property law concepts to fit into title by registration. As land law as it stands today is no longer governed by possession and relativity of title, the indicator of ownership or dominion is clearly registration.[43]

Amongst many other measures taken by the Land Registry of the United Kingdom, a designed software package is used by the Land Registry to minimise acts of

41 *Norton v London & North Western Railway Co* [1879] 13 Ch D 268; *Marshall v Taylor* [1895] 1 Ch 641; *Neilson v Poole* [1969] 20 P & CR 909; *London Borough of Hounslow v Minchinton* [1979] 74 P & CR 221

42 Robert Megarry, Charles Harpum, William Wade, Stuart Bridge, Martin J. Dixon, *The Law of Real Property* (Sweet & Maxwell, 8th ed, 2012) 45-6.

43 Kevin Gray and Susan Francis Gray, *Elements of Land Law* (Butterworths, 2001) 444.

fraud committed by its staff. In England the Land Registry documents are not notarially executed. In the United Kingdome a solicitor who commits an act of fraud or aids in such act will be prosecuted for fraud and the Law Society will take disciplinary action against such solicitor & dis-enrol the solicitor from the roll of solicitors.[44]

In the United Kingdom a solicitor cannot practice without the annual practising certificate issued through the Law Society. Any person who suffered as a result of a fraudulent act of a solicitor will be compensated by the Law Society's compensation fund which is funded by the contributions of solicitors when applying to the Law Society for the renewal of the annual practicing certificate. Due to a solicitor's negligence, a client has suffered some losses in a transaction; such client can make a claim against the indemnity insurance policy of the solicitor. Without having an indemnity insurance policy, a solicitor is not allowed to practise in the United Kingdom. Solicitors working for a firm are covered by the firm's insurance policy.[45]

44 Sunil Foster, 'Advantages of a Computerised Land Registration Scheme with measures to combat Land Registry Fraud' *The Island* (Sri Lanka, 22 January 2011).

45 Ibid

Recommendations and Conclusion

Eliminating the legal and practical limitations that hinder the Doctrine of Indefeasibility of Title: Recommendations to Title Registration in Sri Lanka

Digitalized Land Registration System

The digitalization of the title registration process could be suggested as a feasible measure to counteract security issues in the transfer of land, currently the Surveyor Generals department in working on making the cadastre maps available online for the public to access,[46]if implemented this could aid interested parties could view the lot in which they are interested in and leads to less land frauds occurring, as in the deed system the Notary nor the Transferee will be fully aware as to the extent of such lots in reality, and the online cadastre map assures the extent of such lots.

Further the digitalized system should include an online communication mechanism that for departments involved in the Title registration process, such as the Land Title Settlement Department; Surveyor Department; Register General's Department; Land Commissioner General's Department and the BimSaviya Regional offices present throughout the country, to communicate as well as share records pertaining to Title registration since currently

46 Fernando, Interview with Sarath, Senior Superintendent of Surveys Title Registration, Survey Department, Sri Lanka (Survey Department Narahenpita, 31 May 2018).

such sharing of documents still take place via post, which is very inefficient as it takes up a lot of time, establishing such system would make the process of title registration more efficient.

Additional elements of such digitalized land system would include the taking of digital fingerprints of transferors and transferees, so as to prevent fraud in subsequent transfers, as a digitalized fingerprints would further secure the title registration process and further, by providing an online context where applicant for title registration can see which step of the title investigative process would further improve the efficiency of the process as applicants can submit relevant documents depending on which stage they are in. The stages of title registration in Sri Lanka being demarcation of boundaries, adjudication to determine ownership of lands, cadastral surveying of lands and then the registration process where the details collected are entered and finalized into the land title register.

Reforms to the law on Title Registration and Administrative Structure

Definition for 'Title Fraud'

A rigid definition to 'title fraud' should be introduced in the Title Registration Act so far most jurisdictions including that of Australia and the United Kingdom has been relying on case law to define 'title fraud', but the outcome of these decisions vary from one case to the

other. By having one definition for title fraud, all instances of title fraud would be approached in a similar manner; this provides proprietors with an assurance against perpetrators of land fraud. The Canadian approach to title fraud which states that title fraud occurs when "the ownership or title of a property is fraudulently changed or documents are forged to allow a fraudster to illegally sell or refinance the property"[47]can act as the basis for such definition considering Canada's excellent track record with regards to having a secure title registration system.

A Third Category of Title

Currently there are only two categories of title in Sri Lanka: the first-class title known as the Absolute title and the second-class title known as possessory title.[48]However as pointed out in Chapter 4.3.3 at certain

47 FCT, 'Title Fraud' (FCT Canada) <https://fct.ca/property-owners/title-fraud/> accessed 1 October 2018.

48 Fernando, Face to face interview with Dharmapala, Commissioner of Title Settlement, Department of Land Settlement, Sri Lanka in consultation with Silva, Legal Officer, Department of Land Settlement, Sri Lanka (Land Commissioner General's Department Battaramulla, 23 July 2018).

times it can be quite difficult for the Land Settlement Department to determine instances of ownership which do not fall under the purview of either one the aforementioned categories, therefore it is essential that rights of owners of such property or persons occupying such land be preserved as well.

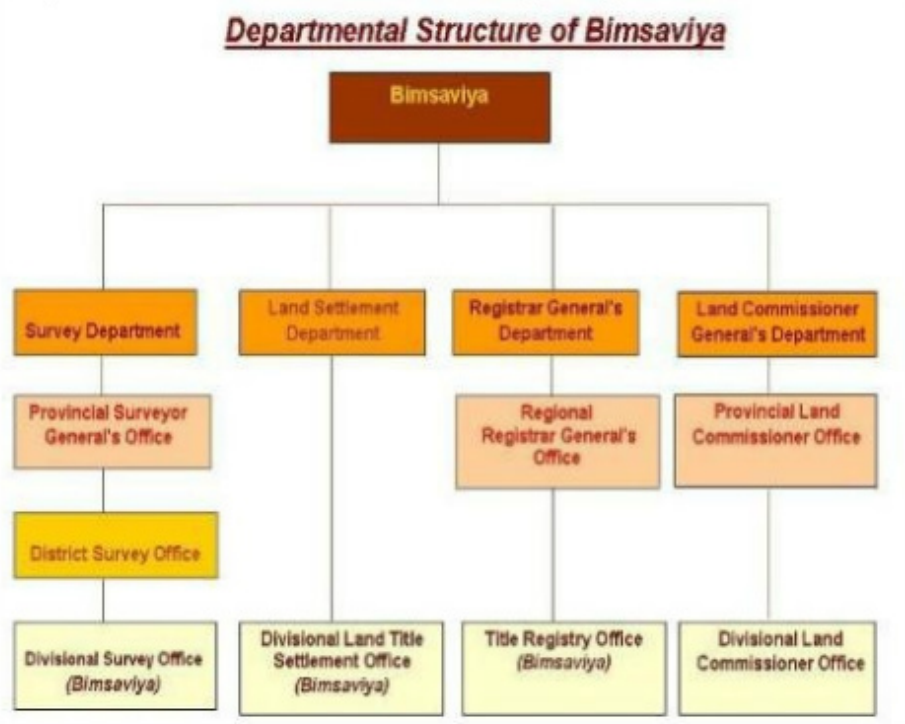
In order to preserve such right a third category of title needs to be introduced, this category of title can be a temporary title in the form of a 'Rights Title' where in the absence of proof of ownership of such a person his/her rights to such lands are recognized up until such dispute to ownership of such lands has beenresolved in courts, so that during the subsistence of a court case to determine ownership to a land the rights of the occupants of such land are not compromised, the third category of title can be applied to and obtained by an application to the Land Settlement Department where after a thorough investigation as to any claim made, a 'Rights Title' can be afforded to a deprived party.

Unification of Departments Involved in Title Registration

A title registration system that provides an indefeasible title to property cannot be fully enforced without a proper title registration process; therefore, it is essential that while the law should sufficiently address title registration concerns the administrative process of title registration should also be in line with such standards. Currently there

are four institutional department involved in the title registration process.

Departmental Structure of BimSaviya Figure 1.2



Source: Registrar General's Department Website

The overwhelming number of Governmental institutions involved in the title registration process as displayed in figure 1.1 can be identified as a hindrance to effective title registration.[49]In Thailand only one institution which is the "Department of Lands" acts as the implementing agency of land titling. The Land Department in Thailand is the government agency responsible for issuance of land title deeds, registration of real estate transactions, land topography and cartography matters thereby this leads to

49 Fernando, Interview with Sarath, Senior Superintendent of Surveys Title Registration, Survey Department, Sri Lanka (Survey Department Narahenpita, 31 May 2018).

the smooth functioning of such procedure as only one government department is involved. The presence of many governmental institutions involved in the process of title registration in Sri Lanka is a liability to the effective implementation of this programme, as of 2016 only 539,359 land parcels (including state lands) have been registered under the Title Registration Act as opposed to the 12 million land parcels present throughout the country, and therefore the total number of land parcels registered had been just 4 percent of the total lands present throughout the country even within a period of 18 years as of 2016.

Alternative means to finance Assurance Fund

It has been well established throughout the research that the absence of the assurance fund within the title registration scheme is a major drawback as it defeats one of the key principles of the doctrine of indefeasibility of title which is the insurance principle. This is because the government had not allocated a separate fund for the purpose of an assurance fund even though the Act explicitly states such, one such way to resolve this matter is to introduce an alternative funding scheme for the assurance fund. It is well known that title registration process is done free of charge and the title certificates are issued on a non-payment basis, however if the land title settlement department were to charge a fee from proprietors when titles are being issued such fee can be allocated to form the assurance fund, thereby satisfying the insurance principle which the Torren's system sought

to establish with the introduction of the title registration system.

Conclusion

In conclusion, it can be affirmed that the Doctrine of Indefeasibility of Title in Sri Lanka is merely a myth and not a legal fact. One of the crucial features of the Torrens title registration system, that encouraged land owners to register their lands in the title registration system was the 'assurance fund' incorporating the insurance principle as an element of indefeasibility of title. The assurance fund acts as the 'carrot' to encourage people not familiar with the Torrens system of lands to convert itself to it from other systems in which they are familiar with. Such assurance fund too forms the basis of the legislation on registration of title in Sri Lanka, however in practise no such fund exists and lawful proprietors who lose their land due to fraud and other circumstances such as errors in registration do not have this essential 'carrot' to rely on, therefore this begs the question is the Sri Lankan land title really indefeasible if it does not incorporate one of the key facets of the doctrine of indefeasibility of title? Or is the doctrine of the indefeasible title a mere facade? With regards to the insurance principle, it can be stated that, it has no enforceable effect in the Sri Lankan context although indemnity can be claimed from the perpetrators who initiated the fraud by an order given in a court of law, in instances.

As to the mirror principle, it is said that any land title

system that is predicated upon the Torrens model which Sri Lanka follows, such title entered into the title register is to act as a mirror as in that it would reflect all the essential information related to the title which Sri Lanka has been successful in doing with its title registration regime. On the other hand, the curtain principle is dependent on both the mirror principle and the insurance principle; if one of those two pillars fails the curtain principle will not stand. So, it is evident from the study that the principles of indefeasibility of title brought via the operation of the Title Registration Act No 21 of 1998 in Sri Lanka is not executed in the practical scenario. Therefore, it can be concluded that indefeasibility of title in Sri Lanka is merely a myth and not a legal fact.

Title registration was brought into the Sri Lankan context as a mean to solve issues related to land tenure. But the greatest challenge is how effectively these registration systems can be implemented specially in developing countries. Land title registration systems are implemented to achieve high quality security to the property, to protect property rights, to facilitate transactions in land, and to enable land to be used as guarantee for a loan, standards which only a truly indefeasible land title can achieve. Therefore, any attempt to introduce a land title registration system will be unfruitful unless such system is supported by suitable legislation, that suits the Sri Lankan context, well-co-ordinated institutions, sufficient financial and human resources as well as the social adherence and awareness. The Title Registration Act has been in blind operation in Sri Lanka since 1998 as most of its

provisions including but not limited to the principles of indefeasibility do not suit the Sri Lankan context, as it did in a developing country like Australia. The objective of title registration is to guarantee title, and with the ever-increasing value of properties and fraud which puts this 'guarantee' and associated indemnity into greater risk, Sri Lanka should pay more attention to its title registration system and its underlying principles of indefeasibility if Sri Lanka is to move forward as a developing nation.

The Rule of Autonomy in the Letter of Credit Process; A Comparative Analysis of the Fraud-Exception Rule

Harsha Widanapathirana*

Abstract

Trade within and among nations represents a significant essence of state and individual affairs in the international arena. The development of international trade, facilitated by globalization, yields for new measures for the purpose of coping with the developing trade related aspects and Letter of Credit can be regarded as one such instrument. Principle of autonomy can be identified as the underlying principle that inspires sellers and buyers to utilize the letter of credit process for their transactions to strengthen their confidence by incorporating banking institutions for certain functions. However, since the principal contract is treated as a contract that is distinct from the letter of credit arrangement it raises issues as per when payments can be dishonoured. Furthermore, it further raises a question as to whether payments should be made irrespective of the prevalent issues in performing the obligations that are depicted in the principal contract. Therefore, inspired by the qualitative approach, the research focused on the instances where the letter of credit process can be interfered by courts of law and thereby challenge the autonomy of the process by referring to primary and secondary data sources along with an analysis which inquires the conflicts that may arise due to intervention by courts in such affairs. The available sources that exemplify the exceptions for the principle of autonomy in the letter of credit processed notes a restrictive approach while attempting to protect the sanctity of the process by minimizing unnecessary intervention by courts. The reasons for such approach that is utilized by courts in checking and balancing the issues there exist between parties to the letter of credit process further suggests the conservative ideology that portrays the importance of preserving the reason for which the letter of credit process was introduced.

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Introduction

Letter of Credit (LOC) can be regarded as one of the most important commercial oriented constructs which fosters trade among international borders as well as within national borders. It is one of the most commonly used instruments international trade (IT) and its value in trade far from easy to quantify.[1] The importance of LCs is further exemplified when its prominence in IT is given consideration as LCs are referred to as the "life blood of international Commerce" by courts and scholars.[2] Such perception on LCs clearly throws light on the importance of its role in the commercial world. As a response to the excessive use and acceptability of LCs the Uniform Customs and Practice for Documentary Credits (UCP 600), issued by the International Chamber of Commerce (ICC),was introduced for the purpose of laying down a platform under which contracting parties, according to their discretion as per Article 1, can perform international transactions with precision and maximum effectiveness[3].

1 Roberto Bergami, "The Link Between Incoterms 2000 and Letter of Credit Documentation Requirement and Payment Risk" (2006) 1 Journal of Business Systems, Governance and Ethics.

2 Carole Murray, David Holloway and Daren Timson-Hunt, *Schmitthoff's Export Trade: The Law and Practice of International Trade.* (Sweet & Maxwell 2012).

3 Thanuja Rodrigo, "UCP 500 to 600: A Forward Movement" (2011) 18 Murdoch University Law Review 1

The arrangement of LCs is seen as an independent agreement exclusive from the contract of sale that is entered into by the buyer and the seller.[4] Therefore, the obligations that stems from LCs towards the parties are distinct from that of the primary contract that is the contract of sale [5]. Additionally, as a result of the separation that is made between the LC and the primary contract of sale questions arise as per the deficiencies in the performance of the primary obligations by the sellers and buyers can affect the LC process. Furthermore, if the LC process can be affected as a result of any such deficiency, how the courts can intervene also appears as an area that should be considered to deduce a clear-cut idea as per the practical implications on the independence or autonomy of the LC process. Therefore, with reference to the aforementioned facts, the purpose of the analysis henceforth will be to briefly identify the autonomy that is guaranteed to transactions involving LCs through considering its legal acceptability in light of UCP 600 and the United Nations Convention on Independent Guarantees and Stand-By Letters of Credit (UNCIG) along with selected jurisdictions.

4 John Lowry and LoukasMistelis, *Commercial Law:Perspectives & Practice* (Butterworth/LexisNexis 2006).

5 Ross Buckley and Xiang Gao, "Development of the Fraud Rule in Letter of Credit Law: The Journey So Far and the Road Ahead." (2002) 23 University of Pennsylvania Journal of International Economic Law 663 <https://scholarship.law.upenn.edu/jil/vol23/iss4/2/> accessed March 15, 2020.

Analysis

Introduction to the Transactions Involving LCs LCs can be identified as an engagement by an issuing party, including a bank or a person but usually a banking institute, to pay a certain amount of money to a beneficiary after the required documentation is duly presented as per the agreement.[6] Therefore, LCs can be perceived as a mechanism that assures the effective performance of the obligations that exist between the buyer and the seller due to a pre-entered contract of sale, mainly making the payments. For instance, in terms of IT, the common concern faced by a buyer would be having to make payments for goods before he/she/it gets possession of the goods and in certain instances without assurance as per goods. Similarly, in terms of the seller the concern will be non-payment for the goods by the buyer after the possession of the goods is transferred to the buyer.[7] Hence, as claimed in the former sections of this analysis, it is reasonable to suggest that the importance of LCs is derived mainly through its ability to provide assurance over such concerns, which is also the main purpose behind it.[8] There are different types of LCs and the basic common mechanism pertaining to LCs can

6 Dianne Dann, "Confirming Bank Liability in Letter of Credit Transactions: Whose Bank Is It Anyway?" (1983) 51 Fordham Law Review <https://ir.lawnet.fordham.edu/flr/vol51/iss6/2/> accessed March 15, 2020.

7 Jennifer Shin, 'Key Issues with International Payments' (*Score.org*, 2013) <https://www.score.org/blog/key-issues- international-payments> accessed 3 October 2020

8 Lakshman Marasinghe, *Principles of International Trade Law* (VijithaYapa Pub 2013).

be explained as follows.

The LC process initiates as a result of a contract of sale entered into under the common law of contracts, referred to as the underlying contract, by a seller/ beneficiary/ exporter and a buyer/ applicant/ importer on agreed conditions and warranties [9]. Secondly, a contract will be formulated regarding the LC between the buyer and with the issuing bank/opening bank. The issuing bank can also be regarded as the buyer's bank under whose instructions the bank will initiate the LC process.[10] The buyer should also specify the law governing the LC, which is usually the UCP 600.[11] Provided that the credit has been approved by the issuing bank, the issuing bank will be notifying the advising bank, most of the time it acts as the nominating bank as well, about the credit which will thereby communicated to the seller. The advising bank is the seller's bank. In terms of any issue regarding the credibility between the banks, a confirming bank can also be introduced to the process as a guarantor. After the seller is notified of the credit arrangement the goods will be dispatched and the documents relating to transportation will be forwarded by the seller to the nominating bank/the

9 Roberto Bergami, "UCP 600 Rules – Changing Letter of Credit Business for International Traders?" (2009) 1 International Journal of Economics and Business Research 191.

10 Noah D, 'Methods of Payment in International Trade: Letters of Credit' (*Shippingsolutions.com*, 2019)
<https://www.shippingsolutions.com/blog/methods-of-payment-ininternational-trade-letters-of- credit> accessed 6 August 2020

11 Lisa Pietrzak, "Sloping in The Right Direction: A First Look at the UCP 600 and the New Standards as Applied to Voestalpine." (2007) 7 The Asper Review of International Business and Trade Law 179.

advising bank.

If the documents are up to the standard the payment will be made to the seller by the confirming bank. The documents will then be transferred by the advising bank to the issuing bank for acceptance and will demand for a reimbursement. When the nominated bank/advising bank makes the payment it becomes qualified to be reimbursed under Article 16 of UCP 600. After the documents are monitored the issuing bank will transfer the documents to the buyer and demand for the payment. This denotes that the process of LCs is based on documentary compliance to a significant degree. Such factor provides the basis, as enshrined in the introduction, for the research as per whether the LC process can be influenced by the lack of performance depicted in the primary obligations under the contract of sale.

Anyhow, before the due date, the applicant will make the payment which then will be transferred to the advising/nominated bank signifying the conclusion of the process. When the said transactions are considered, it is clear that there are multiple contracts within the process involving the LC.[12]Therefore, it is quite essential to

12 KAGAN J, 'What You Should Know About Letters of Credit' (*Investopedia*, 2020) <https://www.investopedia.com/terms/l/letterofcredit.asp> accessed 3 January 2021

identify and evaluate the liability of the banks, issuing and advisory, in terms of certain discrepancies or stigma there may exist between the sellers and buyers. To throw light on the matter, Article 4 of the UCP 600 should be considered.

A reasonable person may assume that the banks involved in the LC process may be held accountable for any dispute that arises between the seller and the buyer from the underlying contract of sale. Anyhow, the wording of Article 4 of UCP 600, supported by Article 5, clearly and succinctly enumerates that a LC is a separate transaction from the original contract of sale that it may be based on and the banks are bound only by the terms of the LC. Furthermore, it is also stated in Article 4 that a beneficiary in a LC transaction cannot benefit from the contractual obligations there exist between banks or between the issuing bank and the applicant for credit/buyer. Article 4 further encourages the issuing bank to discourage the applicant from incorporating the contract of sale or a related document as a fundamental component of the credit/LC application. The same rationale is supported by the UNCIG Article 3. Such tendency to demarcate the contract of sale from the credit agreement by the UCP 600 clearly throws light on different perspectives, mainly the principle of independence/autonomy.[13]

13 Brooke Wunnicke, Diane B Wunnicke and Paul S Turner, *Standby and Commercial Letters of Credit* (Aspen Law & Business 2000).

The Principle of Autonomy and Related Arguments The principle of independence/autonomy suggests that parties, including the issuing bank, advising/nominating bank and the buyer, has to honour the credit agreement as agreed when the documentation requirements are strictly satisfied by the seller irrespective of certain disputes the buyer may have over the underlying contract of sale.[14] Therefore, the buyer may not have any ability to occlude the payments being made to the seller due to any existent disagreement with regard to the contract of sale with the seller. Therefore, the buyer will not be capable of dishonouring the credit agreement for any reason unless otherwise there is a discrepancy in the documentation as per the precedent laid down by *Ward Petroleum Corporation v. Federal Deposit Insurance Corporation*[15] Even though it may seem unequitable, the principle of autonomy provides the accountability that LCs should have especially in international business transactions where the sellers and buyers do not meet physically. For instance, if applicants/buyers are allowed to hold payments for certain discrepancies there may exist in the contract of sale the assurance provided by LCs, such as reliability and accountability, will be lost, hence, might

14 HamedAlavi, "Exceptions to Principle of Autonomy in Documentary Letters of Credit; a Comparative View" (2016) 10 Actual Problems of Economics and Law
<https://www.researchgate.net/publication/311163752_Exceptions_to_principle_of_autonomy_in_documentary_letters_of_credit_a_comparative_vi ew> accessed March 15, 2020.

15 *Ward Petroleum Corporation v Federal Deposit Insurance Corporation* (United States Court of Appeals).

develop negative repercussions over IT relations.[16] Therefore, it is reasonable to assume an inference suggesting that the autonomous nature of LCs tends to be the main factor that caters the requirements of successful transnational and national trade.

However, the question remains as per whether giving effect to such autonomy is acceptable as there are surrounding circumstances where payments will be made without considering some of the material elements of the contract of sale. However, on the other hand, permitting the courts to intervene and make amends and modifications in the LC process can render the LC process less reliable and subsequently less desirable in the viewpoints of buyers and sellers. Additionally, functions that are facilitated by LCs such as commercial functions which assures reimbursements solely based on documents[17] and financing functions by allowing applicants to finance transactions in reliable ways will also be jeopardized need there be constant checks and balances through the intervention of the courts. Therefore, evaluating the legal implications in terms of when and where the underlying rationale of autonomy in LC transactions can be challenged through the intervention of law is a priority in the field of national and international business transactions. In support of the said premise, it should be noted that irrespective of the positives of the

16 John F Dolan, *The Law of Letters of Credit : Commercial and Standby Credits* (AS Pratt & Sons 2007).

17 Gerard Mccormack and A Ward, "Subrogation and Bankers' Autonomous Undertakings" (2000) 116 Law Quarterly Review.

principle of autonomy in LCs, it should be noted that a number of drawbacks can also be detected in LC involved transactions specifically when fraud is involved. Such circumstances justify the motivation behind imposing restrictions on absolute autonomy for the LC process as the 'Principle of Autonomy' shields the beneficiary/seller from any attempt of non- payment by the applicant/ buyer the same assurance can lead to a wide variety of malpractices.[18] For instance, a payment driven beneficiary may submit accurate documents without respecting the terms and conditions of the contract of sale and still secure payments. Such tendencies yield for exceptions to the rule of autonomy, especially through UCP 600, and the discussion henceforth thus will be directed towards various exceptions that are applicable to the rule of autonomy with special emphasis diverse legal instruments and literature.

Exceptions to the Rule of Autonomy

Fraud can be regarded as an exceptional circumstance where the rule of autonomy pertaining to LCs can be challenged. In cases involving fraud, the courts are entrusted with the duty to choose between respecting the principle of autonomy or allowing an injunction, which is a court order that compels or restricts a person from engaging in a course of conduct, against the payment being facilitated. In doing so, due regard will be given to

18 John MacLeod, "Nelson Enonchong, The Independence Principle of Letters of Credit and Demand Guarantees" (2013) 7 Law and Financial Markets Review 167.

aspects such as public policy, statutes and rights of different interested parties.[19]An injunction, according to the writer's perspective is one of the most desirable legal instruments that can be properly used to prevent the banks from making the payments to the beneficiary in a LC transaction under exceptional circumstances. Anyhow, even though fraud is expressly regarded as an exception to the principle of autonomy concerning LCs there is no clear-cut standard as per how and when it should be applied and the extent to which it should be applied.[20]

One of the most notable case laws in terms of the application of the fraud exception rule is the *Sztejn* case[21] which laid down the basic principles of the fraud exception rule. According to the case, the principle of autonomy can only be influenced when there is a fraud involved, which is also provable and not a mere allegation. In addition to the aforementioned condition, it was further stated in the case that the fraud exception rule will not be applicable to a holder in due course who is a legal or a natural person who accepts a negotiable instrument without doubts regarding its legal validity. However, in order to gain a proper insight as per of how the fraud exception rule is put into practice, the following cases concerning English Law should be duly considered.

19 R Garcia, "Autonomy Principle of the Letter of Credit" (2009) 72 Mexican Law Review.

20 Xiang Gao, L.L.M, *The Fraud Rule in the Law of Letters of Credit: A Comparative Study* (Kluwer Law International 2003).

21 "Sztejn v. J. Henry Schroder Banking Corp. | Case Brief for Law School | LexisNexis"(*Community*)<https://www.lexisnexis.com/community/casebrief/p/casebrief-sztejn-v-jhenry-schroder

What is the Underlying Rational of the Fraud Exception Rule?

According to Gao the fraud exception rule in terms of LCs can serve diverse purposes.[22]For instance, it has the capability to prevent fraudulent beneficiaries/sellers with malice intentions from being entitled to payments irrespective of the performance of their preliminary contractual-obligations. Therefore, it is reasonable to conclude that the fraud exception rule can fill a legal gap or a loophole there exists in the process of LCs by making parties accountable for fraudulent conduct. If there is no such obligation in terms of accountability or responsibility with regard to the conduct of the sellers other than the obligation to provide correct and accurate documentation, such process can become a leeway for the perpetrators to harm the buyers and thereby the IT system as a whole. Furthermore, allowing parties in transactions to be accountable only in terms of documentation and not on the other material aspects within a transaction may have negative implications on the public policy as well. Therefore, in uplifting public policy as well, the fraud exception rule also serves as a barrier against perpetrators who might attempt to use LCs as a shield to be entitled for payments by providing proper documents without physically performing the obligations for which the payment is made. Moreover, the fraud exception rule has the ability to increase and maintain the commercial utility of LCs by guaranteeing an equal degree of responsibilities

22 Ibid

and accountability to both the applicants and beneficiaries in a LC agreement. For instance, the reliability on LCs by applicants may not be satisfactory if the applicants are compelled to accept making payments even the principal contract with the beneficiaries is severely breached. On the other hand, the requirement of proper documentation and the ability to refuse payments under the ground of fraud provides security to the banks involved within the process as well. Therefore, the functions of the rule, as mentioned within the current discussion, can be regarded as wide and decisive in formulating a strong platform that fosters IT even though a direct challenge is imposed on the 'Principle of Autonomy'.

Position of the United Kingdom (UK) Law on the Fraud Exception Rule

One of first initiatives undertaken by the English Courts in terms of the fraud exception rule was enshrined in the case of *Discount Records Ltd v. Barclays Bank Ltd and another*.[23] The case facts indicate a dispute or disagreement between the buyer/applicant and the seller/beneficiary in terms of the goods that were subjected to the transaction in their respective contract of sale. Therefore, the buyer has requested the bank not to make payments as per the credit agreement which was initially rejected by the bank.

Subsequently, the buyer-initiated court proceedings

23 *Discount Records Ltd v Barclays Bank Ltd and Barclays Bank International Ltd* (1975) 1 (Chancery Division).

seeking for an injunction to prevent the payment being made to the seller under the basis that the seller has committed fraud by not providing the goods on agreed terms.

However, the courts, while denying the application of the buyer/plaintiff stated that the case was based on allegations which were not grave enough for an injunction to be granted. Furthermore, the courts also exemplified that even the payment is made to the seller by the bank it will not jeopardize the rights of the buyer as the buyer, in case a wrong is committed by the bank, has the ability to institute a case against the bank to recover any damages suffered. The case therefore clearly enumerates the strict standard that is used by courts in exercising its power to intervene in the LC process in light of the fraud exemption rule. Therefore, the case clearly implies that a mere allegation alone will not be sufficient in order for the court to justify intervention, the evidence that supports the claim of the plaintiff should be sufficient.

Additionally, it should further be noted that the aforementioned case exemplifies the court's attitude of granting injunctions when there are absolutely no other alternative remedies available.[24] Furthermore, a secondary implication that is provided through the judgment is the complication that the banks will have to face if the buyer establishes an issue in the underlying

24 Autor: Yanan Zhang, *Approaches to Resolving the International Documentary Letters of Credit Fraud Issue* (University of Eastern Finland 2011).

contract relating to the LC arrangement which could question the act of making the payments. In such a circumstance the buyer may exercise rights over the bank by demanding damages for losses occurred through courts.

However, in cases where the seller is not paid by the bank according to the LC arrangement the seller may also initiate proceedings against the bank for not honouring the LC arrangement as per *The Society of Lloyd's v. Canadian Imperial Bank of Commerce and Others*.[25] Therefore, it is reasonable to conclude that the applicability of the principle of autonomy with regard to the case under consideration is significant and such attitude adopted by courts can have both negative and positive repercussions depending on the case and the precedents that are laid down by the courts.

For instance, if buyers are allowed to obtain injunctions preventing payments being made by the bank to the seller the underlying reliability of LCs will deteriorate which will subsequently derogate free trade and IT. On the other hand, if the banks are given absolute discretion over making payments only by adhering to documentation related standards it may lead to a floodgate of cases initiated by buyers in terms issues pertaining to their principal contract of sales. Moreover, complications may further occur when the seller/beneficiary has involved a third party to the LC agreement as well.

For instance, in the case of *Banco Santander S. A. v.*

25 (1993) 2 (Queen's Bench Division (Commercial Court)).

Banque Pariba[26] the confirming bank has sued the issuing bank for reimbursement as per the LC due to an error detected in the documentation after the seller already got the LC discounted from the confirming bank. As a result of the inconsistencies, the conforming bank was not reimbursed by the issuing bank, which consequently led to the case. The court in this case, considering the facts, held that the conforming bank has no right to be reimbursed as the bank was required to act according to the LC and wait till maturity to make the payment. Therefore, with regard to the said facts, it should be identified that there is a need to balance multiple extremes as far as the LC process is involved and the judiciary should properly act as the facilitator of such equilibrium. Similarly, the following case laws can also be evaluated to obtain a clear perspective on the standards adopted by courts under different circumstances concerning fraud within the purview of transactions involving LC agreements while challenging its autonomy.

The case of *United City Merchants (Investment) Limited v Royal Bank of Canada*[27] is a notable case in terms of fraud involved in a LC agreement. The noteworthy factor which makes the present case important is because the case was initiated based on fraudulent conduct that was neither committed by the parties to the sale contract nor by the banks. It was a misstatement by an agent of the

26 *Banco Santander S A v Banque Paribas* (England and Wales Court of Appeal (Civil Division)).

27 *United City Merchants (Investment) Limited v Royal Bank of Canada* (House of Lords).

seller/beneficiary who had prepared documentation relevant for the transportation of goods that led to the dispute. In the bill of lading, the agent had purposefully indicated a wrong date and a wrong port (from where the goods were dispatched) which breached the terms enshrined in the LC. The course of conduct by the agent had raised questions in terms of the documentation which resulted in payments being dishonoured. The courts in this regard, even though there is clear intention of malice and fraud, stressed that since the seller had no knowledge on the acts committed by the agent, what has happened cannot be interpreted into the fraud exception rule.

A reasonable person, when the cases cited herein are considered, may form an opinion that the autonomy rule has a stringent application in terms of LCs, especially with reference to the UK. However, when the Unites States of America (USA) is considered, a similar perspective is visible. For instance, in the case of *Maurice O'Meara Co. v. National Park Bank*[28] the defence of the issuing bank for dishonouring the payment was that the goods transported were not of the required quality, which was rejected by the Appeal Courts of New York. However, Justice Cardozo dissented by indicating the negative implications of imposing barriers on the issuing bank against the payments when there is clear knowledge about the inconsistencies in the underlying obligations. In

28 *Maurice O'Meara Co v National Park Bank of New York* (1925) 146 (Court of Appeals of New York).

simple terms, Justice Cardozo was of the view that the agreement for credit also has a connection with the goods under the transaction and "To this general statement of principle as to the contractual obligations of the confirming bank to the seller, there is one established exception, that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue. Although there does not appear among the English authorities any case in which this exception has been applied, it is well established in the American cases of which the leading or 'landmark' case is *Sztejn v J. Henry Schroder Banking Corporation*[29] The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application of the maxim *ex turpicausa non orituractio* or, if plain English is to be preferred, 'fraud unravels all'. The courts will not allow their process to be used by a dishonest person to carry out a fraud." if the bank has knowledge on a clear inconsistency it should have the discretion to dishonour the payment. The rationale behind invalidating the exercise of such discretion, as per the writer's perspective, will direct the bank to a difficult position, which is not in the best interest of IT.

29 [1941] 31 N.Y.S. 2d 631.

The aforementioned case law should not be considered as the legal authority which specifies the standard in terms of the fraud exception rule in USA. For instance, the *Sztejn* case which invoked the fraud exception rule, as discussed earlier, can be cited. The aforementioned cases have been cited in many jurisdictions including UK. There is no conflict in terms of the rationale behind the concept of autonomy in LC transactions as discussed within the former parts of this discussion. However, the exceptions, as per the writer's view, are the principles that can add more clarity and credibility to the process involving LCs to an acceptable degree. Whether UCP 600 has been able to perform such rule is quite problematic as per the discussion thus far.

Incorporating a strict rule with clear instances where such rule can be invoked by the courts appears to be a reliable choice when the principle of autonomy in LCs is considered. However, it is also understood that imposing strict rules with specific interpretations may hinder the capabilities of the judiciary to cope with unique circumstances. Anyhow, the need to reach a balance in terms of how and when the principle of autonomy applicable for LCs requires specific guidelines by the principal laws that lays down the legal framework on LCs.

A Comparison with the UNCIG The UNCIG also addresses the process involving LCs and remains as a choice under which parties could get into LC arrangements. The notable aspect of UNCIG

compared to UCP 600 is Articles 19 and 20, which contains specific and expressed exceptions for payments through clear grounds. The UNCIG takes a step forward by specifying the possible remedies that should be provided by courts under exceptional circumstances regarding the performance of obligations by parties to the LC agreement. For the purpose of the analysis, an example can be cited as follows. Under Article 19[30], it is stated,

(1) If it is manifest and clear that:

(a) Any document is not genuine or has been falsified;

(b) No payment is due on the basis asserted in the demand and the supporting documents; or

(c) Judging by the type and purpose of the undertaking, the demand has no conceivable basis, the guarantor/issuer, acting in good faith, has a right, as against the beneficiary, to withhold payment.

For the purposes of subparagraph (c) of paragraph (1) of this article, the following are types of situations in which a demand has no conceivable basis:

(a) The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;

(b) The underlying obligation of the principal/applicant

30 Article 19 of the UNCIG

has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;

(c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) Fulfilment of the underlying obligation

among other instances, that payments should not be made in favour of the beneficiary;

I. When the documents are not in order,

II. If the demand for the payment is not covered by the undertaking/contractual obligations,

III. If the claim for payments has no conceivable basis.

The conceivable basis, according to the UNCIG is described in Subsection 2. For instance, a claim by the beneficiary to make payments in an instance where the underlying obligation has been duly performed by the other party/buyer is regarded as an exception against the rule of autonomy. In such a case, if payments are demanded by the beneficiary, under the ambit of Article 20[31], a provisional order can be obtained against the payment to prevent payments being made to the seller.

Conclusion

UCP 600 is applicable to the LC transaction and the

31 Article 20 of the UNCIG

standards in terms of performance related duties are only applicable to the parties involved. Any circumstance that is not tackled by the UCP 600 can still be dealt with alternative legal remedies to a certain extent[32]. However, such exception doesnot suggest the fact that UCP 600 is a successful legal instrument covering all aspects concerned with LC arrangements. Anyhow, as enshrined in the discussion, autonomy is provided to LCs for many reasons and if UCP 600 is seen in terms of such an angle, it is more than successful.[33]

Therefore, a proper legislation, as per the writer, should not be too open ended or too restrictive. For instance, Article 4 of UCP 600 is very specific in terms of not considering the underlying contract with regard to the credit arrangement but leaves much room for courts to interpret the Article in different ways under different circumstances which can often lead to different outcomes. The cited cases itself denotes such difficulties to a reasonable degree. UNCIG on the other hand is also quite specific but covers more essential areas as opposed to the restrictive pattern of drafting enshrined in the UCP 600.However, it is not desirable to conclude UCP 600 as a failed law as it effectively lays a platform for persons to get into reliable transactions. Anyhow, the writer is of the opinion that there are certain grounds under which UCP

32 MG Bridge, *Benjamin's Sale of Goods* (Sweet & Maxwell 2018).

33 Hang Yen Low, "UCP 600: The New Rules on Documentary Compliance" (2010) 52 International Journal of Law and Management 193 <https://www.researchgate.net/publication/499131 37_UCP_600_the_new _rules_on_documentary_compliance> accessed March 15, 2020.

600 can improve in terms of autonomy.

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