



The impact of fraudulent methods on the independence of banking contracts

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Abstract

The banking business, is the backbone of the economic life at all countries of world. There is no doubt of its importance while comparing with all branches of law, it serves the individuals and organizations to increase the capital and provide the financial consulting services. The institutional banking business is considered a legal and commercial guarantee for banks alone, because, it is the descriptive framework for the bank, and it is considered an institution at one side, and as a merchant at the other side. It is created from integral and organized banking operations in accordance with an integral institutional structure. The Egyptian legislator defined the banking institution, as every facility that normally accepts deposits that are paid on demand or after a deadline and not exceeding one year, whereas this facility may be faced by problems in dealing or with its clients, and the most important problem, is cheating and apparent abuse in transactions, as one of the most important fraudulent methods. Hence we see the most prominent general principles at law, is fraud, which damages everything, and law doesn't grant a protection to the person who has acted in bad faith through these transactions, and nobody can benefit from fraud and manipulation in his dealings, and with regard to banking transactions, the principle of the independence of all obligations, is to protect all parties, but if bad faith occurs, the effect of this, extends to damage these liabilities, so we focus on this topic, to identify the conditions that must be fulfilled in banking contracts, the scope of study, so that we can state, we are in the process of discussing cheating and its impacts, whereas it is considered one of the fraud methods, then we conclude the outcomes from the legal aspect in the independence of these contracts, especially, the guarantee letter and documentary credit.

Keywords: implementation; child adoption; legal implication

Introduction

At the beginning, the legislations ^[1] [The Egyptian civil law (C 131-year 1948)] required to carry out the contracts in a good faith and honesty, it is not in a good faith for one of the contracting parties, to harm the other, even if the apparent form, is sound. However, such conduct is invalid, whether the issuer intended or not, as long as, there is a clear fraud or apparent abuse.

Whereas they are appeared at the false behavior and conduct from the beneficiary while using fraudulent methods such as cheating, and apparent abuse, which they prevent fulfillment.

The jurisprudence and the judgment bear the responsibility ^[2] [The jurisprudents look at the above-mentioned national laws and legislation, while taking note of the provisions of the Egyptian Trade Law (C. 17 of 1999), which dealt with the provisions of the letter of bank guarantee in articles (355 to 260), as well as Law 88 of 2003 and its amendments on the banking system and the Egyptian currency. Regarding the judiciary, refer to the ruling of the economic court in Cairo, in Case No. 229 of 2015, session 29/9/2015 as a judicial precedent that dealt with the issue of beneficiary fraud that the Egyptian commercial legislator did not identify it.] to invalidation this conduct, even there is no a frank context and for application this rule (the fraud damages everything), this rule supported by the unified rules ^[3] [The unified rules issued by the International Chamber of Commerce in Paris mean the international chamber of commerce related to letters of guarantee that are paid on demand and published in Booklet No. 458 of 1992, which states in its first article: by applying these rules to each letter of guarantee under demand, in which it states: It is subject to the unified rules, and these rules are binding on all parties

unless the agreement stipulates otherwise.] and multiple judicial rules to fulfillment all the gaps in front of this type of fraud. The Egyptian court of cassation issued the following ruling:

"The rule of fraud avoids conducts, and it is considered a sound legal rule, even, if there is no special provision in the law, and it is relied on moral and social considerations in combating fraud and trick generally, to maintain the interest of individuals and groups" ^[4]. [Appeal No. 4507, dated 06/26/1996, published in the State Litigation Authority magazine, No. (4), December 1997, and Appeal No. 2001, dated February 28, 1998, published in the State Litigation Authority magazine, No. (3), July 1999, P. 113.]

As well as the French Legislator ^[5] [An overturn commercial French ruling 24/6/1997 E-J- P 1998 Hearing session 9/3/1998 and this ruling is published by Dr. Samiha Al-Qalyubi, The Mediator in Explanation of the Egyptian Trade Law, Part Two, Fifth Edition, Cairo: Dar Al-Nahda Al-Arabiya, 2007, P. 37.] used adopt the motives and executing contracts in good faith, so, the moral rules were the main feature in many of its texts, and the French legislator ^[6] [Legislation of French banks issued in 24 January number 46- year 1984G.] was interested to good faith, and the base of purging defenses at the commercial papers, which are done according with a moral principle and good faith.

Fraud is against advice, whereas deviation from the appropriate implementation of the contract, is similar to the usage of the seller to the fraudulent means to convince the buyer of the quality of his goods, although they are damaged or in violation of quality standards ^[7]. [Maysoon Al Masry, Fraud as an Exception to the Principle of Independence of Obligations in Documentary Credit (A Comparative Legal Study). Al-Baath University Journal. Issue (37). M (38).

2016, PP 133-147-161, in which it was indicated that fraud is considered one of the oldest crimes in history as it is linked to the system of barter and the circulation of goods between people. Therefore, various legislations have been concerned with criminalizing it]

Also fraud is identified as " Either of the contractual parties indicates improper contract different from the reality by a verbal or deed mean, and hides an undesirable description, and if one of the contracting parties recognizes it, he would have refrained from contracting with it" ^[8] [Dr. Abdullah Al-Salami, Deception and its Impact on Contracts, first edition, Riyadh: Treasures of Ishbiliya for Publishing and Distribution, 2004, P. 33.] and this is a general concept, which differs from the concept of anti- commitment fraud of the beneficiary to use the guarantee, with the intent of harming the contracting client in a way that may arise a difference in the mechanism of those bank guarantees from the identified objective and in a contravention of the principle of good faith, including the monetization of letter of guarantee in bad faith with the aim of harming the ordering client.

Fraud may be similar to deception, however fraud is a trick, but deception is a concealment of defects, also, fraud differs from deception, while the fraud arises during the formation of the contract, and deception arises after its formation or outside the circle of the contract ^[9] [Dr. Abdul Razzaq Al Sanhoury, mediator in explaining civil law, part one, the contract. Cairo: Dar Al Nahda Al-Arabiya for printing, publishing and distribution, 1998, P 261.]

Fraud is considered more effective than deception, deemed one of the most important fraudulent methods, due to the availability of the element of intent.

Deception is defined as "the fabrication of false facts that would mislead the other contracting party." Deception is not considered a defect of the will that is independent of itself, rather it is a path that leads the contracting party to commit a misleading, and the result is the invalidation of the contract, not for deception but for misleading ^[10]. [Dr. Samir Tanago, Sources of liability, first edition, Alexandria: Al Wafa Legal Library, 2009, P. 57.]

At the field of letters of guarantee ^[11] [The letter of guarantee, is a written undertaking from the bank to pay the value of the letter of guarantee to the beneficiary, upon their first request without paying attention to any conflict by the customer during its validity period. It superseded the cash insurances that will be transmitted from and to the foreign countries, as a guarantee to the operations, whereas one of its parties, is non-resident, thus, it dispenses of transmittal these funds, and then reclaiming them at the end of their purpose and Its types are represented in the initial letter of guarantee issued to clients to ensure the seriousness of entering into tenders and the final letter of guarantee issued to clients to ensure the seriousness of the business and its validity on the client, refer the text of Article 355 of the Egyptian Trade Law. Also it is defined in Article (2/1) of the UNCITRAL Convention of 1995 in general without limitation to banking rules, as it is defined in an international practice as an independent guarantee or a guarantor letter of credit, provided by a bank or other institution (commercial, international or maritime authority or institutions) or another person (whether natural or legal), whereas the guarantor or the issuer pays the beneficiary, a specified or assignable amount, upon presentation of a simple claim or accompanied by other documents, in

accordance with the terms of the undertaking and any of the documentary conditions.], the relation between the bank and the beneficiary, shall be created, accordingly, the issuer (client) carries out his obligation in the contract, whereas the beneficiary submits the letter of guarantee to the bank, so that the contained obligation in the letter, is implemented immediately as long as the beneficiary's claim is within the limits of the letter of guarantee, and as long as he exercises his right without fraud or deception, however, the beneficiary of the letter of guarantee may frauds, takes advantage of the letter of guarantee, which is featured by independence, and the independence of the letter of guarantee is intended to be independent from all other relations, and this was confirmed by the national legislation and international agreements, as a reference in this to the function performed by the letter of guarantee as a mean of bank credit, whereas it is linked to the base contract signed between the client and the bank. Hence, it has been stated that the most important features of the letter of guarantee, is the principle of its independence from the basis contract, and pursuant to the letter of guarantee, with its original feature to carry out liability at the base contract^[12] [Refer to the impact of fraud on the bank's adherence to the stipulated arbitration clause in the base contract, refer to: Dr. Mutassim Ismail, Arbitration in Banking Disputes, Alexandria, New University House, 2017, P. 333, where His Excellency raised An inquiry in this regard about the impact of the independence of the bank's payment in the letter of guarantee in case of fraud, whereas the United Nations Convention, did not identify a definition of fraud on independent guarantees and letters of credit issued guarantees In 1990, but the agreement expressed fraud as arbitrary according to the text of Article 19 of it, that fraud or arbitrariness is between us, is clear.] on behalf of the beneficiary.

As well as the issuer shall not be under monitoring, what it is called "the provision of self- efficiency" ^[13] [Self-sufficiency is one of the characteristics of the commercial paper, and it means that the bond holder does not need to prove his right other than what is mentioned in the bond, as it is sufficient in itself and is a guarantor of the incoming data, so the bank does not need to consider the basis contract to find out the eligibility of the beneficiary or not, see in the matter of that: Dr. Ahmed Hosni, Commercial Cassation Court, Alexandria: Mansha'at al-Maaref, 1982, P 218, where he referred to the ruling of the Egyptian Court of Cassation No. 294 of 35 BC. Session 27/5/1969, Technical Office Group, P 811, which states its ruling as follows: Although the letter of guarantee was issued in implementation of the contract concluded between the bank and the debtor with whom it deals, the relationship of the bank with the beneficiary in whose favor the letter of guarantee, was issued is separate from its relationship with the client. As the bank is obligated by virtue of the letter of guarantee, as soon as it is issued and reached the beneficiary, to pay the amount demanded by the latter, as it is a right for him to be governed by the letter of guarantee as long as it is within the limits of the bank's commitment indicated in it. Or that his indebtedness does not justify what the beneficiary obtained from the bank.]. On the other hand, the anti-fulfillment fraud, is defined as a request to pay the guarantee, while the base contract does not give the beneficiary, any right before the issuer ^[14]. [Dr. Ali Jamal Uddin Awad, Letters of Bank Guarantee, First Edition,

Cairo: Dar Al Nahda Al-Arabiya, 1998 AD, P230. However, there is another aspect of jurisprudence that sees fraud that prevents payment is the lack of a legal basis for the claim along with the forgery of documents. This view is taken to expand the concept of Fraud, which leads to the overthrow of the principle of independence in the letter of guarantee and consideration of the basis contract, see in this different opinion d. Khalil Victor, The Principle of Independence in the Letter of International Guarantee in accordance with the 1995 United Nations Convention, Ph.D. Thesis, Faculty of Law: Cairo University, 2004, P 435.]

On the other hand, fraud in the field of documentary credit ^[15] [The documentary credit is a written undertaking issued by a bank called the issuer at the request of the buyer, the applicant or the issuer, in favor of the beneficiary seller, and the bank is obligated to fulfill the limits of a specified amount within a certain period when the seller submits the commodity documents in conformity with the instructions of the terms of credit. It is used in financing foreign trade and it represents in our time to the present framework that is accepted by all internal parties in the field of international trade in a manner that preserves the interest of all these parties from exporters and importers, and in the United States of America, it is known as the surety letter of credit issued by the bank in some operations as issued by insurance companies surrounded by a fence of legal obligations to comply to them.], is defined as the misconduct of the beneficiary in the contractual relationship by submitting incorrect or fake documents containing false data or fake signatures.

The bill of lading is the document that can be faked easily, because it represents the goods being transported or shipped goods ^[16] [The shipping document is the most important document in the credit contract as it is a title deed. It is submitted by an exporter bank to an intermediary bank to prove the shipment of the goods or prove the shipping carrier's receipt of the goods by the exporter (the beneficiary) to include information such as the number of parcels, description, weight and information of the sender and consignee. Therefore, it has been said that the shipping document is one of the basic documents in documentary credits, and the Egyptian Maritime Trade Law (G 8 of 1990) defines the bill of lading as a document issued by the carrier at the request of the shipper upon receipt of the goods from him, in which the transport data and conditions are clarified, and one of them is delivered to the shipper. The other for the carrier, is a performance to prove the process of shipping the goods and is released from two original copies, so the bank must verify the shipment and its types (As a receipt for goods shipped).], however, some people ^[17] [Dr. Samiha Al-Qalyubi, previous reference. P 201.] believe that fraud is not limited to its issuance by the beneficiary only, the submission of incorrect documents, whatever the cause or the issuer, is the standard of measurement, while the lesson in the reality.

Therefore, we will discuss the mentioned conditions of fraud in letters of guarantee and documentary credits in a first requirement, and we will discuss the legal effects in a second requirement, while it shall be applied to all banking services in various forms and types, whether at the level of banking services, or insurance or even at the level of investment and currency exchange. Each service has its advantages and parties, who are variable according to the difference in the required service, and then according to the

variable legal consequences and effects of these relations, as follows:

First Requirement

Terms of fraud in letters of guarantee and documentary credits

Insisting on fraud, is sufficient to prevent a claim for payment and this depends on several conditions of fraud and its degree, which will be explained as follows:

The first branch: The fraud should be apparent, fixed and not disputed

To prove the existence of fraud, it must be apparent and consistent with the evidence of the alleged fraud, and fraud should be clear, fixed and no need for investigation of its existence ^[18] [Abdulrahman Yaish, the extent of the bank's legal commitment in the letter of guarantee, Master's Thesis, College of Graduate Studies, An-Najah National University, Palestine, 2018, P. 84.]

Otherwise, the bank cannot refrain from payment due to the argument of its existence, and the example of that, is the beneficiary's claim of the value of the letter of guarantee, despite the client shipped the goods with documents to the country of destination, it is clear evidence of the beneficiary's fraud. Allegation of fraud, is not enough, even there is no conclusive and apparent evidence of fraud, whereas bad faith is not assumed ^[19] [Fraud and arbitrariness must be clear or apparent, as it was decided in this regard that (the abuse of the right usage to liquidate the letter of guarantee is meant the apparent arbitrariness that is unmistakable from the reality of the case papers) Arbitral Case No. 654 of 2009 in which the arbitral award was issued on 19/1/2011, Cairo Regional Center for International Commercial Arbitration –and was published in the Arab Arbitration Journal, Issue 16/6/2011, P. 201 and hereinafter.].

We find in the letter of guarantee, that the reason for fraud, is consistent with the nature of the stipulated guarantee in this type of bank guarantees, and in order these letters do not lose their credibility and their legal base based on the independence ^[20] [Abdulrahman Yaish, a prior reference, P 85.]

The sole permitted exclusion by the French judiciary in the permission of seizure of the amount of credit by the client, is the case of the issued fraud by the beneficiary, while the French Judgment has a condition stated, the fraud is fixed and the possibility is not sufficient in it, as well as it is provided that the fraud is relevant with the documents, and not relevant with the basis contract between the client and the beneficiary.

The entitlement arises to the direct right of the beneficiary on the credit amounts regarding the bank's right to clear payment to face of the beneficiary's debt owed by the latter before the bank, as long as the legal clearing conditions are fulfilled ^[21] [Commercial Cassation March 4, 1953 - Siri 1954-124 Session 23 October 1990 - Dallose Serry 1990-255, Commercial Cassation session 24/6/1997 - p j-E1998 - Session 9/3/1998 - referred to by Dr. Samiha al-Qalyubi, Agreement on Independent Guarantees and Guarantee Letters of Credit, Cairo: Dar al-Nahda al-Arabiya, 2005 edition, P 303 As this judiciary requires that the fraud of the beneficiary be certain, clear and unambiguous.].

It is clear to us, the mechanism of strength of this trend from the French judiciary, considering that issued fraud by the

beneficiary spoils every obligation basis on it, whereas this judiciary requires proof of fraud, leaving no field for possibility.

However, there is another aspect of the same judiciary, that defines the need for clarity of fraud, and it is not sufficient to merely allegation it, without a written document or an investigation, because it has no effect on the independence of the bank's obligation to pay when documents are submitted ^[22] [The second trend from the French judiciary, the ruling of the French Commercial Court of Cassation, session 17/4/1978 - Bank magazine with commentary of Riff Lang, P 625, where it ruled that the submission of forged documents from the beneficiary indicating the delivery of a quantity of goods less than what was agreed upon in the credit deferred payment after the arrival of the goods from prior to fraud, which entitles him not to pay the value of the credit, referred to by Dr. Samiha al-Qalyubi, previous reference, P 833.].

On the other hand, a part of the Egyptian jurisprudence ^[23] [Dr. Mahmoud Mukhtar Bariri, the Commercial Transactions Law, Cairo: Dar Al-Nahda Al-Arabiya, Edition 2001, P 160.] defines the necessity of implementing fraud and verifying it by corrupting everything and excluding the bank's obligation when fraud is available.

This was confirmed by the Egyptian Court of Cassation in its ruling which stated that: "The letter of guarantee, even if it was issued in implementation of the concluded contract between the bank and the debtor, however, it is a relationship of the bank with the beneficiary in whose favor the letter of guarantee, was issued, and it is separated from its relationship with the client ^[24]. [Judgment of the Egyptian Court of Cassation, Egyptian cassation 1189 for the year 49 BC, session 13/2/1984, as well as Appeal No. 1013 for the year 30 BC, session 30/12/1985.]"

Consequently, the bank's obligation to pay the value of the guarantee, shall be forfeited if the beneficiary of the guarantee commits a clear fraud or an apparent abuse in the request for payment, as we have already explained above ^[25]. [Refer to the mentioned judge rulings with Dr. Mutassim Ismail, the prior reference, from P 336-340.].

Accordingly, the Egyptian judiciary has settled that the bank's payment to the beneficiary, is not valid, and it is not entitled to return what it paid to its client, unless the payment was carried out in a valid issued letter of guarantee and in accordance with the client's instructions, as is the case in the letter of guarantee, otherwise, the bank bears the responsibility of payment.

As well as the UNCITRAL Agreement of 1995 ^[26] [See the text of Article 19 of the UNCITRAL Agreement of 1995, which states that "if it is evident and evident that any document submitted is forged or has been forged, the guarantor/issuer, acting in good faith, has the right to the beneficiary to withhold payment."'] has given the bank, the right to refuse to pay, if the submitted documents are unclear and have a type of confusion and suspicion, indicating the existence of forgery, that prevents support of this type of documents, and it also granted the guarantor bank, which acts in good faith, the discretion to pay or not, in order to preserve the commercial confidence in the letter of guarantee as it is independent of the basis contract.

In case submitting a bank claim supported by forged documents or abuse by the beneficiary, the bank shall refrain from payment the beneficiary according to what is stated in the texts of international agreements ^[27] [Item 19 of

the United Nations Convention on Independent Guarantees and Letters of Guarantee for the year 1995.].

This situation may be verified, when the guarantee required the beneficiary to submit documents, as an arbitration decision, a court ruling issued against the order, or an expert reports deciding non-implementation, poor implementation, or delay, or an issued certificate by an expert office or from the beneficiary himself as an invoice that it submitted and was not paid ^[28] [All of the above-mentioned examples are referred to by: Dr. Hamdi Mustafa, fraud from the beneficiary in letters of guarantee and its impact on the bank's commitment according to the UNCITRAL agreement of 1995, "a comparative study", research published in the Journal of Sharia and Law, College of Law, Emirates University, Year 26, Issue Fiftieth, April 2012, P. 54.].

According to the rule of purification of defenses in commercial papers that requires payment or protest in the field of bank guarantee letters, the fraud should be clear ^[29] [Refer to the definition of fraud or apparent abuse according to jurisprudence and judicial jurisprudence as they are fraudulent means used by the beneficiary towards the bank, Akoosh Siham, fraud as an exception to the principle of independence of the international letter of guarantee in accordance with the United Nations Convention on Independent Guarantees and Guarantee Letters of Credit for year 1995, research published in the journal "Policy and Law Books", Issue 19 June 2018, P. 3.], and it differs from the fraud that the endorser adheres to in the commercial paper.

Based on the foregoing of the jurisprudential and judicial opinions, we conclude that fraud is apparently and clearly established in a way that leaves no field for doubt in achieving the knowledge of the beneficiary of its occurrence, and it should be texted at the letter of guarantee itself, as an assurance of the principal of self-efficiency of the letter and the independency from the basis contract, with discharging the bank from the payment in case of availability, as a respect for the international commercial transactions, as well as the client may take all the temporary measures in case the availability of any of these cases, except its liability to repayment.

Second branch: Issuance of fraud by those who invoke it

The injured party is the sole person who has the right to termination the conduct, due to fraud, even if it is from a third party, i.e., other than the beneficiary, but the law requires his knowledge ^[30] [According to the text of Article 126 of the Egyptian Civil Code, which states that "if the fraud was committed by non-contracting parties, the fraudulent contracting party may not request the annulment of the contract, unless it is proven that the other contracting party was supposed to have known of this fraud."].

It should be taking into consideration that the prevention of the banking for payment, shall be done only in case of the beneficiary issued a fraud himself, which prevents him to take benefits of any right of payment and this is an exclusion from the asset.

This condition is an obvious condition, like the first condition for the appearance of fraud, but an inquiry arises: is the fraud required by the beneficiary himself, or is it sufficient for his awareness of it?

There have been many trends in the issuance of fraud by the beneficiary or from others when it involves with a degree of

seriousness that prevents the bank from carrying out its obligation. The first trend^[31] [Dr. Jamal Uddin Awad, Prior Reference, P 230.] means that the fraud is only related to the action of the beneficiary himself, and doesn't include fraud by others, it is only limited to any action by the beneficiary for the purpose to get something not his right.

In order fraud produces its clear effect, it must result from a valid and accurate letter of guarantee, and therefore it emerges from the clarity of fraud that the reason for refusing to pay, is based on objective reasons in the guarantee itself, or that it is due to defects in the form of the letter itself, and for example, the case of the guarantee that no objection has been held by the beneficiary or the case of the request in violation of the terms and conditions of the guarantee, in this case, the beneficiary is not entitled to request the amount of the guarantee, because the conditions of the guarantee are not fulfilled.

At the other hand, the second trend refers to consideration fraud as a material action, and when it is committed, the bank must pay the non-payment, regardless of who commits the fraud, the beneficiary or a third party^[32] [Refer to Abdurrahman Yaish, a prior reference.].

This trend considers that awareness of the beneficiary, is the controller, and in case issue fraud by a third party with the knowledge of the beneficiary, so the issuer client at this case may claim to suspend implementation of the guarantee and not to be in cashed to the beneficiary, but in case of none knowledge of the beneficiary of the fraud, he is not entitled to do so.

Others^[33] [Dr. Samiha Al Qaloubi, a prior reference, P811] assure that, there is a need to limitation fraud to the case of issued fraud from the beneficiary, and it does not apply in the case of fraud issued by a non-beneficiary.

The bank does not refrain from payment the value of the letter in case of fraud occurring without the beneficiary, as this exception should not be expanded and not be carried out on its release, and therefore fraud or abuse should be limited to the work of the beneficiary only^[34] [Refer to a presentation of all the jurisprudential opinions on this: Akoosh Siham, the previous reference, P.6.].

The reason for this, is the principle of independence, as a fraud prevents payment, is an exception to that independence and that expansion of fraud cases, would cancel the main objective of the guarantee, which is an alternative to cash insurance, and that the expansion of fraud by applying while being issued by third parties, will create the complicity of the client with others, and making him cheat to suspend the arising guarantee from the letter of guarantee.

It is clear to us from the foregoing, that the letter is separated and not related to any relationship, other than the relationship of the bank with the beneficiary of the letter, and thus the letter and the bank's commitment, is independent of the relationship of the beneficiary to the issuer or the relationship of the issuer to the bank.

The commitment of the bank in the letter, is separated from the basis contract and its payment is not related to a beyond action or a fulfilled condition, and this doesn't change its link with the event related to the beneficiary from the letter^[35] [Dr. Ali Jamal Uddin Awad, Prior Reference, P 81].

Second Requirement

Legal Effects of Fraud in Letters of Guarantee and Documentary Credits

After identification the applicable conditions at the acted fraud of letters of guarantee and documentary credits, we

here discuss the arise legal effects of fraud and the mechanism of treatment through the letter of guarantee and credit documentary into two branches, the first one related to the effect of fraud at the letters of guarantee, and the second one discussed its effect at the letter of the documentary guarantee.

First branch: The Effect of Fraud at Letters of Guarantee

Letters of guarantee, is considered the sole controller of the relation between the bank and the beneficiary, as well as the commitment of the bank to the guarantee, shall be a future guarantee for the original contract issued between the client and the beneficiary, sometimes takes title of an independent guarantee, whereas the bank may not refuse to pay the beneficiary for a reason that is due to the bank's relationship with the issuer or the relationship of the issuer with the beneficiary^[36] [Refer to the text of item 358/2 of the Egyptian Commercial Law], hence the issuer must take precautions against the fraud of the beneficiary, because of the arise harm to the issuer and this will be done at signing the basis contract, whose letter of guarantee was issued accordingly, and the issuer shall select a beneficiary of a good reputation at field of his work.

This is easy, if the beneficiary lives at the same country, but, if the beneficiary is a foreigner, and is not from the country of the issuer, the issuer must investigate the beneficiary in his country and request information about him, whether from the Chamber of Commerce or with the merchants in the country of the issuer.

The only payment whereas the bank can pay in case that it is ascertained that a case of a clear fraud or an apparent abuse, has been committed, deemed the payment of non-fulfillment of the value of the letter of guarantee, but the issuing bank cannot adhere to all the defenses of the issuer client before the beneficiary based on the rule of independence of legal relations arising from letters of guarantee.

As well as, the issuer should take the precautions while issuing articles of basis contract, and the letter of guarantee should refer to the base contract across from identification the guarantee itself and its independence, also the issuer should take precautions for the provided documents by the beneficiary. Also, it should take care of the form of the letter of guarantee that ensures non-fraud, and shall be done across from identification letters of guarantee issued previously^[37] [Talal Al Shobky, added that the effect of fraud at the bank payment, the source of the letter of guarantee, Master Thesis, Faculty of Law, Middle East University, 2015 P 95, that the letter of guarantee deemed one of the activities of the bank, plays a vital role at the contemporary economic activity, and through it, the banks acquired confidence at fulfillment their liabilities across from the letter of guarantee, dealing will be done between banks or with the clients at many fields such as taxes, customs, or internal and external commerce. As well as Dr. Nasser Al Ghareeb sees that the principals of the Islamic banking and cases of operation, First Version, Cairo: Sphinx Printing, Publish and Distribution, 1996, P201, that should be informed with much precautions, in order fraud shall not be happened to affect the confidence of banks regarding arising many of banking disputes.].

When the beneficiary submits the letter of guarantee to the bank, the bank does not have to refrain from payment, except in the case of fraud, and the bank is not permitted to

refrain from executing the pledge at the request of the person who ordered, because the letter of guarantee is independent of its relationship with the person who issued, and the bank seeks in all cases, to respect its signature and maintain its reputation, while the letter of guarantee, even if it was issued in implementation of the concluded contract between the bank and its client, but the relationship of the bank with the beneficiary in whose favor the letter of guarantee, is an independent relationship from its relationship with the client and it is governed by the letter of guarantee alone, and its will that identified the bank's commitment and the conditions under which it is paid, even if it is requested to be paid during the validity period of the guarantee and the conditioned were achieved, and the identified documents at the letter, were submitted, it should pay immediately ^[38] [Egyptian Commercial Cassation Judgment Appeal No. 1013 of 50 BC, session 30/12/1985.]. Also, the beneficiary may not waive his included right in the letter of guarantee, unless a consent of the bank, and provided that the bank is authorized by the issuer to give this consent ^[39] [Refer to the text of item 357, from the Egyptian Commerce law, accordingly, the bank may not initially refrain from payment the value of the guarantee, just because there is an agreement with the beneficiary to settle the arise disputes between them related to the payment of the value of the letter of guarantee, unless it has evidence of fraud or apparent arbitrariness on the part of the beneficiary.].

On other hand, in case it becomes clear to the issuer, and in his favor not to incash the letter of guarantee in favor of the beneficiary, despite, he is not a party to the letter of guarantee, then when the issuer implements his obligations in the base contract or the reason for non-performance of the original obligation, is payable to the beneficiary, or the client has a creditor with an interest to suspend the payment of the value of the letter for favor of the beneficiary, and even the client's creditor is not a party to the guarantee contract ^[40] [Talal Al Shobki, a prior reference, P97].

An inquiry was raised about the invalidity of the base contract, does it affect the independence of the letter of guarantee?

So, jurisprudence ^[41] [Talal Al Shobki, same reference, P 72] made a distinction between the relative or absolute invalidity of the basis contract, accordingly, they mentioned that in case of the invalidity of the base contract, is absolute, it will inevitably lead to the deletion of the letter of guarantee and if the invalidity is relative, it does not lead to the deletion of the letter of guarantee.

This opinion is in contrary with the independence of the letter of guarantee from the basic contract, which is considered its most prominent characteristic, and which was confirmed by the Egyptian Court of Cassation in one of its rulings stated that: "It is established in the judiciary of this court that the letter of guarantee, even if it is issued in implementation of the concluded contract between the bank and its client, but the relationship of the bank with the beneficiary, in whose favor the letter of guarantee, was issued, it is a relationship separated from his relationship with the client, governed by the letter of guarantee alone, and its phrases identifies the bank's commitment and the conditions under which it is paid" ^[42] [Egyptian Civil Cassation in Appeal No. 7304 of Judicial Year 63, Session 27/6/1994, Technical Office Group, Year 45, P 1125.]

This proves that the bank did not protest the defenses made by the issuer client against the beneficiary, and also proves the non- responsibility of the bank for payment without referring to the issuer client with its obligation to pay upon demand, even if the issuer client opposes ^[43] [In this regard, we have evidence of a court ruling issued by the Cairo Court of Appeal and the ordering client submitted to the head of the Cairo Court of Appeal in his capacity as a judge of temporary orders to issue an order on a petition to suspend the in cash of the value of the letter of guarantee issued by the aggrieved bank, until the settlement of the dispute with the International Chamber of Commerce in Paris, whereas the aggrieved company, the beneficiary, tried to liquidate the letter of guarantee by fraud, which prompted the aggrieved company, to apply to issue an order on a petition to suspend in cash the value of the letter, pursuant to the provision of Article 14 of K 27 of 1994 in the Egyptian Arbitration Law and actually the consultant, the head of the cassation court, issued an order to suspend monetization the letter till resolution at the arbitration with the international commercial chamber at Paris, and despite the cassation court cancelled this order, when there was a grieve from the beneficiary, otherwise, its cancellation was on basis of none effect of the fraud upon the independency of the commitment of the bank, but also as mentioned at the ruling of the court on basis of that there was no scope for sit-in against the court to take temporary or precautionary measures based on the text of Article 14 of the Arbitration Law, because the authority of this court is governed to the existence of a legal text that permits taking the mentioned measures in the form of an order on a petition, while the contested judgment is referred on the text of Article 14. (The judgment of the Cairo Court of Appeal, session 2/1/2002, Order No. 73 of judicial 118), this judgment is referred to by Dr. Hamdi Mustafa, previous reference, P.78-79.].

Second branch: The Effect of Fraud at the Documentary Credits

The documentary credit, is relied on the idea that documents lead to transfer of rights, as if they were made on the goods themselves, and the document-bearing banks acquire an effective and serious guarantee to justify the granted credit to the client ^[44] [Refer to item 347/1 from the Egyptian Commercial Law which stipulates the bank's obligation to examine and verify documents in accordance with the client's orders, the bank must verify that the documents compliance with the instructions of the person ordering the opening of the credit issued by the consulate of the country of arrival located in the country of shipment, as well as the bill of lading accompanying the goods sent, as the shipping document signed by the master or carrier represents proof of shipment of the goods on board the ship and is considered the holder of the goods and the right to receive them, bearing in mind that the bank does not examine the goods In fact, his work is limited to examining the submitted documents to him on paper, not the goods, in accordance with the text of Article 5 of the Uniform Rules for Documentary Credit, see Articles 20 to 27 of the Uniform Rules No. 600 of 2007 regarding documentary credits.], jurisprudence has ^[45] [Refer to Dr. Abdul Rahman Qurman, Commercial Contracts & Bank Operation, Riyadh, Dar Eljadah, 2020, P.433, (where he indicated that the documentary credit has many relations with the intervention

of the beneficiary who is foreign to the contract of opening the credit & the documentary credit is one of the credit operations that are taken as a means of settling the obligations arising from the operations of international trade).]

settled on the independence of the banking relationship between the bank, the source of the credit and the beneficiary from the sales relationship that comes from a sale contract, and that independence in the contractual relations maintain the arising relationships from the generated obligations by each party.

But the independence of the documentary credit, is not absolute, but, some of them are in contrary to the law and rights are gained through it ^[46] [At the documentary credit, the bank is committed directly and finally to face the beneficiary, as it is an independent from the relation of the bank with the issuer client to open a documentary credit, If it is invalidated or terminated, the bank may not refrain from fulfilling its obligation in the face of the beneficiary since the time the of addressing the letter of credit to the seller, but there is a reservation which is the revocable documentary credit, as this type of credit through which the bank reserves the right to cancel at any time and without the availability of any incurred responsibility by the bank towards the client or others, so the value of this type, is that it is a mean of organizing the process of fulfilling the value of the goods. In this case, the bank can return to its pledge at any time, but if it remains on its pledge, there will be no effect on the contract of opening the documentary credit on its commitment to the seller. See: Hani Dowidar, Commercial Contracts and Banking Operations, Alexandria: New University House, 2015, P 292.]

Therefore, fraud in documentary credit, is the material fraud ^[47] [The physical fraud means: the existence of fixed facts that indicate a clear indication of the beneficiary's violation of the terms of the basic contract and transferred to illegal means, such as the seller's agreement with the buyer to sell him certain goods and after the arrival of the agreed goods, shown they are other things of no value.] on the part of the beneficiary to obtain the credit feature that gives the client, many advantages and benefits to ease of dealing with modern machines and tools, however, fraud in the documentary credit is based to the beneficiary's implementation of his obligations, an implementation with a defect that harms the rights and interests of the buyer on the one hand, and on the other hand it achieves a benefit for him resulting from obtaining the value of the credit.

Accordingly, we find that the liability between the bank and the beneficiary, is mutual, while the beneficiary's breach of his obligation towards the bank, results the bank refraining from implementing its payment, whereas the bank initiating the credit, it is responsible for its implementation and paying its value to the beneficiary, so the documents are normally sent to the bank directly, and the bank inspects them and after assuring their conformity to the conditions, it will inform his client to attend and receive it after payment the value to be transferred to the seller (the beneficiary) and to clear the goods from port customs.

For example, the beneficiary is not obligated to submit the conformed documents with the letter of documentary credit, which justifies the bank's prevention and immediately notifies the issuer of the difference in the conformity of the submitted documents to the terms of the credit, indicating or explaining the reasons for its refusal, but the fraud of the

beneficiary towards the issued client, cannot be treated according to the principles of the credit rules and for the independency of the relationships, but it is governed by the general rules at sale contract ^[48] [Dr. Abdul Hadi Al Ghamdi, the nature of documentary credit and the effect of fraud on the bank's commitment towards the beneficiary, King Saud University Journal, No. (3), M (24), 2012, P. 147-159-173.]

The fraud that occurs in the documentary credit, gives the right to issuer or to the affected party to suspend the implementation of this credit or to place a retention, if it is implemented and before the retention, whereas compensation will be arise for fraud in itself, by the buyer seizing the right of the seller with the bank, hence we are in three cases:

The first case

The fraud is discovered before performance the credit, and the victim in this case, can order to suspend of the credit performance.

The second case

The fraud is discovered after the delivery of the documents and before the bank payment or trade, and here, the aggrieved person has the right to seize the value of the credit, to be compensated against the caused damage by fraud.

The Third case

The fraud is discovered after the implementation of the credit, whether by payment or trading, and in this case the aggrieved party has the right to claim compensation from the offender in accordance with the provisions of civil liability, or the criminal case if its conditions are met ^[49] [It has been settled that the occurrence of fraud in documentary credits is considered to be what gives the buyer the right to file a lawsuit to in cash the value of the credit. So that, fraud is an unlawful contractual breach of the rights of one of the parties. It must be taken into consideration that the request for payment relates to the correct and valid credit and that the fraud be clear and unambiguous and be issued by those who are invoked against it, because the general rule, is that the party to whom the fraud is committed, has the right to annul the act even if this fraud is from a third party, to verify the corruption of the will contractor because of this fraud.]

It should be noted that, the unified principles and customs, did not explicitly identify fraud in the documentary credit, as it was left to the internal legislation to deal with it, whereas the unified principles and customs, were interested with the independence of documentary credits from other contracts and relationships in the approval process, so we find the text of Article (4/1) of the broadcast No. (600) states that "the credit is independent in nature from the sales contract or other contracts concluded by the bank, even if the credit refers to this contract, while the bank is considered a third party in relation to the sales contract" ^[50] [There as an interest in unifying the provisions of documentary credits since 1920 in the United States, then Germany and France, although they were individual attempts, but they led to the conclusion of the Vienna Conference of 1933 regarding the unification of provisions called the unified rules and customs related to documentary credits and then amended to issue rules No. 600 of 2007 that

were applicable as of from 1/7/2007 under the title of Uniform Customs Practice Publication 600 (2007), see Dr. Samiha Al-Qalyubi, previous reference, P 802.].

We believe, that despite the great importance of documentary credit as it is one of the most important tools of contemporary trade, which arise from transactions to settle them and pay the price in the operations of import and export, the seller can perform his liability to deliver the goods to the buyer, and the buyer can inspect them at the same time, and with the large number of these transactions and the development of machines and tools, a way was opened for some to practices of fraud and deception in order to harm the rights of others through forgery and fraud.

As well as, it is clear that, the regulating international rules of documentary credits, are still insufficient to solve the arising problems and issues to face fraud in documentary credits, despite the banks activating control and protection in identifying such cases, the most important of which is that the opened documentary credit for an indefinite period, is considered canceled after expiration of six months of the date of notification the beneficiary to open it without usage^[51] [Refer to text of item 339 of Egyptian Commercial Law].

It should be noted about the mechanism of anti-fraud, whether the bank or the buyer takes the precautions and warning from the operations of fraud, that damages the documentary credit, before issue the base contract, or by authorizing it to refuse to receive the submitted documents with a proved case of fraud, through the buyer's good selection of sellers who enjoy a strong financial position that enables them to open a deferred or revocable letter of credit. As well as the buyer can also deal with the seller (exporter) in standard contracts, and the approval includes the condition of inspection when shipping, by specialized companies, and the buyer shall identify the approved carrier in the process of shipment, and it should enjoy a good reputation and good techniques, and it is better to deal with the national companies that have an agent in the region and not ship the goods on chartered ships.

Results & Recommendations

First: Results

1. Nowadays, banks are considered one of the most important resources of the national economy, as they work to stimulate production by providing credit, which plays a vital role in financing and investing all financial and economic activities.
2. Both of the documentary credit, and the letter of guarantee, have an independence of each other from the other relations and the base contract, and they complement each other.
3. The documentary credit was created by the commercial custom, as a guarantee for the seller to collect the price from the buyer, while the letter was created by the commercial custom, as a guarantee for the buyer regarding the implementation of the seller to what is stipulated in the base contract.
4. Fraud is an exception to the principle of independence in letters of credit and documentary credits.
5. The fraud must be apparent and fixed, and it must be issued by those who are protesting against it, in order occurrence of its effect.

6. One of the forms of fraud, is the beneficiary's claiming for the value of the letter of guarantee, which he is not entitled to.
7. The presence of fraud constitutes an impediment to pay the value of the letter of guarantee.
8. The issuer must take the sufficient precautions on his part, to avoid fraud, as he is the only party who suffers from it.
9. The issuer client has the right to receive the documents that prove a case of fraud.

Second: Recommendation

1. We recommend to activate the judicial means effectively, as the methods of protection against fraud at letters of guarantee, and to oblige the bank not to pay, in case it assures the availability of fraud.
2. We hope that the legislator stipulates the inability of the bank to face the beneficiary beyond of the scope of the letter of guarantee and documentary credit.
3. We wish to unify the used models in banks regarding the documentary credit at the international level, to prevent differences and maintain balance in relations.

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