

CML Seminar Series: Letter of Credit Terms v UCP and eUCP Provisions – How Should Irreconcilable Conflicts be Resolved?

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The Executive Centre, Ocean Financial Centre



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by Professor Enonchong

The CML Seminar Series on 'Letter of Credit Terms v UCP and eUCP Provisions: How Should Irreconcilable Conflicts be Resolved' was held on 22 August 2024 (Thursday) from 4.30 to 6 pm. The speaker was Professor Nelson Enonchong, Barber Professor of Law, University of Birmingham, Deputy Dean of Birmingham Law School. Professor Stephen Girvin introduced the speaker.

Professor Enonchong started by defining the general problem the courts face due to a possible conflict between the letter of credit terms and the UCP provisions.

The speaker emphasised the key questions that the courts should answer when dealing with possible conflict. The first one is whether the credit is subject to the UCP. Art 1 of the UCP states that the credit is subject to its provisions when the parties incorporate them. In most cases, the UCP is incorporated by reference.

The second question is whether there is a conflict between the terms of the credit and the UCP. The professor paid particular attention to *Forestal Mimosa Ltd v Oriental Credit* [1986], in which it was held that the appropriate way of interpreting the credit and the UCP is to read them together and not in order with the credit terms priority. This approach was generally followed in other cases.

The third question is how a conflict may be resolved. In some cases, the inclusion of the express terms in the credit that conflict with the UCP may be considered an express exclusion or modification of the conflicting UCP provisions. However, there are provisions in the UCP that expressly address the issue of conflict and resolve it in favour of the UCP (eg, Art 20(c)(ii) in the UCP 600).

The problem is evident in light of the non-documentary conditions. Before UCP 500, the courts held that if the credit contains a non-documentary condition, the bank is entitled and obliged to request the necessary documents, thereby transforming it into a documentary one. The UCP 500 introduced the 'disregard rule' under which the court may disregard the condition if the documents to indicate compliance with this condition are not stipulated. The problem is the lack of clarity concerning the term 'condition'.

This was discussed in several cases, one of which is *Kuvera Resources Pte Ltd v JP Morgan Chase Bank NA* [2022], where the sanction clause was not considered a 'non-documentary condition' under the relevant provision of the UCP. Various explanation notes and position papers addressed the issue. However, the problem of lack of clarity is still in place.

One of the possible ways of development is to consider the example of related instruments, such as demand guarantees, in relation to which this problem is addressed more thoroughly, and internationalisation of the English courts' approach.

A Q&A session followed the presentation. The participants asked questions on the revocability of letters of credit and the necessity for a new version of the UCP.

