IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1994] SGCA 50

CA 66/1993

Between

Indian Bank

… *Appellant*

And

Union Bank of Switzerland

… *Respondent*

GROUNDS OF DECISION

Banking — Letters of credit — Negotiable credit; Banking — Letters of credit — Negotiable credit; Words and Phrases

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Indian Bank v Union Bank of Switzerland

[1994] SGCA 50

CA 66/1993
Chao Hick Tin J; Warren Khoo L H J; Rajendran S J
25 March 1994

1 Cur Adv Vult

2 This is an appeal against the decision of the High Court which held that the appellant bank (hereinafter called `IB`) is liable to the respondent bank (hereinafter called `UBS`) in respect of a letter of credit issued by IB. There is a separate appeal (No 67 of 1993) by South Asian Exports Pte Ltd (`SAE`), the third party in the action below, against that part of the High Court decision which held that IB was entitled to an indemnity from SAE, who was the applicant of the letter of credit. While this judgment is only concerned with the first mentioned appeal, it was counsel for SAE who made the most substantial submission before us as, on most of the issues, IB and SAE have taken a common stand.

3 The facts of the case are extensively set out in the judgment of the High Court reported at [1993] 3 SLR 371 and we propose only to briefly set out those essentials which are necessary for a proper appreciation of the issues raised in this appeal.

4 In August 1985, SAE agreed to purchase 1500 metric tons of Turkish chick peas from a seller in Holland, Kagex BV, at US$511 per metric ton. Payment was to be by `confirmed, irrevocable, unrestricted, transferable L/C` for 100% of the contract value. In SAE`s application to IB dated 27 August 1985 for the issue of the letter of credit, SAE requested Indian Bank to:

> *Please open by full telex through your correspondents an irrevocable letter of credit in favour of M/s Kagex BV for ... available by draft on (openers) South Asian Exports Pte Ltd ... at 120 days without recourse for 100% invoice value ...*

5 On the application, it was also stated that the letter of credit was to be advised through Swiss Credit Bank, Luzern, Switzerland (`CS`) and that the credit was to be `confirmed by the advising bank at openers account`. The designation of CS as the advising bank was later altered to UBS as IB did not have any banking relationship with CS.

6 A letter of credit, unrestricted for negotiations, was accordingly issued by IB to UBS on 28 August 1985 for a sum of US$766,500 in these terms:

> *For US$766,500 on 28 August 1985. Please advise the LC through Swiss Credit Bank, Luzern, Switzerland ... and add your confirmation on opener`s account.*

7 IB also gave an undertaking that:

> *We hereby engage with drawers and or bona fide holders that the drafts drawn and negotiated in conformity with the terms of the credit will be duly honoured by us on presentation.*

8 The shipment and negotiation deadlines were stated to be 17 September 1985 and 8 October 1985 respectively.

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9 Among the documents required to draw on the credit were a `draft at 120 days DA from bill of lading date drawn on openers.` Two of the relevant terms of the credit were:

> *The negotiating bank must send the original draft and documents direct to us by airmail and the remaining documents by subsequent airmail certifying that documents negotiated are in conformity with the terms and conditions of the credit.*

10 The credit is subject to Uniform Customs and Practice of Documentary Credits (1983) ... (hereafter referred to as `UCP 400`)

11 UBS forwarded the letter of credit to CS, who in turn forwarded it to the beneficiary, Kagex. On 3 September 1985, at the request of SAE, IB made a number of amendments to the letter of credit, the material one for the present appeal is this: `draft to be drawn on Union Bank of Switzerland Zurich instead of openers.`

12 The shipment and negotiation deadlines were subsequently extended twice. The eventual deadlines were 10 October 1985 and 31 October 1985 respectively.

13 The bills of lading for the shipment were issued on 30 September 1985. The evidence shows that the beneficiary, Kagex, tendered some of the required documents to CS, including a draft made out to the order of CS and drawn on UBS, on or before 18 October 1985. On 23 October 1985, the complete documents, in six sets, were in turn forwarded by CS to UBS who received them on the same day. However, the transmittal note of CS was dated 21 October 1985. UBS initially took the stand that the presentation by CS was late as the documents were received by UBS after 21 days from the date of the bills of lading, 30 September 1985. However, a superior officer overruled the remarks

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of two officers and two checkers. UBS accepted the draft on 28 October 1985 and returned it to CS and forwarded the other documents to IB. The draft was to mature on 28 January 1986. IB received the documents on 2 November 1985 and rejected them on 12 November 1985 on grounds of (i) late presentation; (ii) non-compliance with the terms of the letter of credit and (iii) various documentary discrepancies.

14 CS received the accepted draft on or about 29 October 1985 and the next day discounted the draft and credited Kagex account with the appropriate amount, less the usual charges. UBS paid on the maturity of the draft and sought reimbursement from Bankers Trust Co who initially honoured the commitment but subsequently reversed the credit given. UBS thus commenced the present action against IB to recover the sum they paid out to Kagex. IB, in turn, sought an indemnity from SAE and brought the latter into the proceedings as a third party.

15 Three main issues were raised in the court below:

> (i) whether the presentation of the documents to CS was for the purpose of negotiation and, if not, whether the presentation to UBS on 23 October 1985 was out of time;
>
> (ii) if the presentation to CS was for the purpose of negotiation, whether CS should, as the negotiating bank, forward the draft and the documents direct to IB; and
>
> (iii) whether the documents presented complied with the requirements of the letter of credit.

16 The learned trial judge found that all the documents were presented by Kagex to CS by 21 October 1985 for the purpose of negotiation by CS and not for transmission to UBS for collection. He held that there were no material discrepancies in the documents tendered from what were required under the

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credit. He also held that there was undue delay on the part of IB in sending out the notice of rejection, thus disentitling them to reject the documents.

17 We would add that considerable arguments before the court below also touched on the nature of the present credit. Was it to be categorized as an acceptance credit (article 10(a)(iii) and (b)(iii)) or a negotiation credit (art 10(a)(iv) and (b)(iv))? This point is not being pursued before us. The appellants concede that the credit could be negotiated by any bank.

18 Counsel for IB submitted that there are altogether nine issues that arise for consideration:

> (i) Were the documents presented by Kagex to CS on or before 21 October 1985?
>
> (ii) Did Kagex present the documents to CS for negotiation or for collection?
>
> (iii) Were CS in fact in the process of negotiation on 23 October 1985 and, on the pleadings, was it open to the trial judge to hold that CS were in the process of negotiation?
>
> (iv) If CS were a negotiating bank when they forwarded the documents to UBS, did UBS exceed its mandate in accepting the draft despite CS` non-compliance with a term of the LC requiring a negotiating bank to send the draft and documents directly to IB certifying that documents negotiated were in conformity with the letter of credit?
>
> (v) Following from (iv), was the presentation to CS on or before 21 October 1985 or the presentation to UBS on 23 October 1985 the relevant presentation under art 47(a) of UCP 400?
>
> (vi) Did IB proceed to examine the documents with due despatch?
>
> (vii) Did IB send its rejection notice to UBS without delay?
>
> (viii) If the rejection notice was sent out in time, could IB rely on grounds other than those specified in the notice?
>
> (ix) Were the documents tendered discrepant?

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19 There is an overlap between some of these issues. We would also observe that some aspects of issues (vi) to (ix) are also pertinent to the question of the rights and liabilities between SAE and IB, which is not being considered in this judgment.

20 **When were the documents tendered?**

21 As mentioned above, the bills of lading in question were dated 30 September 1985. Pursuant to art 47(a) of UCP 400 the documents had to be presented for payment, acceptance or negotiation within 21 days of the bills of lading, ie by 21 October 1985.

22 IB submitted that there was no sufficient or credible evidence before the trial judge for him to find that the documents were presented to CS on or before 21 October 1985. This is because no documentary evidence was produced to show when the documents were presented to CS; counsel was on the verge of suggesting that UBS had something to hide. Furthermore, no witness who had actual knowledge of this matter was called upon to testify in court as to what he knew. Instead, only one Mr Locher, a senior management staff of CS in Zurich, testified. He had no firsthand knowledge of the facts of the case. He only came into the picture much later, on 18 December 1985. The person who had actual knowledge, one Mr Dolder, had retired from CS and he had refused to come to testify. There is, however, the evidence of one Mr Helbling from UBS who told the court that the practice of his bank when it received documents for negotiation from a beneficiary would be to stamp acknowledgement of receipt and then send them to the documentary credit department for examination. He believed that this procedure was common to major Swiss banks though there might be slight differences between banks.

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23 The only pertinent document tendered to court by UBS was a letter dated 10 October 1985 (RA 781) which had a receipt date stamp of CS of 14 October 1985. It was a letter from Kagex to CS forwarding certain documents (invoices and bills of lading). But the letter also indicated that certain other documents would be forwarded later by other people. There was no record when the other documents were received by CS.

24 On 23 October 1985, the documents were forwarded by CS Luzern to UBS Zurich with a transmittal note which was itself dated 21 October 1985. Mr Locher said that ordinarily the transmittal note would have been prepared after the documents had been checked. However, in the present case, he said that the first checker at CS Luzern completed checking on 22 October 1985 and that the documents were only sent out to UBS on 23 October 1985. Mr Locher ventured an explanation that perhaps in this case the transmittal note could have been prepared while checking was in progress. However, there was this statement in the transmittal note, `Should - contrary to expectations - any discrepancies appear, kindly request a report by telephone,` which would seem to suggest that the checking was completed at the time the transmittal note was prepared. Counsel for IB submitted that this leaves in doubt the question as to the dates on which the transmittal note was prepared and the checking completed, which, in turn, raises a question mark as to the date on which all the documents were received by CS, bearing in mind that the documents were not forwarded to UBS Zurich until 23 October 1985. There was no explanation from those involved in the preparation of the transmittal note.

25 Counsel for UBS submitted that in the defence filed, IB had not disputed that the documents were presented to CS on or before 21 October 1985. This is perhaps not entirely correct. In para 10 of the re-amended statement of claim it is stated that Kagex had presented the relevant documents to CS in Luzern on

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or before 21 October 1985. In IB`s re-amended defence, they put UBS to strict proof of that assertion. In para 7 thereof, IB stated that `the documents presented under the letter of credit in question were presented to Credit Suisse not earlier than 21 October 1985 for onward transmission to (UBS).` Counsel for UBS relied on para 7 to say there was an admission. While that wording may not be an entirely happy one, we think, viewing para 7 as a whole, there is really no admission, bearing in mind para 7(a):

> (7) The defendants put the plaintiffs to strict proof as to para 10 of the re-amended statement of claim and contend that the documents presented under the letter of credit in question were presented to Credit Suisse not earlier than 21 October 1985 for onward transmision to the plaintiffs who received same not earlier than 23 October 1985 and negotiated same on 28 October 1985 ... In particular, the defendants state that the material discrepancies in the documents presented were:
>
> (a) the fact that the documents, including the bills of lading in question ... were presented to CS and/or the plaintiffs more than 21 days after the issue of the said bills of lading which is a breach of art 47(a) ... The plaintiffs, having received the documents ... after the expiry of the period ..., ought to have rejected the same.

26 We think it significant that no objection was taken when counsel for SAE put to Mr Locher that the documents were not received by CS on or before 21 October 1985.

27 The burden was clearly on UBS to prove that CS did in fact receive all the documents required under the letter of credit by 21 October 1985. The document, which, on the face, shows that was the transmittal note dated 21 October 1985. While some question marks were raised on the note, the learned judge was, nevertheless, satisfied that all the documents were presented by 21 October 1985. The learned judge must have accepted Mr Locher`s explanation that perhaps the note was prepared while checking was being undertaken. He

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heard the evidence. We asked the question why a reputable bank like CS would seek to backdate a document like the transmittal note. While we think that not everyone would come to the same conclusion as the learned judge, we are not persuaded that the learned judge`s finding was wrong.

28 **Was presentation for negotiation?**

29 The learned judge fully appreciated that the presentation to CS on 21 October 1985 must be for the purpose of negotiation, otherwise it would be out of time. He noted the difference between collection and negotiation when he said that `if it was presented to CS for collection, then presentation under the credit was made when the documents reached the counters of UBS Zurich for acceptance on 23 October 1985, in which event the presentation was out of time.` Before us, it is not in dispute that the credit, being unrestricted for negotiation, could be negotiated with CS or any other bank. The learned judge ruled that the presentation by Kagex to CS was for negotiation. His reasons were:

> *On the evidence, and taking into account that the credit was unrestricted for negotiation and full sets of documents were presented on the last day, stipulated for presentation, Kagex could not have intended to present these documents to CS who were their bankers for collection as they would be out of time when the documents reached the counters of UBS. Also significant is the fact that the draft was made out to the orders of CS.*

30 Counsel for IB drew our attention to the re-amended statement of claim where UBS stated that CS had negotiated the documents on or before 22 October 1985. Counsel submitted that this was not borne out at all by the evidence.

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31 The first question which has to be determined is what is the meaning of the word `negotiation`. To our mind, there cannot be any doubt that, in the context of a letter of credit, `negotiation` must mean the purchase of or the giving of value for the stipulated draft and/or documents in reliance on the credit. It means more than to examine the documents although the UCP 400 does not define it. It is of significance to note that in the 1993 Revision of the Uniform Customs and Practice for Documentary Credits (`UCP 500`), it is expressly provided that `negotiation means the giving of value for draft(s) and/or document(s) by the bank authorized to negotiate. Mere examination of the documents without giving of value does not constitute a negotiation`. In our view, UCP 500 has put in express language what was clearly implicit in UCP 400.

32 The two different roles which a bank may play when a customer comes to it with the draft and the documents are succinctly described in ***Benjamin`s Sale of Goods*** (4th Ed) at para 23-145 as follows:

> *Where the seller remits the draft and the documents to his own banker, the latter may assume one of two roles. First, where the seller does not require an advance, he simply instructs his banker to present the draft and the documents to the issuing banker or to the confirming banker. In such a case, the seller`s banker is an agent for collection and usually has no rights of his own under the documentary credit ... Secondly, the banker may agree to make an advance to the seller against the draft. In such a case the banker `negotiates` or `purchases` the seller`s draft and becomes a `holder`.*

33 Before us, IB are not contending that, for there to be negotiation, value had to be given immediately on presentation of the documents (as they did in the court below) and that, if this were not done, the presentation could not be a presentation for negotiation. The learned judge dealt with this point as follows:

> *So long as presentation was timely, it complied with art 47(a) and negotiation need not be completed before the expiry of that period*

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> *of 21 days. In any case, the credit allowed `negotiation till 31 October 1985`.*

34 At this juncture, we think we ought to make this observation. Under the letter of credit, there was a deadline each for shipment and for negotiation. Any non-compliance with either of those two deadlines would mean that the credit would not be available to the beneficiary. Because of the incorporation of UCP 400 into the credit terms, a third deadline was added by virtue of art 47, namely, that the documents must be presented for payment, acceptance or negotiation within 21 days of the date of issue of bill of lading. Non-compliance with this deadline would give rise to the same consequence. To satisfy this requirement, it must be shown that the documents were presented to CS for negotiation; no question of `payment` or `acceptance` was applicable here.

35 We now come to the thrust of IB`s contention, which is that there is no evidence at all to show that the documents were presented by Kagex to CS Luzern for negotiation. Both UBS` expert witnesses, one Mr Andre Wicki (PW2) and another Mr Eric Bishop (PW4), confirmed that whether there had been presentation for negotiation was a question of fact as indeed was the question whether CS was acting as a negotiating bank or collecting bank.

36 There was nothing on the face of the transmittal note to show what CS were doing, whether negotiating or collecting. Mr Helbling had to agree that that was so. Indeed, there wasn`t a single document to show what were Kagex`s intentions when they presented the documents to CS or what were their instructions to CS. Ordinarily, one would expect to see the beneficiary executing a form entitled `application for negotiation of documentary bill` or a similar form. The only available evidence showing the intentions of Kagex or the instructions to CS was the evidence of Mr Locher. Counsel for IB pointed out

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that the following evidence of Mr Locher, in fact, confirmed that CS were only acting as collecting agents for Kagex:

> (i) The draft had to be returned to the beneficiary Kagex after acceptance by UBS.
>
> (ii) CS received the accepted draft from UBS on 29 October 1985 and discounted it on 30 October 1985.
>
> (iii) By `negotiation`, Locher had understood it to mean `taking the documents from the beneficiary, checking the documents, mailing them to UBS and asking them to return the accepted draft.` He said if `negotiation` meant to purchase, buy or give value for the draft, then CS had not negotiated by 21 October 1985. To his mind, presentation of documents to CS to be forwarded to UBS without CS buying over the draft was presentation within the meaning of art 47(a); that presentation merely for collection was presentation under art 47(a) as this was a hybrid credit not falling within any of the categories mentioned in art 10 of UPC 400.
>
> (iv) He admitted that while it was possible to purchase a draft before acceptance, it was not usual, and that CS had no commitment in the transaction.
>
> (v) There had been no presentation of the draft to CS for the purpose of obtaining value. What CS had done was a service to Kagex and was done on Kagex`s behalf.

37 IB also placed reliance on one Mr Wicki`s (a legal practitioner in Switzerland) evidence that CS would be presenting documents to UBS as a service to Kagex only if they were acting as a collecting agent. Mr Wicki also said that `the receiving of the documents, processing them and forwarding them for payment like this case by CS is not negotiation`. Negotiation means giving value.

38 We are somewhat surprised that, for a bank like CS, there should be such a lack of documentation for the transaction. Having carefully scrutinized the evidence of M/s Locher and Wicki, it seems to us that the only reasonable conclusion one could come to is that Kagex did not present the documents to

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CS for negotiation; neither did CS present the documents to UBS as a negotiating bank. CS were plainly acting as collecting agents, rendering services to a customer. It is significant that Mr Locher gave no answer when it was put to him that the draft and the documents were not presented to CS for negotiation, in the sense of giving value for the draft, but for collection.

39 We think, with respect, that the learned judge had not given sufficient consideration to the evidence that was before him and strayed into the realm of speculation. It was, and is, not in question that the credit was unrestricted for negotiation. The learned judge also found that the documents were presented by Kagex to CS on the last day. These two facts do not per se show that the presentation was for negotiation unless someone from Kagex or CS had come to court to say what the parties had actually discussed or what were Kagex`s instructions. Counsel for UBS asked why would Kagex proceed on a collection basis thereby rendering the credit nugatory. These are questions for Kagex and/or CS to answer. Perhaps it was a case of oversight on the part of Kagex and/or CS. We do not know. We should not speculate. The burden was on the plaintiffs. There was nothing to indicate that the 21-day deadline under art 47 was on their mind. We do not think just because the documents were apparently all presented on the last day, that, in itself, suggests that the presentation was for negotiation. It was consistent with other purposes as well. The fact remains that we do not have any other evidence than Mr Locher`s, and Mr Locher`s evidence does not show that the presentation was for negotiation. In fact, the contrary is true.

40 The third important factor that influenced the learned judge`s mind was the fact that the draft was drawn to the order of CS. This point, though consistent with negotiation, does not necessarily prove that the documents were presented for negotiation. The evidence of Mr Locher points to the contrary, as he said

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that the accepted draft was the property of Kagex who could keep the same until expiry or who could ***discount or negotiate it with any bank*** . He also said that, until 30 October 1985, CS had no commitment to the beneficiary. An inference may be drawn based on the evidence; but no inference should be drawn which contradicts the evidence.

41 Raymond Jack in his work, ***Documentary Credits*** , gave two broad reasons why a beneficiary of a credit goes to a bank for collection (at p 128):

> *First, the beneficiary may find it convenient to use its services in this way. For example, the beneficiary may prefer to use its own bank to forward the documents where they have to be presented abroad rather than forwarding them itself. It may also want to have the documents checked by the bank for compliance with the credit. If there are discrepancies, a bank may be in a better position to request their waiver than the beneficiary itself. Second, the beneficiary may have been financed by the bank to obtain the goods which are the object of the transaction underlying the credit, either by way of a general overdraft arrangement or by a specific advance. In either case, the bank may well require that the documents be presented through it, so that it has control of the documents in the event that the transaction goes wrong.*

42 Either one or both of these reasons might well apply in this case.

43 Counsel for UBS asked why would Kagex despatch the insurance certificate by `DHL` if this was a `collection` case. Again, at best, this is a neutral point. That is also consistent with a `collection` situation. What we are saying is that the fact that the insurance certificate would be conveyed by DHL does not irresistibly point to `negotiation.`

44 The learned judge felt that the case ***European Asian Bank AG v Punjab & Sind Bank (No 2)*** was of direct relevance and was of assistance. There, the Court of Appeal agreed with the first instance judge that, on the evidence, the contention that the European Asian Bank were mere agents for collection was

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unarguable. We quote from Goff LJ for the pertinent facts of that case (at pp 618-619):

> *When Bentrex presented the documents to the (appellants) on 7 August 1979, they completed a standard form of the respondents which could be used whether the documents were sent for collection for purchase or for discount. Which of these three purposes was intended by Bentrex was not specified expressly in the document; but a very substantial part of the document designed to be completed where documents were sent for collection was left entirely blank, although nearly all the remainder of the document was completed. The draft presented by Bentrex with the documents was made out to the order of the respondents, not to the order of Bentrex. Thereafter, everything which the appellants did was consistent only with their either being in the process of negotiating the letter of credit or having negotiated it. First, they made enquiries on 8 August addressed in error to the wrong bank: the purpose of their enquiries was to find out whether, in the light of the two supposed discrepancies in the documents, they might themselves pay - an enquiry inconsistent with their acting only as agents for collection. Next, they wrote to the respondents on 13 August using what was plainly one of their own standard forms. The form was suitable for use by a bank which had already negotiated a letter of credit: whereas the appellants were at this stage plainly still in the process of negotiation. The document begins with the words:*
>
> *`We have negotiated documents under your letter of credit as follows ...`*
>
> *It refers to the enclosed documents; and there are then typed in the words (which are the most relevant part of the document):*
>
> *`... At maturity, ie 3 February 1980, we will reimburse ourselves on Irving Trust, New York. Please advise acceptance.`*
>
> *This document is wholly inconsistent with agency for collection.*

45 The court also held that the mere fact that the European Asian Bank had not yet paid the beneficiary did not mean that it was at any time appointed as an agent for collection.

46 It should be apparent that the facts in ***European Asian Bank*** were quite different from the instant case. The issues are not exactly the same as in the present case the purpose of the presentation as of the deadline 21 October 1985

is crucial having regard to art 47(a). This same issue did not arise in ***European Asian Bank*** as can be seen from the following passage of Goff LJ (at p 619), which was also quoted by the learned judge below:

> *But we wish to add this. Even if it were a fact that, as at 13 August, the appellants had been appointed agents for collection by Bentrex, it is beyond question that, by 20 August, the appellants had negotiated the letter of credit, and there is no suggestion that they acted otherwise than in good faith in so doing. Thereafter, in February 1980, they claimed payment from the respondents; and this was refused. In our judgment, it is not open to the respondents, on these facts, to say against the appellants that they were justified in refusing payment on the ground that the documents were fraudulent or even forged. In our judgment, the relevant time for considering this question is the time when payment falls due and is claimed and refused. If, at that time, the party claiming payment had negotiated the relevant documents in good faith, the issuing bank cannot excuse his refusal to pay on the ground that, at some earlier time, the negotiating bank was a mere agent for collection on behalf of the seller and allege against him fraud or forgery (if that indeed be the case) on the part of the beneficiary of the letter of credit.*

47 The second case relied upon by the learned judge is ***Flagship Cruises Ltd v New England Merchants National Bank of Boston*** , where, under the letter of credit, drafts must be negotiated no later than 3 November 1972. There, Flagship, on 31 October 1972, delivered to its bankers, Chemical Bank of New York, the original letter of credit and drafts drawn on New England Merchants National Bank for payment to Flagship. In its covering letter, it instructed Chemical Bank to `present for collection`. The documents did not go to Chemical Bank`s letter of credit department where the documents would have been examined and payment made but to its collection department, which merely forwarded the documents to the issuing bank. On 6 November 1972, Chemical Bank mailed the documents, with a transmittal form dated 3 November 1972, demanding payment from the issuing bank. It did not enclose the covering letter of 31 October 1972 from Flagship. The drafts were endorsed by Chemical `for and on behalf of` Flagship. Though there was no evidence

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when the endorsement was made, two employees, on examining the records, felt that the processing, including the endorsement, was completed on 3 November 1972. The issuing bank received the documents on 9 November 1972 and rejected them as being out of time. On 13 November 1972, Chemical Bank wired Merchants to say that the draft had been `negotiated by us within validity of credit`. On 16 November 1972, Merchants received a copy of Flagship`s covering letter of 31 October 1972, which was also the date on which Merchants received all the documents. The US District Court of Appeal held that by 3 November 1972 (the deadline for negotiation) the documents had been presented for negotiations. The court said:

> *Flagship`s duty, as we read the letter of credit, was to present the bills of exchange to its bank before 3 November. We agree with the district court`s conclusion that Flagship did so. Flagship presented all the necessary documents to Chemical on 31 October. The Chemical`s form, calling on Merchant to honour the draft was dated 3 November. Sometime during this interval, negotiation occurred.*

48 All we wish to observe is that that was a finding by the court on the evidence before it. Perhaps the circumstances there warrant the inference made by the court. The court did not quite elaborate how negotiations occurred between 31 October and 3 November 1972. We do not see the case as having decided that the mere asking by a beneficiary of his banker to collect a bill constituted negotiation.

49 In the instant case, we have the evidence of Mr Locher who said that there was no commitment by CS on the draft drawn by Kagex until 30 October 1985 when CS discounted it and credited the appropriate amount to Kagex. Kagex could have discounted the draft with any other bank.

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50 For the above reasons, we would respectfully differ from the learned judge and hold that UBS have not shown that the documents were presented by Kagex to CS for negotiation. The essential difference between a negotiation bank and a collecting bank is that `a negotiation bank holds the documents in its own right, whereas a collecting bank holds them as agent for the beneficiary`: See ***Raymond Jack on Documentary Credits*** (1991 Ed). The evidence shows that CS was holding the draft and documents for Kagex. It was acting as a collecting bank. Accordingly, the presentation by Kagex was for collection.

51 Our discussion above would also have substantially covered issues (iii) and (v).

52 **Should CS send the draft and documents direct to IB?**

53 In view of our decision above that there was non-compliance with a term of the credit, IB is entitled to avoid liability and to succeed in this appeal. Accordingly, there is really no necessity for us to proceed to consider the remaining issues. However, we propose to indicate briefly our views on issues (iv), (vi) and (vii) as extensive arguments have been advanced to us on those questions.

54 As mentioned before, the credit stated that `the negotiating bank must send the original draft and documents direct to us (ie IB) by airmail, and the remaining documents, by subsequent airmail certifying that documents negotiated are in conformity with the terms and conditions of the credit.` Following from our decision above that CS had, in forwarding the documents to UBS, only acted as an agent for collection, there was no question of CS having to send the draft and documents direct to IB.

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55 If we had upheld the decision of the learned judge that the documents were presented to CS for negotiation and that, on 21 October 1985, CS was the negotiation bank, the question would arise whether CS should have submitted the draft and the documents direct to IB rather than to UBS. On this point, we would be inclined to agree with the learned judge. As he pointed out, this provision requiring the submission of the draft and documents direct to IB was in the original letter of credit. At that stage, the draft was to be drawn on `openers`, namely, SAE. In those circumstances, it would have made sense to require the submission of the draft and documents to IB, who would, in turn, obtain the acceptance of SAE to the draft. When the credit was later amended requiring the draft to be drawn on UBS, yet maintaining the other provisions of the credit, a situation of conflict seems to have been created: one requiring the negotiation bank to submit the draft to UBS for acceptance and the other requiring the negotiation bank to submit the draft and documents to IB. We would be inclined to think that this was truly a case of oversight when the amendment was made. In the circumstances, we are unable to see how IB could be heard to contend that CS should have sent the draft and documents direct to IB in Singapore. One view of the matter is that the later amendment had impliedly modified the submission clause. Another view could well be that the negotiation bank had an option either of sending the draft and documents to UBS or of sending them direct to IB, Singapore. The former view is certainly in line with what was stated by Mr Santhanakrishnan, the assistant general manager of IB, in an affidavit filed in a related Suit No 1108/86 instituted by SAE against IB:

> *Therefore, under the original arrangement, it was intended that Kagex BV would present the drafts with the other documents and that the defendants [IB], on receiving the drafts, would add their acceptance and return the drafts to the drawer at once and the drawer would then be free to discount the drafts. If the documents were not in conformity with the letter of credit, the*

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> *defendants could have refused to accept the drafts. It would have been a condition precedent to the defendants` right to acceptance of the draft that the other documents were exactly as required. Therefore, the only function for the transmission of the drafts to the defendants under the original arrangements was to enable the defendants to add their acceptance to the drafts, having checked that the other documents were in order.*

56 But the alteration of the terms of the credit by the defendants` letter to Kagex BV of 5 September 1985 requiring UBS to be the drawer (sic) and acceptor appears to have removed the only commercial purpose in having UBS send the drafts to the defendants and, with the amendment, there was no reason why the defendants would even need to look at the drafts as the drafts would have already been accepted by UBS and UBS would have irrevocably rendered itself liable as acceptor provided all the other documents comply with the terms of the credit. The defendants would have to reimburse UBS on maturity of the drafts if they were for the correct amount and in correct terms.

57 In our judgment, whichever of the two views is correct, if the draft and documents had been presented by Kagex to CS on 21 October 1985 for negotiation, CS would not have acted outside the terms of the credit when CS forwarded the draft and the documents to UBS for acceptance.

58 **Examination of documents and notification of rejection**

59 Next we have two related issues, (vi) and (vii): Did IB proceed to examine the documents with due despatch and, if so, whether IB had sent out their rejection notice without delay.

60 The pertinent facts on the two issues are these. The documents, less the draft, sent by UBS were received by IB on 2 November 1985, which was a Saturday. Examination of the documents commenced on Monday, 4 November

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1985. IB completed checking the documents for discrepancies by 8 November 1985 and found seven discrepancies. According to Mr Ang Kim Hua, an assistant manager with IB, IB could have sent out the rejection notice on 8 November 1985 evening; or, at the very latest, on 9 November 1985.

61 However, IB did not send out the notice then because they were requested by a director of SAE, one Mr Mehta, to withhold sending out the notice as SAE had a banking expert who might be able to find more discrepancies and rephrase the notice in a more professional way. One set of photocopies of the documents was handed by IB to Mr Mehta. On 12 November 1985, SAE reverted, agreeing to the seven discrepancies and adding one more item of discrepancy. In fact, there was a meeting on that day between IB and SAE. In the evening, at about 7.43pm, IB sent out their rejection notice where they listed the eight `glaring and patent discrepancies/irregularities`. On 18 November 1985, UBS rebutted IB`s reasons for rejecting the documents and maintained that UBS were entitled to reimbursement upon the maturity of the draft on 28 January 1986.

62 The learned judge, having taken into account the evidence and the opinions of experts, held that IB ought to have conveyed the notice of rejection by 8 November 1985 at the latest.

63 The relevant provisions of the UCP 400 which govern the matter are arts 15 and 16(b), (c), (d) and (e). They read:

> (15) 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.

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> (16) (b) If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms and conditions of the credit, it must determine, on the basis of the documents alone, whether to take up such documents, or to refuse them and claim that they appear on their face not to be in accordance with the terms and conditions of the credit.
>
> (c) The issuing bank shall have a reasonable time in which to examine the documents and to determine as above whether to take up or to refuse the documents.
>
> (d) If the issuing bank decides to refuse the documents, it must give notice to that effect without delay by telecommunication or, if that is not possible, by other expeditious means, to the bank from which it received the documents (the remitting bank), or to the beneficiary, if it received the documents directly from him. Such notice must state the discrepancies in respect of which the issuing bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presentor (remitting bank or the beneficiary, as the case may be). The issuing bank shall then be entitled to claim from the remitting bank refund of any reimbursement which may have been made to that bank.
>
> (e) If the issuing bank fails to act in accordance with the provisions of paras (c) and (d) of this article and/or fails to hold the documents at the disposal of, or to return them to, the presentor, the issuing bank shall be precluded from claiming that the documents are not in accordance with the terms and conditions of the credit.

64 These provisions clearly give the issuing bank a reasonable time within which to examine the documents. Now, the documents in question were received by IB on a Saturday and examination commenced on the following Monday. There is evidence to indicate that, at the Singapore branch of IB, it was not their practice to examine documents on a Saturday. There is no evidence at which hour on that Saturday morning did the documents arrive. Even taking the worst scenario, that the documents arrived first thing in the morning, we do not think that a delay of half a working day would mean that the examination of the documents was not carried out with all due despatch. A duty to examine the

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documents within a reasonable time does not mean that the examination must commence as soon as the documents arrived.

65 The experts differed as to the time required to examine the documents in question, which were not voluminous or complex. They range from three days to five-and-a-half days. However, the fact of the matter is that examination was actually completed on 8 November 1985, that is five days. It was within the range contemplated by the experts. The question is whether, by withholding a reply until the SAE`s banking expert had been consulted, IB had failed to act in accordance with art 16(c) and (d), with the consequence that IB was precluded from claiming that the documents were not in accordance with the terms and conditions of the credit. This case does not involve the giving of a second notice or additional grounds as was the situation in ***United Bank Ltd v Banque National de Paris*** or ***Amixco Asia (Pte) Ltd v Bank Bumiputra Malaysia Bhd*** . The issue in our present case was whether IB had delayed in communicating their notice of rejection.

66 The learned judge held that 8 November 1983 should be the latest date for IB to convey the notice of rejection. Mr Helbling told the court that UBS took only three days to examine the documents. Only Mr Locher, who had no firsthand knowledge of the matter, said that IB would require five to seven days to examine the documents. The experts said it should be between three to five-and-a-half days. There is no basis for us to differ from this finding of the learned judge; indeed, we think he is correct.

67 The next question to consider is whether, in determining the reasonable period of time required to examine documents and to give a reply, the time needed to consult the customer should be included. Though in an earlier case, ***Co-operative Centrale Raiffeisen-Boerenleen-Bank BA v Sumitomo Bank;***

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The Royan, Bretagne and Auvergne , Gatehouse J felt that no prudent bank would act without consulting its customers, this was not followed in ***Bankers Trust Co v State Bank of India*** , where Hirst J took a different view as he held that a reasonable time under art 16(c) did not include time to take instructions of the customer.

68 On appeal, the English Court of Appeal upheld the views of Hirst J. The court was unanimous in its opinion that no time should be allowed to enable the customer to examine the documents for the purpose of discovering further discrepancies. Lloyd LJ, who delivered the leading judgment, said (at p 449):

> *Under art 15, it is the bank which is given the task of examining documents to ascertain whether they appear on their face to be in accordance with the terms and conditions of the credit. Nothing in art 15 suggests that it was ever intended that the task of examining the documents should fall on the customer as well as the bank. So when, in art 16(c), it is provided that the issuing bank shall have a reasonable time in which to examine the documents, these words mean what they say. A reasonable time for the bank to examine the documents cannot be extended by a further period of time to enable the customer to examine the documents. So what happened in the present case was not only the cause of an excessive time being taken overall; it was also clearly wrong in principle.*

69 We agree with the views that no additional time should be allowed to an issuing bank to consult the customer for the purpose of detecting more discrepancies. However, the court in ***Bankers Trust*** was divided on the question whether time should be allowed for the bank to consult the customer on whether to accept the discrepancies. That is a question which does not arise in the present case and we do not propose to go into that.

70 **Judgment**

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71 In view of our decision above that there was non-compliance with a term of the credit, this appeal has to be allowed and the judgment of the court below is set aside. UBS shall bear the costs of IB for both this appeal and the action below. There shall be the usual consequential orders.

72 Appeal allowed.

Chao Hick Tin J
Warren Khoo L H J
Rajendran S J

Tan Teng Muan (Mallal & Namazie) for the appellants
Scott Thillagaretnam and Kenny Chooi (Khattar Wong & Pnrs) for the respondents
Alan Thambiayah and Hilda Lee (Cooma Lau & Loh) for South Asian Exports

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