

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 22

Suit 5404/1986, 1632/1987, 2198/1987

Between

Chinsim Trading (Pte) Ltd

... Plaintiff

And

Indian Bank and other actions

... Defendant

GROUND OF DECISION

Banking — Letters of credit — Negotiable credit; Banking — Letters of credit
— Negotiating bank; Banking — Letters of credit — Relationship of parties

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Chinsim Trading (Pte) Ltd v Indian Bank and other actions

[1993] SGHC 22

Suit 5404/1986, 1632/1987, 2198/1987

Kan Ting Chiu JC

30 January 1993

1 Cur Adv Vult

2 A single letter of credit spawned three actions between the issuing bank, the intermediary bank and the beneficiary. The three actions were consolidated for hearing before me.

3 The credit was issued by the Indian Bank on the request of Intsearch Marketing Services Pte Ltd in favour of Chinsim Trading (Pte) Ltd ('Chinsim'). Chinsim presented the credit to the Banque Indosuez for negotiation. Banque Indosuez negotiated the credit to their satisfaction and sent the documents to Indian Bank for payment. When the Indian Bank failed to pay, three suits were filed.

4 Suit No 5404 of 1986 is a claim by Chinsim against Indian Bank. Chinsim sued Indian Bank as the acceptor or issuer of the credit negotiated by Banque Indosuez. In the second action, Suit No 1632 of 1987, Chinsim sued Banque Indosuez on the ground that Banque Indosuez failed to deliver the credit that they had received 'for negotiation or for collection' to Indian Bank before the credit expired. Lastly, Banque Indosuez claimed in Suit No 2198 of 1987

that they had duly negotiated and presented the documents to Indian Bank and Indian Bank had wrongfully failed to take up the documents or make payment to them.

5 **The documents**

6 The letter of credit issued by the Indian Bank was an irrevocable unrestricted credit for US\$66,000 dated 18 August 1986 expiring on 2 September 1986. Printed on the credit are statements that `We hereby engage with drawers and/or bona fide holders that drafts drawn and negotiated in conformity with the terms of the credit will be honoured by us and that drafts accepted with the terms of this credit will be duly honoured at maturity` and `This Credit is subject to Uniform Customs and Practice for Documentary Credits (1983 Revision) International Chamber of Commerce Publication No 400)` (the UCP`. A typewritten statement was inserted that `Reimbursement will be made by us on receipt of documents as per terms of the credit to a bank nominated by the negotiating bank`.

7 The credit specified the documents which were to be presented for negotiation. The document specifically relevant to these proceedings is an inspection certificate to be issued by one Ramkumar Bishwanath.

8 When Chinsim presented the documents to Banque Indosuez, they filled in an `Application for Negotiation of Documentary Bill` dated 1 September 1986 in the bank`s standard form. The application form opens with the words: `We request you to negotiate with recourse to us the attached documents ...`. The form contains printed instructions to the bank for the disposal of the proceeds which an applicant may select by ticking against the adjacent boxes. One of the instructions was `Credit us only on receipt of funds ...`. This

instruction was not selected by Chinsim. At the foot of the form, it was printed: `It is distinctly understood that the abovementioned negotiation is effected with full recourse to ourselves and any interest for delay in reimbursement including all relative charges are for our account`. The effect of this is, inter alia, that if payment is made to a beneficiary before funds are received from the issuing bank, Banque Indosuez will charge the beneficiary interest on the sum paid out before the reimbursement. On this form, the credit officer of the bank made the notation `Upon receipt of funds` but the notation was cancelled. It was not alleged that the notation was made with the knowledge of Chinsim.

9 The documents were forwarded by Banque Indosuez to Indian Bank on 3 September accompanied by a printed standard form letter dated 2 September 1986. In this letter Banque Indosuez informed Indian Bank that `We send you herewith documents as noted below relating to our negotiation.` By way of emphasis, the words `our negotiation` were enclosed in a box. Banque Indosuez went on to certify that `all the terms and conditions of the credit have been complied with`. At the foot of the letter there is the notation that `This negotiation has been effected according to Uniform Customs and Practice for Documentary Credits (1983 Revision) International Chamber of Commerce Publication No 400`.

10 **Facts**

11 The primary facts are not in dispute. Chinsim presented the documents to Banque Indosuez on 1 September 1986 at about 5pm. The documents included a sight draft drawn by Chinsim on Indian Bank in favour of Banque Indosuez for US\$65,961.51. (The diminution in this figure from the US\$66,000 stated in the credit was not explained).

12 The officers of Banque Indosuez did not check the documents that day but commenced to do so on the next day, ie 2 September. On checking, some documents, including an inspection certificate, were found to need rectification. The weight entry in the certificate needed to be changed from 250 tons to 249.8542 tons. This entry was corrected and the certificate was returned to the bank at 5.15pm on 2 September. However, it was then discovered that although the weight was amended, the amendment was not signed. The certificate was returned to Chinsim again on 3 September for this to be done, and when it was returned with the signature emplaced, the whole set of documents were sent to Indian Bank on 3 September together with Banque Indosuez's letter dated 2 September which I have referred to. Initially, Indian Bank raised queries over the certificate of origin and bills of lading. However, by the time the actions were commenced, the dispute was confined to two issues - whether there was a full presentation of documents on 2 September before the credit expired, and whether the documents were presented to Bank Indosuez for negotiation or collection.

13 **Issues**

14 On the facts, several issues of fact and law were raised. The issues that have to be addressed were:

- (1) whether Banque Indosuez was acting as a collecting bank or a negotiating bank in dealing with the documents;
- (2) whether Banque Indosuez received all the documents on 2 September;
- (3) whether Banque Indosuez can negotiate the draft without paying Chinsim;
- (4) whether there can be reimbursement without payment; and

(5) whether Chinsim can sue Indian Bank for payment if the draft was negotiated by Banque Indosuez.

15 Whether Banque Indosuez was acting as a collecting or negotiating bank

16 The contemporaneous documents bear clear evidence on the nature of the dealings between Chinsim and Banque Indosuez. Chinsim issued unequivocal written instructions on 1 September to the bank requesting it to negotiate the documents. By their letter to Indian Bank dated 2 September, Banque Indosuez confirmed that they had negotiated the documents. On 5 September, Banque Indosuez repeated to Indian Bank that `as far as we are concerned all the documents are properly presented in accordance with the terms of your letter of credit and negotiated by us`.

17 The evidence adduced in court was equally clear. Mr Tan Chen Tat who presented the documents to Banque Indosuez on behalf of Chinsim as well as Mr Lee Fon Yoong, the bank`s then credit marketing officer, who received the documents from him confirmed that the documents were presented for the purpose of negotiation.

18 The nature of the transaction came into question because of an unfortunate confusion on the part of the officers of Banque Indosuez, their solicitors and the solicitors for Chinsim. It is hard to believe that they can be confused over something so basic, yet Banque Indosuez took the position from 26 September 1986 to 17 March 1987 that it was acting as a collecting bank, and Chinsim sued Banque Indosuez on the basis that they had delivered the documents `for negotiation and or for collection`.

19 On the evidence, there can be no doubt that Chinsim had presented the documents to Banque Indosuez for negotiation and that Banque Indosuez received the documents for that purpose.

20 **Whether Banque Indosuez received all the documents on 2 September 1986**

21 At the hearing, the parties treated the expiry date of the credit as the date by which negotiation must take place. That is not the effect of the expiry date. Article 46(a) of the UCP requires every credit to stipulate an expiry date `for **presentation** of documents for payment, acceptance or negotiation` (emphasis added). Documents presented before the date of expiration can be negotiated subsequently (see International Chamber of Commerce Publication No 489, Cases 275 and 276).

22 The UCP does not state when a document is to be considered compliant and when it is to be considered discrepant. Indeed, the UCP cannot attempt to do so because the types and contents of the documents that are to be tendered are left to the parties` determination. However, the UCP does provide in art 15 that:

*Banks must examine all documents **with reasonable care** to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit. (Emphasis added.)*

23 In this case the invoice, weight notes, certificate of origin and bill of lading presented recorded the weight of the timber as 249.8542 tons, but the inspection certificate stated it as 250 tons.

24 Miss Susan Sim Choo Hiang of Banque Indosuez, who checked the documents, said that the bank was willing to negotiate the credit on 2 September because the beneficiaries said they can get it endorsed the next day. She also said that she did not regard the absence of the signature against the amended weight to be a discrepancy, but requested the endorsement of the signature `To show that the alterations are done by proper parties. That is a general practice - all banks do that`.

25 There was some confusion in her evidence. In answer to counsel for Indian Bank, she agreed that there was no proper presentation of documents for negotiation on or before 2 September because the inspection certificate was only rectified and presented on 3 September. When I asked her what would happen if the inspection certificate was not rectified on 3 September she said: `We would not have the documents sent to IB (Indian Bank)`. Her explanation that the bank negotiated the documents on 2 September because of Chinsim`s assurance that they can get the amendment endorsed the next day did not agree with her evidence and the evidence of her superior officer, assistant manager Mrs Debbie Lee Tock Fan, that the beneficiaries were only told on 3 September to get the correction endorsed.

26 Mrs Debbie Lee accepted that the original inspection certificate showing the weight of 250 tons was discrepant. However, she regarded the amended certificate as it stood on 2 September (ie without the signature to the amendment) as a compliant certificate. Her explanation was that `If the certificate had come back without the endorsement we could still have sent it to the Indian Bank because there was an endorsement to the alteration beside the vessel Eastern Lucky. We can take the amendment to the quantity as good.` She was referring to the entry on shipment in the inspection certificate immediately below the entry on weight. The shipment entry was amended in respect of the

name of the vessel Eastern Lucky and endorsed with the signature of Ramkumar Bishwanath who issued the certificate.

27 I find it difficult to accept this explanation because Mrs Lee knew that the amendment and signature regarding the vessel were on the certificate when it was presented on 1 September. There was no basis for her to treat the signature as applicable to the subsequent amendment to the weight, because clearly, it did not.

28 Banque Indosuez called two expert witnesses to give their opinions on this matter. Mr KA Swaminathan was of the view that no additional signature was required for the amendment and that the one signature against the Eastern Lucky can cover both the amendments to the weight and the vessel. The second expert, Mr Eric Bishop, took a stronger stand: `The inspection certificate without the signature against the amended quantity is acceptable to me as a good tender`. When he was questioned, he explained that he did not consider the entry on quantity in the inspection certificate as important but added that if the entry was important, he would require the amendment to be signed. He did not explain why signatures are required for some amendments and not for others. There is authority that minor variations are acceptable without amendment (see ***Gian Singh & Co Ltd v Banque de L'Indochine*** 1), but no authority was cited in support of the proposition that minor amendments do not have to be signed.

29 All the evidence on this issue must be assessed against the duty imposed by art 15 of the UCP that `Banks must examine all documents with reasonable care`. On this basis, I accept Miss Susan Sim`s evidence that amendments are required to be endorsed to show that they are done by the proper parties. That reflects good sense and sound practice. The acceptance of an unsigned and possibly unauthorized amendment cannot be consistent with the exercise of

reasonable care. I cannot accept Mr Swaminathan's view that the signature against the amendment to the vessel can be applied to the subsequent amendment to the quantity. I am also unable to accept Mr Bishop's opinion that the entry of weight in an inspection certificate is not important. Miss Susan Sim and Mrs Debbie Lee who checked the documents regarded the entry to be important enough to require rectification. A bank which regards a weight entry in an inspection certificate as unimportant would have failed to exercise reasonable care.

30 In the circumstances, I find that Chinsim had not submitted a proper inspection certificate to Banque Indosuez till 3 September, and consequently the full set of documents was not presented for negotiation before the expiration of the credit on 2 September.

31 The release of the inspection certificate to the beneficiary on 3 September for the signature to be endorsed is noteworthy in view of Banque Indosuez's position that presentation and negotiation were accomplished on 2 September. Is the release consistent with Banque Indosuez having already negotiated the credit on the previous day? What would happen if the beneficiary failed to return the certificate? Miss Susan Sim said: 'If at 2pm on 3 September the inspection certificate was missing we will have to cancel the negotiation and tell the customer it is too late to negotiate...', and Mrs Debbie Lee said: 'If the inspection certificate did not come back we will let the customer know that we cannot negotiate the documents'. Their evidence showed that they had not committed themselves to the negotiation on 2 September. It was at best a conditional negotiation, which became unconditional on 3 September, although the beneficiary did not even know that it had to obtain the further signature till 3 September³. On the evidence, I find there was no proper presentation and no negotiation on 2 September. However, as Chinsim and Banque Indosuez agreed

between themselves that the documents were negotiated, my finding does not affect the relationship between them. It does, however, mean that Indian Bank's defence that there was no timeous presentation of the documents and no negotiation by Banque Indosuez succeeds against Banque Indosuez.

32 **Whether Banque Indosuez can negotiate the draft without paying**

33 Indian Bank contended that Banque Indosuez cannot have negotiated the draft because it had not paid Chinsim on 2 September or thereafter. This raises the question whether payment needs to be made by a negotiating bank on negotiation. There should not be a strict requirement for immediate payment. An applicant for negotiation may instruct a negotiating bank to make payment only on receipt of funds. The time of payment would also depend on the tenor of the draft. A sight draft is payable upon presentation, but time drafts are not due for payment until the stipulated time for payment. A negotiating bank which has not confirmed the credit may negotiate only on condition, for example, that payment will be on receipt of funds - **Maran Road Saw Mill v Austin Taylor & Co Ltd**. [1975] 1 LLR 156 Each transaction must be considered on its own facts.

34 The fact that the beneficiary did not instruct the bank to make payment upon receipt of funds and the further fact that the words 'Upon receipt of funds' were cancelled are inconsistent with there being any agreement between bank and customer that payment was to be made only on receipt of funds. When Mr Tan Chen Chat was cross-examined by counsel for Banque Indosuez on this point, the farthest that counsel went was to '[S]uggest that it was understood that payment from Banque Indosuez would be after Banque Indosuez received payment from Indian Bank'. There was no suggestion of any express agreement

that payment was to be deferred till funds were received from Indian Bank. On the evidence, I find that payment was due on negotiation.

35 Counsel for Banque Indosuez submitted that a negotiating bank has a discretion whether to make immediate payment on negotiation. This proposition is pitched too high to be sustainable. A non-confirming negotiating bank may agree to negotiate only if it does not have to pay out of its own funds, but that must be a matter of agreement arrived at with the customer when the documents are accepted for negotiation. If the bank does not impose such a condition and it is not agreed to, the obligation to pay will be determined on a consideration of the relevant law and facts, and is not to be determined at its discretion.

36 **Whether Banque Indosuez was entitled to be reimbursed**

37 If there was nothing else that affected the payment arrangements, Indian Bank would be justified in contending that Banque Indosuez should pay and complete the negotiation before seeking payment from them. However, there was something else to consider. In the letter of credit, Indian Bank had specifically represented that '[R]eimbursement will be made by us **on receipt of documents** as per terms of the credit to a bank nominated by the negotiating bank' (emphasis added). This representation imposed an obligation to pay on receipt of documents, regardless whether the negotiating bank has paid. Indian Bank was bound by its promise and cannot refuse to pay because Banque Indosuez has not paid.

38 Counsel for Indian Bank submitted that the concept of negotiating a bill implies payment as it requires the giving of value for it. This submission wrongly equates the giving of value with payment. Paying is not the only way to give value. A negotiating bank can give value to a draft by assuming a liability

to pay at a future date. As I have noted earlier, a beneficiary may instruct that payment be deferred till the receipt of funds from the issuing bank. This would relieve the beneficiary from paying interest resulting from late reimbursement by the issuing bank which the beneficiary will otherwise have to bear. The beneficiary may also elect that payment be deferred, not to the date of receipt of funds, but to an intermediate date when the funds are required, so as to minimize the interest payable. Payment may also be deferred when the draft is a time draft. In all such situations, no payment is made by the negotiating bank to the beneficiary upon negotiation.

39 It was also argued on behalf of Indian Bank that an issuing bank was under no obligation to pay a negotiating bank unless the latter has itself made payment under the credit. The argument is that the issuing bank's duty is to `reimburse` a negotiating bank under arts 11(d) and 16(a) of the UCP, and reimbursement implies prior payment by the negotiating bank. The two provisions read:

11(d) By nominating a bank other than itself, or by allowing for negotiation by any bank, or by authorizing or requesting a bank to add its confirmation, the issuing bank authorizes such bank to pay, accept or negotiate, as the case may be, against documents which appear on their face to be in accordance with the terms and conditions of the credit, and undertakes to reimburse such bank in accordance with the provisions of these articles.

and

16(a) If a bank so authorized effects payment, or incurs a deferred payment undertaking, or accepts, or negotiates against documents which appear on their face to be in accordance with the terms and conditions of a credit, the party giving such authority shall be bound to reimburse the bank which has effected payment, or incurred a deferred payment undertaking, or has accepted, or negotiated, and to take up the documents.

40 Counsel for Indian Bank referred to ***Co-operative Centrale Raiffeisen-Boereleenbank BA v The Sumitomo Bank*** [1978] 1 LLR 345 This decision

touched on a confirming bank's right to be reimbursed by an issuing bank under the 1974 revision of the UCP. Article 8(a) and (b) of that revision provide that:

(a) In documentary credit operation all parties concerned deal in documents and not in goods.

(b) Payment, acceptance or negotiation against documents which appear on their face to be in accordance with the terms and conditions of a credit by a bank authorized to do so, binds the party giving the authorization to take up the documents and reimburse the bank which has effected the payment, acceptance or negotiation.

41 In his judgment, Gatehouse J stated that:

Where conforming documents are presented by the beneficiary and payment made by the confirming bank, the issuing bank is obliged under article 8(b) to reimburse the confirming bank, and it is not in dispute that that means pay in full as of the date on which the confirming bank pays the beneficiary. (Emphasis added.)

42 Such a construction can cause an impasse between a negotiating bank and an issuing bank. If a beneficiary instructs a negotiating bank to pay upon receipt of funds from an issuing bank, then no payment will be made because the negotiating bank will not pay out of its own funds, and the issuing bank will not pay the negotiating bank. A more flexible construction will serve the needs of banks and their customers better.

43 Counsel for Banque Indosuez cited an American decision which also considered the meaning of reimbursement. The case is ***Flagship Cruises Ltd v New England National Bank of Boston***.⁴ The United States Court of Appeal in this case considered the effect of the second paragraph of art 8 of the 1962 revision of the UCP. This provision is identical to art 8(b) of the 1974 revision which I have set out. In this case, the negotiating bank had also presented the documents to the issuing bank before making payment. The credit prescribed

the time by which it must be negotiated but did not set out the time by which the documents are to be sent by the negotiating bank to the issuing bank. The court found that negotiation of the credit would take place between the time the documents were presented to the negotiation bank and when they were presented to the issuing bank. On the issuing bank's duty to reimburse, Chief Judge Coffin, who delivered the judgment of the court stated:

While 'reimbursement' might be understood to imply that payment had been made, it seems more reasonable to understand it in the sense of indemnity for the payment that has been made or will be made as a result of negotiation or acceptance. (Emphasis added.)

44 The broader approach is preferable. 'Reimburse' should be construed purposively to apply in situations involving immediate as well as deferred payments, including situations where beneficiaries agree that negotiating banks will only pay on receipt of funds from issuing banks.

45 Having come to the conclusion that reimbursement is not to be conditional to prior payment by the negotiating bank in every case, I find that even if all the documents had been presented in time, Banque Indosuez was not entitled to reimbursement without paying Chinsim because there was no agreement to defer payment on the sight draft. As payment was due on negotiation and was not paid, Banque Indosuez had not negotiated the draft, and was not entitled to be reimbursed.

46 **Whether Chinsim can sue Indian Bank for payment**

47 At the trial, Chinsim's case was that the documents were presented to Banque Indosuez for negotiation and was negotiated by the bank.

48 I accepted Indian Bank's contention that the documents were submitted after the expiration of the credit, although Banque Indosuez agreed with Chinsim that they had been submitted in time. The question is whether Indian Bank is bound by Banque Indosuez's agreement.

49 It is settled law that a negotiating bank does not negotiate as an agent of an issuing bank - *European Asian Bank AG v Punjab and Sind Bank*.⁵ Banque Indosuez's admission that the documents were presented in time therefore did not bind Indian Bank, and Chinsim cannot rely on the admission against Indian Bank. As they had failed to present the documents on time, Chinsim have no claim on Indian Bank.

50 Even if there was a proper presentation and negotiation by Banque Indosuez, Chinsim's claim for payment on the negotiation should be against the negotiation party. As Chinsim have elected to negotiate the credit with Banque Indosuez rather than negotiate with the issuing bank, Chinsim must look to Banque Indosuez for payment.

51 **Conclusion**

52 My decisions on the three actions on the basis of my findings are:

(i) Suit No 5404 of 1986 - Chinsim's claim against Indian Bank be dismissed with costs.

(ii) Suit No 1632 of 1987 - judgment for Chinsim against Banque Indosuez in the sum of US\$65,961.51 with interest at 6%pa from 3 September 1986 to the date of judgment. However, as Chinsim had pleaded its case on the alternative grounds of negotiation and collection and have succeeded only on the former, it is awarded half the taxed costs; and

(iii) Suit No 2198 of 1987 - Banque Indosuez's claim against Indian Bank be dismissed with costs.

53 Chinsim`s claim against Banque Indosuez was for the amount of the credit, US\$66,000, converted in S\$139,920 on the exchange rate of S\$2.12 to US\$1. The selection of the exchange rate was not explained and was not accepted by Banque Indosuez. In fact, the parties focused their energies on the issues of liability and left the issues of the proper currency and sum of claim unaddressed. I will not go into this issue beyond referring to the House of Lords decision in **Miliangos v George Frank (Textiles) Ltd** [1974] AC 443 and the examination of that decision on its application to Singapore by Michael Hwang JC in **Indo Commercial Society (Pte) Ltd v Ebrahim & Anor** [1992] 2 SLR 1041 and say that the proper currency for this judgment should be the American currency. The proper sum is the sum of the draft rather than the sum of the credit because in the negotiation of a credit what is actually negotiated is the draft drawn under the credit.

54 **Outcome:**

Kan Ting Chiu JC

Cheng Tim Pin and Lo Wai Ping (Yap & Yap) for Chinsim
Tan Teng Muan (Mallal & Namazie) for Indian Bank
A Haque and R Srivathsan (Haridass Ho & Partners) for Banque
Indosuez
