

CRIME IN THE FIELD OF BANKING BY USING THE WEAKNESS OF LETTER OF CREDIT

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ABSTRACT

Letter of Credit (LC) is highly desirable and wide acceptance in the trading community because LC considered to carry low financial risk. Behind its use, the LC turns often misused by external actors even aided by unscrupulous internal bank to make fictitious transactions, create a letter or false documents as a condition for payment. This paper discusses the occurrence of criminal acts in the banking sector by exploiting weaknesses in the LC that make the bank as a victim and also a means to commit crimes such banking. The discussion in this paper emphasized on the application of laws and regulations applicable to indict the perpetrators of criminal acts in the banking sector by exploiting weaknesses of LC. Aspects of the discussion of a criminal offense based on the special legal of banking, Act No. 10 of 1998 concerning Banking for the perpetrators of bank's internal, and under the provisions of the Penal Code for persons outside the bank.

Key words : letter of credit, criminal acts in the banking sector

INTRODUCTION

Letter of Credit (LC) is a payment method offered by bank for settlement the international transaction, particularly the foreign trade namely import export. LC as the method of payment is a secure financing facility for both importers and exporters, particularly for exporters who have traded goods. For exporters, the most important element in a transaction is the assurance that the goods that have been sold will get the payment as agreed by the buyer when the seller has sent the goods in request. On the other hand, for buyers, the accuracy of receipt of goods is the most important element because the goods that come late will certainly not be worth selling again or no longer useful, especially the fashionable and perishable goods that will quickly be abandoned by consumers when assessed has expired time or has expired for consumption.

Therefore, the existence of LC is a means capable of providing guarantee for the interests of the sellers and buyers. In the event of default by either party, either the seller or the buyer, the bank as the LC issuer will provide payment guarantee for the seller or the waiver of payment for the buyer. Almost all foreign trade transactions generally use LC because of the guarantee power provided in the use of LC, mainly on the first transactions done between the seller and the buyer.

The fact that there is a seller's rights regarding the payment of the transaction and the buyer's right regarding the receipt of goods guaranteed through the use of LC does not eliminate the possibility of occurrences of deviations which should be a constraint in the settlement of transactions using LC. These constraints can become neglected at the buyer's request. Generally, in the process of negotiation made by the seller in order to request payment for the transaction has been done or will be done, requires the inspection of documents requested or required to be prepared by the seller as stated in the LC by the bank and forwarded to the buyer. In case of discrepancy, the seller is obliged to repair or provide all documents required in LC. In case of discrepancy, the seller is obliged to repair or provide all documents required in LC. If the buyer accepts that the deviation is negligible, the issuing bank of LC shall make payment to the negotiating bank which will be forwarded to the seller. This is where the weakness of LC use occurs. That is, the bank as a guarantor only relates to documents, even the bank can keep running a negotiated process of LC payment to the seller despite the occurrence of irregularities as long as the buyer gives the "ignored" instructions on the deviation that occurred.

The conditions occurring in payments using LC as described above are set out in the universal provision for payment methods using Letter of Credit (UCP). Subsequently in Article 5 UCP 600, it is emphasized that in transactions using LC banks deal only with documents and not dealing with goods, or other implementation. The provisions in the UCP are the basis for the principle of attachment to

documents in LC. In Article 14 a UCP 600 it is affirmed that the LC payments are based on the suitability between the LC requirements and the submitted documents viewed under "on their face".¹

With this LC weakness it is possible once the occurrence of collusion between buyers and sellers. For example to obtain and rotate funds paid by the bank to the seller as working capital without having to pay interest and administration costs as in the application of working capital loans or other mortgage credit. Another example is the L/C fictitious. In the case of a fictitious LC there is actually no real transaction between the seller and the buyer. Sellers and buyers colluded to get funding as a cheaper way than applying for credit, or used to steal bank funds. Because the bank only checks the documents and does not check the physical transaction, then the bank never know that the transaction actually never happened. In many cases the fictitious LC always involves the internal bank itself, and this is what is called collusion and corruption to deceive the bank. This is also of concern to banks in terms of risk management.

One of the fundamental things is UCP does not regulate fraud issues in LC transactions. Fraud in LC transaction is not regulated in UCP 500 (Article 15) or in UCP 600 (Article 34). Fraud is a legal arrangement in the Criminal Law. In the case of fraud or collusion that makes the bank as a victim can be categorized as a crime in the field of banking².

There are differences in the use of terminology in banking criminal act, such as a crime in the field of banking, crime against banking, and banking crime. This term difference evolves to the notion of banking crime. Banking crime can be interpreted as a crime "in the banking sector" which in this sense includes all unlawful acts that are related to the banking business. In this sense also covered banks as perpetrators and banks as victims³.

This paper will reveals the occurrence of criminal offenses in the field of banking conducted by buyers and sellers by utilizing the weaknesses of Letter of Credit either colluded or without colluding with the internal bank.

Based on the research focus, this type of research is a normative legal research. Normative research is a legal research conducted by examining library materials or secondary data⁴. The approach used in discussing the research data is the Statute Approach and Conceptual Approach. The Statute Approach is conducted by reviewing all laws and regulations pertaining to legal issues being addressed. While the conceptual approach moved from the views and doctrines that developed in the science of law. The legal substances used are primary, secondary and tertiary. Secondary data were collected through document studies of literature materials consisting of:

1. Primary Legal Material, binding legal material derived from legislation that is:
 - 1) The Criminal Code
 - 2) Law on Criminal Procedure Law. No. 8 Year 1981
 - 3) Law No. 10/1998 on Amendment of Law no. 7 Year 1992 on Banking
 - 4) Uniform Customs and Practice for Documentary Credit, ICC Publication No. 500 Year 1994 (UCP 500)
 - 5) Uniform Customs and Practice for Documentary Credit, ICC Publication No. 600 Year 2007 (UCP 600)
 - 6) Circular Letter of Bank Number 26/34 /ULN dated December 17, 1993
2. Secondary Legal Material, namely:

Materials that provide an explanation of the primary law, namely books and reading sources related to the problems studied, scientific work of the law and documents relating to the problems studied.
3. Tertiary Law Material, namely:

¹Circular Letter of BI Number 26/34 / ULN dated December 17, 1993

²The term "Criminal Acts in the Field of Banking is used by Brigadier General Drs. HAK Moch Anwar, SH and Prof. Mardjono Reksodiputro, SH, MA. See, HAK Moch Anwar, Crime in Banking, (Bandung: Alumni, 1986). See also Marjono Reksodiputro, Progress of Economic Development and Crime, Collection of Essay Books, (Jakarta: Center for Justice Services and Legal Services, 1994), page 74

³Setiadi, Edi and Rena Yulia, Economic Criminal Law, Yogyakarta, Graha Ilmu, 2010, page 139

⁴Soerjono Soekanto and Sri Mamudji, Normative Law Research: A Brief Overview, Jakarta, PT. Raja Grafindo Persada, 2009, page 13

Supporting materials outside the legal field that provide guidance and explanation of primary and secondary legal materials such as general dictionary, legal dictionary, encyclopedia, newspapers as long as contains information relevant to this research material.

LITERATURE REVIEW

Letter of Credit in Banking Practice

In general, Letter of Credit (LC) is used to finance the contract of sale of goods or long distance sales crossing the boundaries of a territory between buyers and sellers who do not know each other well. However, LC is not a guarantee or guarantee or a negotiable instrument.

How to pay by using LC is not separated from the terms and conditions set by the parties concerned. One of the requirements is that a payment can be made if it has been submitted documents to the bank that formally meet the requirements stipulated in the LC. Payment by LC in its implementation involves banking services that are located in different countries. Therefore, the use of payment method with LC requires the suitability of payment method between the banks, which is realized by the existence of regulatory uniformity⁵.

LC literally can be translated as a debt or letter of receivables or billing, but in fact LC is a promise of payment if and after fulfilled certain conditions⁶.

In Uniform Customs and Practice for Documentary Credits⁷, ICC Publication No. 600 of 2007 (UCP 600), the definition of Letter of Credit is "Each agreement, in various names or with various purposes, issued by a bank (Issuing Bank) acts upon the request and instruction of a customer (Applicant) or on his own behalf, to make payment to a third party or its proxy (the person designated by the beneficiary/LC recipient) or authorize another bank to make payment, or to accept and pay bills of exchange/draft, or authorize other banks to negotiate upon the submission of the designated documents, provided that the documents meet the terms and conditions of LC".

The LC definition under UCP is the promise of the issuing bank to make a payment or authorize another bank to make payments to the recipient for the submission of documents in accordance with LC requirements⁸. The essence of the LC definition according to UCP is that the LC is the promise of payment. The issuing bank shall make payment to the recipient either directly or through another bank upon the instruction of the applicant promising to pay back to the issuing bank.

The definition of LC according to Bank Indonesia is a promise from the issuing bank to pay a sum of money to the exporter as long as the exporter can meet the terms and conditions of the Letter of Credit⁹. The opinion of Bank Indonesia is the core of the LC is the promise of payment. The payment of LC to the recipient may be made directly by the issuing bank or through another bank as its proxy.

In practice Commercial banks in Indonesia follow the LC definition according to UCP. This is because at the time of enactment of Government Regulation no. 16 of 1970 (amended by Government Regulation No. 11 of 1976) and both have been revoked by Government Regulation no. 1 of 1982, Bank Indonesia issues the Association of Foreign Exchange Flows Regulations (HKPLLD) as the implementation provisions requiring that LCs received from overseas as well as those issued from Indonesia abroad are subject to UCP applicable UCP 290¹⁰ which came into force on 1 October 1975.

As a condition of its implementation, Bank Indonesia issues Circular Letter of Bank Indonesia no. 17/14 / ULN dated September 29, 1984 which requires that the LC issued by the foreign exchange bank in Indonesia be subject to the prevailing UCP, UCP 400, which entered into force on 1 October

⁵Adrian Sutedi, *Juridical Review Letter of Credit and Syndicated Credit*, Bandung, Alfabeta, page 6

⁶C.F.G. Sunaryati Hartono was quoted by Ramlan Ginting, *International Business and Banking Transactions*, Jakarta, 2008, page 15

⁷The enforcement of UCP 500 or UCP 600 is not based on the signature and ratification mechanism by the government or the head of State as is appropriate to a treaty or convention. In Indonesia, BI issues Bank Indonesia Circular Letter in the UCP 500 enforcement setting

⁸UCP 500, article 2

⁹Bank Indonesia, Foreign Affairs, Foreign Exchange Payment and Registration Section, *International Payment Method Letter of Credit & Non-Letter of Credit*, 1995, page 2

¹⁰The prevailing UCP is UCP 1974 Revision, ICC Publication No. 290 also called UCP 290

1984. Then the Bank Indonesia Circular Letter no. 17/14 / ULN is revoked by Bank Indonesia Circular Letter no. 26/34 /ULN Dated December 17, 1993 which regulates LC subjection on UCP applicable UCP 500. Bank Indonesia Circular Letter no. 26/34 /ULN gives the foreign exchange bank the option to determine the LC it submits under or not to UCP 500. In practice, the foreign exchange bank is still subject to the LC definition following UCP 500 even though UCP 600 has been published.

Letter of Credit as a means of payment is in great demand internationally because of the elements of the promise of payment available in this instrument. LC recipients who sell goods to LC applicants feel secure because of the promise of payment from the issuing bank. Conversely, the applicant also feels secure buying goods by way of payment using LC because it will receive the documents it wants because the fulfillment is a condition of LC payments.

In general, the issuing bank does not directly make payments to the recipient, but through another bank authorized by LC to do so. Another bank acts according to the authorization¹¹ it receives from the issuing bank. If the other bank concerned acts outside its authority of attorney then the bank is solely responsible for any risks that may arise. If the other bank acts according to the authorization receiving from the issuing bank, then the other bank is entitled to a reimbursement from the issuing bank¹² for the payment it has made to the addressee. Furthermore, the issuing bank shall also be entitled to receive reimbursement from the applicant for any payment made to another bank. This repayment is called reimbursement.

Bank Documents, Payments and Guarantee in Letter of Credit

The main thing to note in the use of LC as a means of financing and payment of export import transactions is on the documents required in the LC. The basis for bank transactions is focused on documents only, so the beneficiary must meet the specific requirements related to the documents as stated in the LC accompanied by the draft itself to obtain payment. The document is evidence of the implementation by the beneficiary regarding the sales contract on its part and the transfer of ownership of the goods¹³.

In this way the buyer obtains a certainty of receiving the goods which have been approved and fixed payment by the buyer. Similarly, the bank concerned with this transaction is granted the right of ownership of the goods, thereby ensuring that the buyer will fulfill its obligations under the agreement of the LC¹⁴.

According to Maurice Megrah, the LC payment requirement is the submission of documents in accordance with LC requirements. The submission of these documents is a condition for LCs to be paid or accepted and paid at maturity¹⁵. Those documents are the main basis for determining the bank's attitude in the payment of LC.

Article 4 UCP 500 contains the following provisions:

“In credit operations all parties concerned deal with documents, and not with goods, services and/or other performances to which the documents may relate.”

Furthermore, article 5 of UCP 600 contains the following provisions:

“Banks deal with documents and not with goods, services or performance to which the document may relate.”

In this case the emphasis of the difference between UCP 500 and UCP 600 lies on the party implementing the LC. UCP 500 says the party implementing the LC is all parties, including the issuing bank, the designated bank and the recipient. Meanwhile, UCP 600 said the party carrying out the LC is a bank, meaning only the issuing bank and the appointed bank.

¹¹This Intermediary Bank is justified in accordance with UCP 500 Articles 2, 7, 9, 10, 14, 18

¹²UCP 500 Article 14, 19

¹³Soepriyo Andhibroto, Letter of Credit In Theory and Practice, Semarang: Dahara Prize, 1997, page 160

¹⁴ibid

¹⁵Maurice Megrah, Risk Aspects of The Irrevocable Documentary Credit, as quoted by Ramlan Ginting, Op.Cit., Page 217

Subject to the provisions of Article 4 UCP 500 or Article 5 UCP 600, the bank shall pay the documents filed as long as the submitted documents meet the LC requirements. Banks in implementing LC deal with documents only. So the core of LC realization is the suitability of documents with LC requirements. Therefore, banks are required to conduct research on documents to determine whether the documents can be paid or not. The benchmark specifying document is UCP. The Bank shall conduct research on the documents submitted to determine whether the documents are in compliance with the LC requirements. According to Article 13 a UCP 500, the measurement of conformity is based on international banking practice standards. Inconsistent documents one to another are a reflection of the lack of compliance between documents and LC requirements. Meanwhile, according to Articles 14 a and d UCP 600, the suitability measurement is based on the presence or absence of conflict between the document and the data in the document, other required documents or LC. Basic measurement to determine whether or not a conflict based on LC, the document itself and international banking practice standards¹⁶.

The decision to determine documents physically (formally) has or has not been in accordance with the LC requirement and substantially the documents have been or have not been consistent with one another completely based on the research of the bank, not on the basis of the other party's understanding. Such as this research documents is called research based on face (appear on their face).

Based on Article 14 b UCP 600, the bank in examining the documents has a maximum of 5 (five) banking days after the presentation day to determine the appropriate presentation. In Article 15 UCP 600 mention that the issuing bank and the confirming bank are obliged to undertake honor or negotiation of the appropriate presentation. This means that once the issuing bank or confirmation bank has established the appropriate presentation under Article 14 b UCP 600, then based on Article 15 UCP 600 issuing bank or confirmation bank enters the settlements process for honor or negotiate. In essence Article 15 UCP contains the obligation to pay when the presentation is appropriate, without arranging when the realization of the honor or negotiate.

Weaknesses of Letter Of Credit

LC is said to be an effective payment method, providing payment guarantee for exporters as well as guaranteed fulfillment of documents for the interests of importers. However, in practice, the method of payment with LC is not fully able to run effectively, this is evidenced by the various deficiencies contained in the payment method using LC, among others as follows:

1. The LC is concerned with 'complying presentation' which is the presentation of documents that meet the terms and conditions of Letter of Credit, applicable UCP requirements and international banking standard practices, so that payments are made by banks only on the basis of documents.
2. If the document contains discrepancies, then even if the goods have been shipped/shipped in accordance with the order, the exporter has the potential to not receive the payment or receive the payment with discrepancy fee deducted.
3. In the event of fraud, the exporter/beneficiary will not receive a payment even if all documents submitted meet the requirements.

Under the principle of independence, the LC is a contract independent of its basic contract. The sales contract, LC issuance contract, LC contract between issuing bank and beneficiary, agency contract is interrelated in business, but legally those contracts could not be attributed one to another.

Analysis

The main thing to note in the use of L / C as a means of payment of import export transactions is on the documents required in LC. LC is very concerned with 'complying presentation' which is presentation of documents that have met the terms and conditions of Letter of Credit, applicable UCP terms and practices of international banking standards, so that payments are made by banks only on the basis of documents. The basis for bank transactions is focused on documents only, so the beneficiary must meet the specific requirements related to the documents as specified in the LC accompanied by

¹⁶Ibid., page 219-220

the draft itself to obtain the payment. The document is evidence of the implementation by the beneficiary regarding the sales contract on its part and the transfer of ownership of the goods.

The weakness of LC is what is used by related parties, in this case the buyer and seller to commit crime in the banking scope. Generally, perpetrators of crime in the banking field is done by corporate actors commonly referred to as white collar crime. In doing the action the perpetrator is also assisted by an insider or person in the bank. Forms of white collar crime in banking crime related to employment activities and their positions may include falsifying letters in payment traffic (checks, money orders, demand deposits), establishing banks without permission (to avoid taxes), providing credit beyond the Banks financial capability, embezzling customers 'money, leaking all customers' financial secrets and more itself.

Banking crime cases both banks as victims or involve insiders in banks by utilizing the weakness of LC often occur in Indonesia, including the case of LC Bank Pembangunan Indonesia-Bapindo (famous of the case of Golden Key Group-GKG) and the case of fictitious LC BNI (known as Gramarindo Group-BNI case).

In the case of KGK, Bapindo has ignored the principles of prudence and supervision, in this case the Legal Lending Limit (BMPK), namely the provision of credit of 1.3 trillion has exceeded the limits considered to violate the principles of prudence and supervision. In BNI case, the usance transactions of LC Gramarindo Group and Petindo Group as beneficiary have been negotiated by BNI Bank Kebayoran Baru with discounts without preceding the acceptance from the issuing bank. In addition, LC documents contain irregularities and LC negotiations are conducted without document completeness.

Any offense as a violation of prohibitions or obligations under the law is essentially an act of law (*onrechtmatige handeling*) as the main requirement shall comply with all elements of the offense as formulated in a law intentionally or unintentionally committed by a person who is accountable and by law has been declared a punishable offense. The criminal act is said to be strafbaarfeit.

In general, the potential deviations that may occur when applying for the issuance of LC facilities are among others the debtor using fictitious or falsified supporting documents, resulting in fictitious transactions and as if there is a legal relationship between the importer (applicant) and the exporter (Beneficiary) which can also occur both companies are paper trading companies. In this case of course the bank will be harmed, because the LC facility can be disbursed by the debtor. However, fictitious transactions using these LC facilities usually also often involve internal parties from the bank itself. In the event of a falsification of documents at the time of submission of an LC facility involving an internal bank, it is appropriate to implement article 49 paragraph (1) letter a of the Banking Act for the internal parties involved in the bank. The use of Article 49 Paragraph (1) Sub-Paragraph a (Law Number 10 of 1998) relates to fraudulent crimes related to bookkeeping, business activity reports, bank account transactions.

Banking Law number 10 of 1998 is a criminal act with specific perpetrators, only applicable to the Commissioners of the Bank, Board of Directors of Banks and Bank Employees. That is, the perpetrators of crime in article 49 are internal banks themselves. If a bank employee conspires with an outside bank conducting a criminal offense, then the bank's employees are subject to bank laws while outsiders are subject to the Criminal Code.

Under the provisions of the Criminal Code, the perpetrators of criminal acts in the banking sector may be charged under Article 55 paragraph (1) first book of the Criminal Code, Article 264 paragraph (2) jo Article 55 paragraph (1) to the Criminal Code; and Article 263 paragraph (1) jo Article 55 paragraph (1) of the Criminal Code.

Article 264 paragraph (2) jo article 55 paragraph (1) first book of Criminal Code, aimed at the act of forgery or falsifying the letter. Counterfeiting or falsifying the letter mentioned in article 264 of the Criminal Code is committing an act of falsifying a pre-existing letter or falsifying a letter that has been specified criteria. This is different from the definition of article 263 of the Criminal Code which is to make a fake letter that has not existed before with the aim to give rise to rights.

Article 263 paragraph (1) of the Criminal Code contains elements of who, makes false or falsified letters, which may give rise to any right, contract or debt relief, or designated as evidence of a thing, with the intent to use or order others to wear The letter seems to be true and not false, such use may result in harm, those who do, order to do or participate in doing.

Conclusion

Criminal actions in the field of banking by buyers and sellers may occur by exploiting the weaknesses of LCs that are particularly concerned with 'complying presentation', ie presentation of documents that meet the requirements of LC, applicable UCP regulations and international banking standard practices. So payments are made by banks only on the basis of documents without any physical verification of the transactions taking place.

The effort to overcome the crime in the banking sector conducted by the internal bank is charged with Act Number 10 of 1998 concerning Banking which clearly states that the legal subjects or perpetrators of criminal acts in committing the crime of false registration are set in a limitative manner, namely the board of commissioners, directors, or bank employees which are all officers and employees of the bank, while persons outside the bank are subject to the Criminal Code.

Banks are required to have a stricter standard of internal verification procedures for each LC facility transaction regardless of proximity of customer relations with both importers and exporters in order to overcome the weaknesses in the provision of LC facilities.

The penalties applied are more effective and maximized, especially for the internal bank considering the bank is an institution trusted by the public to save the funds. For parties outside banks that make banks as a means and targets of criminal offenses in the field of banking can be snared by adding articles in the Act Money Laundering Crime. This can happen considering the weakness of LC that does not verify facts in the field, so the LC facility applied by the importer can be used as a means of money laundering through bank.

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