Korea Exchange Bank v Standard Chartered Bank
[2005] SGHC 220

Case Number : Suit 162/2004, RA 307/2004

Decision Date : 29 November 2005

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Chew Kei-Jin (Tan Rajah and Cheah) for the appellant / defendant; Toh Kian Sing and Ian Teo (Rajah and Tann) for the respondent / plaintiff

Parties : Korea Exchange Bank — Standard Chartered Bank

Banking – Letters of credit – Applicable principle – Issuing bank sending notice of refusal – Negotiating bank re-presenting amended documents for reimbursement – Issuing bank failing to send another notice of refusal – Whether issuing bank can rely on discrepancies stated in notice of refusal to resist payment to negotiating bank

Banking – Letters of credit – Applicable principle – Letter of credit containing non-documentary condition – Whether effect to be given to non-documentary condition in spite of incorporation of Art 13(c) Uniform Customs and Practice for Documentary Credits 1993 (International Chamber of Commerce Publication No 500)

Contract – Contractual terms – Rules of construction – Apparent conflict between provisions of letter of credit – Whether apparently conflicting provisions may be read harmoniously

29 November 2005 *Judgment reserved.*

Andrew Ang J:

1 This was an appeal by Korea Exchange Bank (the appellant/defendant), the issuing bank of two letters of credit ("the LCs") against summary judgment granted by the learned assistant registrar ("AR"), Mr Vincent Leow, for the sum of US$1,961,430.67 together with interest and costs. The appellant was found liable for wrongfully rejecting documents presented by Standard Chartered Bank (the respondent/plaintiff) as negotiating and confirming bank of the LCs. In refusing to make payment under each of the LCs, the appellant had relied on three discrepancies (between the documents presented and the terms stipulated by such LC), none of which the learned AR found to be valid.

Factual background

2 The facts of this case are straightforward and undisputed. The applicant for the LCs was Petaco Petroleum Inc ("Petaco"), a South Korean company which purchased gas oil from Trafigura Beheer BV Amsterdam ("Trafigura"). The LCs were intended to finance the purchase of the gas oil and, accordingly, Trafigura was named the beneficiary in the LCs.

The letters of credit

3 The LCs which the appellant issued were made expressly subject to the provisions of the Uniform Customs and Practice for Documentary Credits 1993 (International Chamber of Commerce Publication No 500) ("UCP 500"). The terms of the LCs are materially similar and are set out below.

(a)	M06M8310NS00032	[as amended]
50:	Applicant	Petaco Petroleum Inc.
59:	Beneficiary	Trafigura Beheer BV Amsterdam.
32B:	Currency code, amount	USD800000
39A:	Percentage credit amount tolerance	10/10
41D:	Available with	By any bank by negotiation
42C:	Drafts at	Sight
42D:	Drawee	Korea Exchange Bank World Trade Center Branch
45A:	Description of goods and/or services	Origin: Japan Gas oil 26,000 BBL +/– 10 pct. Price term: CFR any port(s) in South Korea

47A:	Additional conditions	Late presentation B/L acceptable. Price: The price in US dollars per barrel based on the quantity as determined under clause 12 of the contract shall be on a ex tank price at Pyongtaek, Korea Basis shall be equal to the average of the mean quotations published in the Platt's Asia Pacific/Arabian Gulf Marketscan for gasoil reg 0.5 pct quotations under the heading Singapore plus a premium of US dollars 3.38 per US BBL. A. Availability by negotiation at sight against following documents. Seller's commercial invoice (telex/telefax acceptable) Independant [*sic*] inspector's quantity report at loadport (telex/fax acceptable) Copy of seller's authorization for release of product to Petaco (telex/fax copy acceptable) Photo copy B/L (telex/telefax acceptable) …3 E. The amount of this letter of credit shall automatically fluctuate to cover any increase/decrease according to the price clause without further amendment to this credit. … J. Documents showing alterations without approval stamp or initials are acceptable.
49.	Confirmation instructions	May add

(b) M06M8310NS00064

The material terms and conditions of Letter of Credit M06M8310NS00064 are similar to those enumerated above save that under "Description of Goods", the quantity of gas oil is reflected as "27000 BBL +/– 10 pct".

4 Each of the LCs called for the presentation of the following documents:

(a) seller's commercial invoice (telex/telefax acceptable);

(b) independent inspector's quantity report at loadport (telex/telefax acceptable);

(c) copy of seller's authorisation for release of product (*ie*, gas oil) to Petaco; and

(d) photocopy of bill of lading.

Because the LCs were available by negotiation, the LCs also called for sight drafts drawn on the appellant to be presented.

5 It is not disputed that the LCs were available with any bank by negotiation and that confirmation could be added to them. The respondent added its confirmation to the LCs. Petaco became insolvent in late 2003. Therefore, the appellant would have been unable to obtain reimbursement from Petaco if they had paid under the LCs.

Presentation of documents under the letters of credit

6 In respect of each of the LCs, Trafigura, as beneficiary, presented to the respondent the documents called for in each of the LCs ("the Tendered Documents"). LC No M06M8310NS00064 also called for a "signed commercial invoice" which was also duly presented. Being of the view that the Tendered Documents conformed with the terms of each of the LCs, the respondent negotiated and gave value against the Tendered Documents and credited the amount under each LC to the beneficiary.

7 On 16 December 2003, the respondent delivered the Tendered Documents to the appellant with a view to obtaining reimbursement under the LCs. On 27 December 2003, the appellant sent a notice of refusal in respect of each LC, rejecting the Tendered Documents presented thereunder on the basis that the documents contained three alleged discrepancies. In response to the above notices of refusal, the respondent replied on 29 December 2003, refuting all the discrepancies alleged.

8 The respondent stated that it would re-present the Tendered Documents without prejudice to its position that the initial presentation was in conformance with the LCs and that the refusal was therefore wrongful.

9 On 29 December 2003, in order to answer one alleged discrepancy raised in regard to the seller's authorisation, the respondent re-presented the Tendered Documents to the appellant. The re-presented copy of the seller's authorisation was amended to remove the alleged discrepancy. It was made clear to the appellant that the re-presentation by the respondent was without prejudice to the respondent's position that the Tendered Documents as presented on 16 December 2003 complied with the terms and conditions of the LCs. The appellant did not send a notice of refusal in response. Neither did it return the Tendered Documents.

The issues

10 Of the three discrepancies raised by the appellant in respect of each of the LCs, the only one remaining in contention is that raised by the comment "Amount Overdrawn", the others having been abandoned by the appellant for the purposes of this appeal. As regards this alleged discrepancy, the respondent raised a preliminary objection at the hearing before me that such a description of the discrepancy was inaccurate and lacked particularity. Although, in an affidavit filed on behalf of the appellant in the O 14 proceedings, it was subsequently clarified that the seller's invoice was overdrawn in the sense that it exceeded the LC limit of US$800,000 +/−10%, the respondent argued that it was not open to the appellant to embellish belatedly its initial statement of the discrepancy.

11 Examination of the sources cited in support of the respondent's proposition do not appear to bear out the respondent's contention. Raymond Jack, Ali Malek & David Quest, *Documentary Credits* (Butterworths, 3rd Ed, 2001) at pp 120–121 appear to be concerned more with the need for a notice of refusal to identify all discrepancies on pain of the issuing bank being precluded from adding on other discrepancies at a later date if it failed to do so. (This, of course, is understandable as a beneficiary will need to rectify all discrepancies within the time limit of the credit and ought not to be confronted with discrepancies raised in piecemeal fashion. Indeed, the Singapore courts in *United Bank Ltd v Banque Nationale de Paris* [1992] 2 SLR 64 and *Amixco Asia (Pte) Ltd v Bank Bumiputra Malaysia Bhd* [1992] 2 SLR 943 accepted this principle when they dealt with earlier versions of the UCP 500.) In contrast it seems permissible for a later communication to clarify what was already identified as a discrepancy in the original notice of refusal: *Kumagai-Zenecon Construction Pte Ltd v Arab Bank plc* [1997] 2 SLR 805 at [31].

12 Be that as it may, I accept that there is a need for sufficient clarity in a notice of refusal so that the beneficiary may know for certain what needs to be rectified. That said, I am of the view that in the present case, the use of the words "Amount Overdrawn" sufficiently conveyed the issuing bank's objection. Certainly the respondent was left in no doubt as to its purport.

13 So then, the first issue in this appeal is whether the claim for reimbursement of US$939,789.01 and US$1,021,641.66 exceeded the respective credit amounts in the LCs. The second issue is whether or not the appellant was obliged to issue a further notice of refusal in respect of the second presentation of the Tendered Documents on 29 December 2003, given that the Tendered Documents still had the discrepancy as to overdrawing already specified in the notice of refusal issued to the respondent on 26 December 2003.

Whether claim exceeded credit limits

Construction of terms of the LCs material to the alleged discrepancy

14 Field 32B of each of the LCs provided as follows:

> Currency code, amount USD800000.

Field 39A provided as follows:

> Percentage credit amount tolerance 10/10.

Field 47A of the LCs (as amended) listed "Additional Conditions" amongst which were the following:

> Price: The price in US dollars per barrel based on the quantity as determined under clause 12 of

the contract shall be on a ex tank price at Pyongtaek, Korea Basis shall be equal to the average of the mean quotations published in the Platt's Asia Pacific/Arabian Gulf Marketscan for gasoil reg 0.5 pct quotations under the heading Singapore plus a premium of US dollars 3.38 per US BBL.

…

E. The amount of this letter of credit shall automatically fluctuate to cover any increase/decrease according to the price clause without further amendment to this credit.

15 The appellant's case is that as provided in Fields 32B read with 39A, the LCs were each for an amount of US$800,000 plus or minus 10%, *ie*, ranging from US$720,000 to US$880,000; the amounts claimed by the respondent being in each case in excess of the upper limit of $880,000, the appellant was not obliged to make payment. In other words, the appellant regarded Fields 32B and 39A as paramount.

16 The respondent, however, took the position that Additional Condition E prevailed over the provisions of Fields 32B and 39A. In its view, the "+/−10 pct" tolerance in the credit limit was meant to cater to a similar percentage tolerance for the volume of gas oil shipped, as provided for in Field 45A in the following terms:

Description of goods Origin: Japan

and/or services: Gas oil 26,000 BBL +/− 10 pct.

(Note: In the case of LC No M06M8310NS00064 the number of barrels was 27,000.)

17 The respondent contended that Additional Condition E catered to fluctuations in the price of the gas oil and that the credit limit provided for in Fields 32B and 39A could be exceeded without the need for amendment of the LCs.

18 Additional Condition E may be divided into two parts:

(a) The amount of the LC shall automatically fluctuate to cover any increase/decrease according to the price clause; and

(b) Such automatic fluctuation in the LC amount is to take effect without further amendment to the LC.

It is pertinent to note that the fluctuation in this provision is not expressed to be subject to any tolerance limits.

19 The appellant, however, contended that Additional Condition E allowed for fluctuation in the price of gas oil without the need to amend the LC provided the price payable for the gas oil shipped was within the "+/−10 pct" tolerance for the LC amount stipulated for under Field 39A.

20 In my view, such a construction would throw up two difficulties. Firstly, if the price increase was capable of being accommodated by the tolerance limit in Field 39A, then Additional Condition E became superfluous. Secondly, if the tolerance in the credit limit was completely taken up by a maximum increase of 10% in the volume of gas oil, Additional Condition E would have to be disregarded and given absolutely no effect even if there was a price increase. The appellant's construction is untenable as it would offend against two rules of construction.

21 Firstly, it would offend on both counts against the rule succinctly stated in Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 3rd Ed, 2004) ("*Lewison*") at p 198, as follows:

> In construing a contract all parts of it must be given effect where possible, and no part of it should be treated as *inoperative* or *surplus*. [emphasis added]

Secondly, it would offend against the principle that in order to arrive at the true interpretation of a document, a clause must not be considered in isolation but rather in the context of the document as a whole: Lewison at p 193.

22 In *Chamber Colliery Company, Ltd v Twyerould* [1915] 1 Ch 268 (Note), Lord Watson said (at 272):

> I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.

A reading of the contract as a whole sometimes results in one clause taking effect subject to another apparently inconsistent clause. Thus, in *Howe v Botwood* [1913] 2 KB 387, there were two such inconsistent clauses in a lease. One imposed a covenant on the tenant to pay outgoings and assessments and the other required the landlord to keep the exterior of the property in repair. A dispute arose between the tenant and the landlord as to who should bear the cost of complying with a notice served by the sanitation authority. Channell J held (at 391):

> The expenses of executing the work would under this covenant fall on the plaintiff. If therefore that covenant by the plaintiff had stood alone without the covenant by the defendant, that is how I should construe it. That covenant, however, has to be read with the earlier covenant by the tenant to pay and discharge all outgoings. There are thus two covenants, one placing the burden on the tenant and the other placing it on the landlord. We must construe the lease as a whole so as to make it consistent in both its parts. In my opinion the covenant by the tenant must be read as if it contained the words "except such as are by this lease imposed upon the landlord." By reading that exception into the covenant by the tenant the two covenants can be read together.

23 Likewise, in the present case, the provisions of Fields 32B and 39A limiting the credit limit to US$800,000 "+/− 10 pct" should not be read in isolation but should be considered in the context of the LCs as a whole. When that is done, it will be seen that there is an *apparent* conflict between those provisions and the automatic fluctuation clause in Additional Condition E. I use the word "apparent" advisedly for, in my view, the conflict can be resolved so that Additional Conditional E prevails over Fields 32B and 39A. The key to this resolution is found in the wording of Additional Condition E itself; as noted earlier, the second part of Additional Condition E provides that any fluctuation in the LC amount shall take effect *without further amendment to the credit*. In my view, that is as good as saying "Notwithstanding the credit tolerance limit provided under Fields 32B and 39A".

24 I regret to say I am unmoved by the appellant's plea that on the construction contended for by the respondent, the appellant's liability under the LCs would be unlimited. It is untrue that such a construction would render the LC similar to a "blank cheque" as the appellant's counsel described it. Under Additional Condition E, the increase in the credit is limited by the increase in the price of oil.

Even if, as recent events have shown, the price of oil could escalate dramatically, there is still a limit. Besides, the problem with the provisions being of the appellant's making, they ought to be construed against the appellant. If there is any ambiguous or unclear term in a letter of credit, a confirming bank is entitled to take a reasonable construction thereof even if, upon closer consideration in an action in a court of law, it is possible that some other interpretation is to be preferred: *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] 1 Lloyd's Rep 275.

Non-documentary condition

25 In addition to its submissions on the proper construction to be given to the provisions in question, the appellant had a second string to the bow. The appellant argued that the price clause in Field 47A was a non-documentary condition which, by reason of Art 13(c) of UCP 500, was to be treated as not stated and therefore disregarded; Additional Condition E, being inseparably linked to the price clause, had to suffer the same fate. Article 13(c) reads as follows:

> If a Credit contains conditions without stating the document(s) to be presented in compliance therewith, banks will deem such conditions as not stated and will disregard them.

The respondent's rebuttal was multi-pronged. Firstly, it contended that the two provisions did not impose non-documentary conditions, the latter being *requirements* stipulated in a letter of credit, the satisfaction of which could only be achieved by reference to extraneous factual matters rather than the documents presented.

26 Secondly, the respondent argued that even if the price clause was a non-documentary condition, Additional Condition E clearly was not and was capable of standing on its own even if the price clause were disregarded; one should just ignore the reference therein to the price clause. It reasoned that to do so would be to give a purposive interpretation to the clause so as not to frustrate the intention behind the inclusion of the automatic fluctuation clause in the LCs, *viz*, to facilitate the trade in gas oil where contract prices, rather than being fixed, are usually linked to a benchmark.

27 Cogent as they may be, my own preference is to take a step back and look into the purpose behind the introduction of Art 13(c) in UCP 500.

Purpose of Art 13(c) in UCP 500

28 The mischief at which Art 13(c) is aimed is clear. As pointed out in the International Chamber of Commerce ("ICC") Banking Commission Position Paper No 3, the specific purpose of this sub-Article was to eradicate the totally wrong practice of incorporating non-documentary conditions into documentary credits. This practice presented serious difficulties to the bank and went against the principles of Art 4 of UCP 500 which provides:

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

29 Article 13(c) therefore stipulates that if a credit contains conditions without stating the document(s) to be presented in compliance therewith, banks will deem such conditions as not stated and will disregard them. This solution was preferred against the alternative which was to allow banks to exercise their discretion to accept any document which they deemed sufficient in purported compliance with a non-documentary condition. As Charles del Busto, the chairman of the drafting group of UCP 500 stated in *Documentary Credits: UCP 500 & 400 Compared* (Charles del Busto ed)

(ICC Publication, 1993) at p 43:

> The onus must be placed on the Applicant and the Issuing Bank to issue the Credit properly. They cannot be allowed to shift this responsibility to other parties. The Applicant and the Issuing Bank must be the ones who must determine the document required to satisfy a non-documentary condition.

Article 13(c) therefore avails the negotiating bank or confirming bank against the issuing bank and, arguably, the issuing bank against the applicant.

30 What the appellant, as issuing bank, sought to do in the present case was to invoke Art 13(c) against the respondent as negotiating and confirming bank. This was turning Art 13(c) on its head. Besides, in invoking Art 13(c) and thereby contending that Additional Condition E was to be disregarded, the appellant was seeking to renege on its obligations under Additional Condition E. This leads us to another reason why the appellant should fail in its attempt to invoke Art 13(c).

Primacy of express terms

31 To put it shortly, the contest is between two express provisions of the LCs, *viz*, the price clause and the automatic fluctuation clause (Additional Condition E) on the one hand and Art 13(c) on the other which was incorporated by reference when the terms of UCP 500 were made applicable.

32 Article 1 of UCP 500 provides that where the provisions of UCP 500 have been incorporated into the terms of the credit, they shall apply "unless otherwise expressly stipulated in the Credit". The quoted words have not been interpreted so stringently as to mean that only an express *exclusion* of any particular provision of UCP 500 will have effect. It is enough if an express provision in the LC stipulates a requirement which is clearly at odds with a provision in UCP 500 in circumstances where an implication may be drawn that the intention was to exclude the operation of the UCP provision in question. In such an event, the express provision will override the provision of the UCP incorporated by reference only. In *Documentary Credits* ([11] *supra*) at para 8.18 the writer states:

> [T]he parties to a contract are free to make their own bargain within the limits of the law, and the Uniform Customs do not have the force of law. It is clear that, if a credit expressly provided that Article 13.c should not apply, it would not. It can be strongly argued that the same result can be achieved by implication in appropriate circumstances. For the inclusion of a term in the credit that payment is only to be made if a non-documentary condition is satisfied is an expression of the parties' intention which is specific to that credit and to which it may be assumed from the circumstances that the parties have directed their attention. It is a principle of English law relating to the construction of contracts that, where there is a conflict between an express term of the contract and a standard incorporated term, the express term should be given preference on the ground that it is a term to which the parties have given their attention. Where a credit is issued containing a non-documentary condition among those to be satisfied before payment, it can certainly be argued that it is Article 13.c which must give way. The strength of the argument will be increased the greater the importance of the condition to the working of the credit. At that point, a further difficulty might arise because the court might find that Article 13.c had been excluded as between the applicant and the issuing bank but not as between the issuing bank and the beneficiary. The bank might then find itself in the most unfortunate position of being obliged to take up the documents but unable to pass them on if there was a non-documentary discrepancy. It is suggested that in the absence of an express exclusion an English court will seek to uphold the scheme of the Uniform Customs by requiring all effective conditions to be documentary.

33 In the present case, the importance of the price clause and the automatic fluctuation clause to the working of the credit is obvious. Without it, the credit would be unworkable as the price for the gas oil is not fixed but fluctuates with a benchmark. Therefore, even if they were non-documentary conditions, effect should be given to the two express clauses rather than to Art 13(c). Such was the approach of the Singapore High Court in *Kumagai-Zenecon Construction Pte Ltd v Arab Bank plc* ([11] *supra*).

34 Judith Prakash J held as follows in [25] and [26] of her judgment:

> It has to be remembered, however, that the provisions of UCP-500 were not expressly repeated in the credit. Instead they were incorporated by reference. It is a well known principle of construction of contracts that the express terms of the contract are capable of overriding terms incorporated by reference if inconsistent with such incorporated terms. This position was recognised by Raymond Jack during his discussion of the effect of art 13c.

(Then followed a quotation of the above passage in *Documentary Credits* in the form in which it appeared in the 2nd Ed of the same book by Raymond Jack.)

> Whilst I recognised the desirability of upholding the provisions of UCP-500 in general, it appeared to me that in this instance the circumstances were such that the credit could only be operated if the non-documentary conditions ie the ascertainment of the fact and quantum of Low's obligation were satisfied. Otherwise the credit did not make sense since the implication was that any amount within the maximum limit of the credit could have been demanded irrespective of the effect of the two judgments. I therefore found that in this case art 13c had been excluded by implication because of the express working of cl 2 of the credit.

35 The Court of Appeal in *Kumagai-Zenecon Construction Pte Ltd v Arab Bank plc* [1997] 3 SLR 770 upheld Prakash J's decision. The court ruled that what the learned judge had decided was not inconsistent with the decision of the English Court of Appeal in *Forestal Mimosa Ltd v Oriental Credit Ltd* [1986] 1 WLR 631 upon which the appellants relied. In that case, Sir John Megaw had said, at 639:

> The marginal note which I have cited provides unambiguously that, except insofar as otherwise expressly stated, this documentary credit is subject to the Uniform Customs. Unless, therefore, there is some express provision which excludes the Uniform Customs terms, they have got to be brought in. There is no such express provision excluding any relevant part of the Uniform Customs. It might be that, if it could be shown that there was some irreconcileable [*sic*] inconsistency between the Uniform Customs terms and the other terms of the document, the Uniform Customs terms would have to be ignored. In my judgment, there is no justification for reading into the contract any implied exclusion; and — I think this is probably part of the same proposition — there is no inconsistency between the terms which the Uniform Customs would incorporate and the terms which appear on the face of the document itself. On the contrary, those terms have been included by reference to the Uniform Customs terms, and are to be interpreted by reference to the relevant parts of the Uniform Customs terms.

The Singapore Court of Appeal held that in the case before them there indeed was an "irreconcilable inconsistency" between the express provisions in the LC and the provisions of the UCP 500 (albeit the particular provision thereof referred to was Art 13(a).)

36 In England, despite the suggestion at the end of the passage from *Documentary Credits* cited above ([32] *supra*), a similar attempt to invoke Art 13(c) failed in *Credit Agricole Indosuez v*

Generale Bank and Seco Steel Trading Inc and Considar Inc [2000] 1 Lloyd's Rep 123. Indeed, it would appear that in the only two reported decisions cited before me where Art 13(c) was invoked, the English and Singapore courts declined to give effect to it.

37 For all the foregoing reasons, therefore, I hold that the appellant's contention that the price clause and the automatic fluctuation clause should be disregarded must fail. It follows that the amount of payment sought by the respondent did not exceed the credit limit of the LCs.

38 Having so decided, it is not strictly necessary that I consider the second issue, *viz*, whether it was incumbent upon the appellant to issue a second notice of refusal when the Tendered Documents were re-presented. However, as considerable effort was put into submissions on this point by counsel on both sides, it is perhaps appropriate that I do so.

Whether a second notice of refusal was required

39 It will be recalled, from my earlier account of the events, that on 29 December 2003 the respondent made a second presentation of the Tendered Documents to the appellant which were the same as before except that the seller's authorisation had been amended to correct what the respondent called a "spurious discrepancy". In particular, the alleged overdrawing was not rectified. The re-presentation was made without prejudice to the respondent's position that the Tendered Documents as earlier presented on 16 December 2003 were fully compliant. The appellant did not send a notice of refusal in response. Neither did it return the Tendered Documents.

40 The respondent contends that by reason of such failure, even if the Tendered Documents were discrepant, the appellant is now precluded by Arts 13 and 14 of UCP 500 from so asserting. In particular, Art 14(d) and (e) provide as follows:

> (d) i If the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, decides to refuse the documents, it must give notice to that effect by tele-communication or, if that is not possible, by other expeditious means, without delay but no later than the close of the seventh banking day following the day of receipt of the documents. Such notice shall be given to the bank from which it received the documents, or to the Beneficiary, if it received the documents directly from him.
>
> ii Such notice must state all discrepancies in respect of which the bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presenter.
>
> iii The Issuing Bank and/or Confirming Bank, if any, shall then be entitled to claim from the remitting bank refund, with interest, of any reimbursement which has been made to that bank.
>
> (e) If the Issuing Bank and/or Confirming Bank, if any, fails to act in accordance with the provisions of this Article and/or fails to hold the documents at the disposal of, or return them to the presenter, the Issuing Bank and/or Confirming Bank, if any, shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the Credit.

It is important to note that Arts 13 and 14 do not distinguish between the first and subsequent presentations. Neither is such a distinction drawn in any of the standard texts on documentary credit to which I have referred.

41 The respondent cited the Opinion of the ICC Banking Commission, Reference R328 – 1998/99 where it was stated that Art 14(d)(i) of UCP 500 applied "whether the documents are a first presentation or a presentation on the basis of *corrected documents*" [emphasis added].

42 Support for the respondent's position may also be found in the judgment of Evans J in *Floating Dock Ltd v The Hongkong & Shanghai Banking Corporation* [1986] 1 Lloyd's Rep 65 at 80. In what appears to be *obiter dicta*, the learned judge opined that the failure of an issuing bank, in its second notice of refusal, to cite a valid discrepancy which it had properly cited in its first notice of refusal precluded the bank from relying on such discrepancy. *A fortiori* in the present case where even if there was a valid discrepancy, the appellant simply gave no second notice of refusal.

43 The appellant sought to argue that a party presenting documents for payment had to act in good faith; where, as in this case, the respondent already was aware of the discrepancy (having been previously notified under the notice of refusal) its re-presentation was in bad faith and could not be considered a presentation for purposes of Arts 13 and 14.

44 I do not see how the re-presentation of the Tendered Documents (with amendment to the seller's authorisation) could be criticised as lacking in good faith. The respondent was convinced that the Tendered Documents were compliant and were well entitled to re-present them for payment. It was surely no hardship for the appellant to respond a second time even if it was only to reject the Tendered Documents once again.

45 I agree with the respondent that to read into the UCP 500 an overriding requirement of good faith may require banks to go beyond documentary examination. This would be contrary to the fundamental principle in documentary credit that banks deal only with documents. In similar vein, albeit not entirely *apropos*, Art 15 of UCP 500 provides, *inter alia*, that "[b]anks assume no liability or responsibility … for the good faith … of the consignors, the carriers, the forwarders, the consignees or the insurers of the goods, or any other person whomsoever".

46 In summary, I hold that:

(a) the Tendered Documents were not discrepant and that the appellant was not entitled to reject them; and

(b) even if they were, having failed to give notice of refusal of the Tendered Documents on the re-presentation thereof, the appellant was precluded by Art 14(e) from claiming that the said documents were not in compliance with the terms and conditions of the LCs.

Accordingly, the appeal is dismissed with costs to be taxed unless agreed.

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