Singapore Journal of Legal Studies
[1993] 226 – 234

SHORTER ARTICLES/COMMENTS

DOCUMENTARY LETTERS OF CREDIT: THE BANK'S DUTY TO BRING UP ALL DISCREPANCIES

Amixco Asia (Pte) Ltd v *Bank Bumiputra Malaysia Berhad*[1]

THE High Court recently took the opportunity to comment on an issuing bank's duty to bring up all discrepancies in documents presented to it under a letter of credit. In the process, the Court considered Article 16 in the Uniform Customs and Practice for Documentary Credits (UCP), 1983 Revision,[2] and its relation to well-established contractual principles.

In this case, the plaintiffs contracted to sell a quantity of tin slag to the buyers. At the application of the buyers, the defendants as issuing bank, opened a letter of credit in favour of the plaintiffs. Banque Nationale de Paris (BNP) was appointed as advising or intermediary bank. The credit was subject to the UCP. Its expiry date was 30 April 1985. Under the credit, the plaintiffs could present drafts to the advising or intermediary bank for negotiation, as well as to the issuing bank itself. Partial utilization of the credit was possible. On the facts, the plaintiffs chose to submit three drafts first to the advising bank. As the advising bank did not negotiate these, the plaintiffs were left to make a claim on the drafts on the defendants directly. The defendants received the first draft on 15 April 1985, and the other two on 2 May 1985. They refused to honour the drafts, and their refusal gave rise to this action by the plaintiffs.

Against this background, the issue was whether the plaintiffs were entitled to payment against the three drafts, or whether the defendants had good reasons for their refusal to pay. The defendants argued that they had various grounds for refusal. These can be separated into three categories:

1. Discrepancies in the documents to be negotiated in respect of the first draft:

---

[1] [1992] 2 SLR 943 (Hereafter "*Amixco*").

[2] References to the UCP are to the 1983 revision, unless otherwise stated.

– the warehouse receipts presented by the plaintiffs were "stale";

– there were discrepancies between the documents presented by the plaintiffs and the terms of the letter of credit;

2. Presentation of second and third drafts *after* expiry of the credit; and

3. Grounds for *rejecting the goods* as contained in their pleadings. It appears that the defendants argued that they were entitled to raise such additional grounds for rejecting the goods, even though these grounds had not been raised earlier at the rejection of the *drafts*.[3]

Selvam JC held that the defendants were not liable to pay on the three drafts. In dealing with the grounds above, the learned judicial commissioner set out the two types of grounds on which an issuing bank could reject documents presented for negotiation under a documentary credit. These were the grounds of breach of non-documentary conditions (such as presentation after expiry of the credit), and of non-conformity with documentary conditions (such as the presentation of non-conforming documents). On the facts, the plaintiffs had breached documentary conditions in their presentation of the first draft, and non-documentary conditions in presentation of the other two drafts.

There is no problem with the rejection of the three drafts on these grounds. After all, with respect to the first draft, Selvam JC agreed with the defendants that there were discrepancies between the credit and the documents presented.[4] These amounted to breaches of Articles 23 and 47(a) of the UCP. With respect to the second and third drafts, their presentations were made to the issuing bank *after* expiry of the credit.[5] There was thus

---

[3] This is not apparent from the judgment itself, but is gathered from the headnotes of the report.

[4] The following were discrepancies accepted as valid grounds for rejection by the court: the inconsistency between one of the certificates of assay and the combined certificates of assay regarding the tantalum content of the tin slag; the failure of the certificate of weight/assay to evidence data on the goods as required by the credit; and the failure of the documents (other than the certificate of weighing, sampling and moisture determination) to state that the goods were placed in second-hand steel drums or PP bags, as required by the credit. The court rejected the ground under Art 47 that the warehouse receipt was "stale" or issued and/or presented late.

[5] The plaintiffs did not plead that there was negotiation of these two drafts by BNP, the advising bank, who were therefore merely acting as collecting agents. This meant that any presentation would have had to have been made directly to the defendants, the issuing bank. Since the drafts reached the defendants out of time, they were held not liable in respect of them. See *supra,* note 1, at 954-6.

a clear breach of Article 46 of the UCP. Hence, the defendants were vindicated in their non-payment of the first draft on breach of documentary conditions, and of the other two drafts on breach of non-documentary grounds.

With respect to the additional grounds which the defendants sought to raise subsequently in their pleadings, the learned judicial commissioner took pains to explain why the defendants were not entitled to raise them. The remarks made in this respect are the subject of this comment.

In holding that the plaintiffs were not allowed to raise grounds other than those set out in their rejection notice, Selvam JC held that the common law principle allowing a "second bite at the cherry" did not apply here. In coming to this conclusion, the learned judicial commissioner had to deal with three authorities, as well as statements in *Halsbury's Laws of England,* relied on by the plaintiffs. These cases suggest that an issuing bank of a credit subject to the UCP should not be forbidden from relying on some ground not brought up at the initial rejection of documents under the credit.

The Three Authorities

In the first case, *Skandinaviska Kreditaktie Bolaget* v *Barclays Bank,*[6] Greer J held that the issuing bank was not entitled to an indemnity from its customers, the defendants, for payment made against improper documents. The decisive ground was that the plaintiff bank had accepted documents which it was not entitled to as they did not conform with its instructions. An argument was also raised by the plaintiff bank that the defendant was estopped by not having raised the objections earlier. Greer J said *obiter* that the defendant would not be deprived under English law of his right to object, by a failure to raise the valid objections until at a later stage. In *Kydon Compania Naviera SA* v *National Westminster Bank Ltd,*[7] Parker J rejected a similar argument based on estoppel and allowed the defendant bank to raise grounds of objection to the documents, which were not raised at their time of refusal to pay. Finally, in *Westpac Banking Corp & Commonwealth Steel Co Ltd* v *South Carolina National Bank "Westpac* ",[8] the Privy Council affirmed this principle.

The correctness of these three decisions was not questioned by Selvam JC. In fact, he specifically affirmed the ruling in *Westpac.* However, he implicitly distinguished this case, saying that the "abandonment of the initial ground and presentation of a new ground was in reality a change

---

[6] (1925) 22 Lloyd's List Law Rep 523.
[7] [1981] 1 Lloyd's Rep 68 (PC).
[8] [1986] 1 Lloyd's Rep 311.

in form and not substance."[9] *Westpac* was the most relevant authority as it involved Article 8 of UCP 1974, whose wording much more closely resembles that of the 1983 provision.[10] It is arguable that the new ground sought to be raised in *Westpac* was *not* one of form only. Granted that the broad objection was still that the documents tendered were not "clean on board bills of lading", it was for various substantially different reasons: no longer that the words "Shipped on Board" were a notation, but that they were inconsistent with other words, and that the words "Shipped on Board" showed that the date on the bill of lading could not have been the date of its issue.

Taking a broader view, the rule established by the three cases is merely an illustration of a more general principle of contract law.[11] This is the rule that a party who has raised grounds of objection may later raise other grounds existing at the first objection. It would appear therefore that a subsidiary rule should apply, that where a bank gives one set of reasons for rejecting documents under a UCP credit, it is not prevented from subsequently raising other grounds. This was, however, not accepted by Selvam JC.

The Exceptions

Selvam JC rightly pointed out that there are exceptions to the rule at general law. He listed three established types of cases in which a party may not be allowed to resort to other grounds not relied on earlier. The first is where if the point not taken is one which if taken could have been put right. The second is where the party seeking to assert new grounds has by his conduct precluded himself from doing so, by reason of estoppel. The third is where a statute forbids the raising of other grounds later.

It is interesting that Selvam JC found these exceptions inadequate, and went on to establish a new one, namely, where a statute or contract imposes a time limit to give reasons for doing or refusing to do an act. In the present context, the limit is one imposed by contract and not statute. These are the time limits for acting/refusing to act in the UCP, which are incorporated

---

[9] *Supra,* note 1, at 952.

[10] Selvam JC's judgment sets out at 948 what he called the "discrepancy provisions" in the UCP 1962 and UCP 1974, namely the predecessors to the present Arts 15 and 16 of UCP 1983. Art 8 of UCP 1962 requires the issuing bank to give notice and reasons for rejection of documents but with no reference to doing so within a reasonable time. Art 8 of UCP 1974 had such provision on reasonable time added to it, and resembles substantially the present Art 16. Since the version relevant in *Westpac* was Art 8 of UCP 1974, it would have been the most cogent authority for the defendants.

[11] The rule is accepted as well-established: see *A Guest (general editor), Benjamin's Sale of Goods,* (4th ed, 1992), at paras 19-138 to 19-139.

into the contract by the parties. This means that where a bank adopts the terms (and thus the time limits) of Article 16 into the letter of credit contract, it must ensure that it raises *all* objections which it intends to rely on, at the point of rejecting discrepant documents. This is because under Selvam JC's new exception, it will be held to have given up its rights to raise any other objections later. Hence the reference to only "one bite of the cherry".

Questions

These remarks in the case are important as they indicate the attitude of the Singapore courts. A few questions may be asked of the "new exception". Were the existing exceptions not sufficient for the court to arrive at the same result? Is the rejection of documents under a letter of credit subject to the UCP deserving of a new, separate exception? Or could the existing exceptions have been applied to achieve the same effect?

The existing exceptions raise the question of whether it would be fair to the other party to allow the new reason to be raised. Looking at the first two of these exceptions, this would appear to be the rationale for their existence. In the exception established in *Heisler* v *Anglo-Dai Ltd,*[12] the rationale behind refusing a new ground there was that to allow it would be unfair to the other party. The latter could have corrected the error or defect if told. As he was *not* told, he may either have been unaware of it or have thought that the first party had waived it.

This seems to be consistent with the purpose of Article 16(d) of the UCP. What is, after all, its purpose as a contractual term? It ensures that a bank which is presented with documents does not reject them on frivolous grounds, and that it gives a response within a reasonable time to either the bank which sent it the documents or the beneficiary, as the case may be, to allow arrangements to be made either for amendment/rectification where possible, or termination of the credit. In other words, the court would ask: if the defect had been raised earlier, would the other bank/beneficiary have been able to put it right? If so, the bank which is rejecting the documents should not be allowed to raise it at a later stage. This exception could perhaps have been employed to resolve the present issue. However, if one were to take the strict approach demonstrated in the present case, this exception would not suffice, as it would allow the raising of new objections which could not have been rectified in any case.[13]

---

[12] [1954] 1 WLR 1273, referred to in Selvam JC's judgment, *supra,* note 1, at 953.

[13] However, a view at the other end of the spectrum can be found in the passage from *The Law of Bankers' Commercial Credits* (7th ed, 1984), at 190-191. The position there is so generous to the bank that it suggests that, even where the later defect is one that the beneficiary could have rectified if raised earlier, the bank should not be bound to accept the documents.

Alternatively then, could the estoppel exception have disposed of the present matter? In *Panchaud Frères SA* v *Etablissements General Grain Co,*[14] cited by Selvam JC as establishing this exception, the conduct of the first party *precluded* him from relying on new grounds. Again, this outcome arose because it would have been unfair to the other to allow the raising of the subsequent reasons.[15] This general estoppel principle applies equally to the bank's conduct in stating its grounds for rejecting documents under Article 16.[16] This would mean that where the bank acted in such a manner as to make it unfair for it later to raise other grounds of rejection, it would be estopped from doing so.

However, the author of *Paget's Law of Banking,* while recognizing that there would be difficulties with Article 16 if one were to hold that a bank may bring up a subsequent ground, advocates that there be no estoppel by the mere raising of invalid grounds. In his opinion, to "hold otherwise would be an unwarranted departure from the basic rule that the beneficiary is entitled to be paid only if he presents conforming documents."[17]

This view need not have presented a problem in the present case. If there is conduct beyond a mere statement of invalid grounds, there may be more reason to hold that the classic estoppel arises.[18] In this case, for instance, the defendants apparently chose to wait until the pleadings stage to raise the new grounds, some time after the initial rejection. The court could well have adopted a strict approach and found the defendants' tardiness and silence in the interim sufficient to constitute a representation

---

[14] [1970] 1 Lloyd's Rep 53.

[15] *Ibid.* Lord Denning, MR (as he then was) said, at 57: "It is a case of estoppel by conduct. The basis of it is that a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs which another has taken to be settled or correct...". Although Winn LJ did not agree that there was estoppel on the facts, he did say at 59: "what one has here is something perhaps in our law not yet wholly developed as a separate doctrine – which is more in the nature of a requirement of fair conduct – a criterion of what is fair conduct between the parties. There may be an inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negativing any liberty to blow hot and cold in commercial conduct".

[16] *Halsbury's Laws of England* (4th ed, reissue 1989), Vol 3(1), para 285, states that there are two situations of estoppel in relation to a bank's conduct in relation to documents, a general estoppel outside the provisions of Art 16, and an estoppel arising from that provision.

[17] M Hapgood, *Paget's Law of Banking* (10th ed, 1989), at 645. It also states on the same page that there is "no wider duty to identify each and every discrepancy", as the notice of rejection "need only identify the discrepancies in respect of which the documents are rejected on that particular occasion". *Halsbury's* (*supra,* note 16) is of the same view, that a mere statement of a particular reason or reasons does not necessarily found a representation or an estoppel.

[18] An even more recent decision of the Singapore Court of Appeal shows that the estoppel argument is alive and well under Singapore law in the context of a bank's conduct in rejecting documents: see *Indian Overseas Bank* v *United Coconut Mills Inc* [1993] 1 SLR 141.

which was relied on. The defendants would have been estopped from raising the later grounds. Banks may then often find themselves estopped by similar conduct from raising new objections.

Apart from the general estoppel, an estoppel can arise in respect of failure by the bank to comply with Article 16.[19] This is because the wording of Article 16(e) itself suggests that the application of the estoppel principle.[20] This brings us to the next point. A simple reading of Article 16 paragraphs (d) and (e) could equally have disposed of the matter. This entails focussing on the following words in paragraph (d) of that Article: "Such notice must state the discrepancies in respect of which the issuing bank refuses the documents...".

The "discrepancies" here may be read to mean *all discrepancies which the bank intends to rely on which would make its refusal rightful.* Read this way, and applying paragraph (e), the result is that a bank which does not state the proper grounds at refusal would be one which "fails to act in accordance with the provisions of paragraph ... (d)..." and is therefore "precluded from claiming that the documents are not in accordance with the terms and conditions of the credit." On the present facts, the defendants did not act in accordance with Article 16(d) by not stating the grounds of refusal they wished later to rely on in their notice, and therefore would be precluded from now so relying under Article 16(e). This would be the application of the estoppel exception under Article 16 itself.

A further alternative would be to argue that no exception to the general rule needs to be applied in this type of case at all. As Selvam JC himself observed, Article 16(d) and (e) represent express terms by which the parties *contract out of the general principle above.*[21] This means that the general principle has no application because the parties have expressly negatived it by their adoption of the UCP (in particular, Article 16) into their contract, and not because of any of the exceptions. Such an interpretation of Article 16(d) and (e) would merely be a simple exercise in interpretation of contractual terms in the form of UCP Articles. In fact, this is supported by the rather scant authorities which Selvam JC himself cited, in *Case Studies in Documentary Credits (1989),* and *Kerr-McGee Chemical Corp* v *Federal Deposit Insurance Corp.*[22]

---

[19] *Halsbury's Laws of England, supra,* note 16.

[20] The use of the word "precluded" in para (e) in relation to the bank which fails to act in accordance with paras (c) and (d), or fails to hold the documents at the disposal of or to return them to the presentor, suggests the idea of estoppel. This interpretation of Art 16 finds support in *The Law Relating to Banker and Customer in Australia* (looseleaf), at para 25.420.

[21] *Supra,* note 1, at 953.

[22] References and citations at 953-4 of his judgment, *supra,* note 1.

Finally, Selvam JC also relied on an English authority, *Bankers Trust Co v State Bank of India,*[23] and he purported to follow "the logic of the decision of the English Court of Appeal" in that case. However, the case did not deal with the same issue as that in the present case. There, the question was whether the "reasonable time" in Article 16(c) of the UCP could be extended to include time for the bank to consult the buyers (their clients) to discover or waive any discrepancies.[24]

Conclusion

There is much common sense in the view of the learned judicial commissioner. Why should the banks be given the luxury of giving one set of reasons first and of resorting to another set at a later point? For one thing, it should make banks scour documents more diligently, and make them present all discrepancies which they should be able to discover within the allotted "reasonable time" period.[25] In fact, in a decision of the Singapore High Court on this point, *United Bank Ltd* v *Banque Nationale de Paris,*[26] the same position was adopted. In *Union Bank of Switzerland* v *Indian Bank & South Asian Exports Pte Ltd,*[27] the most recent judgment adverting to this problem, the view in *Amixco* was expressly approved albeit without an examination of its reasoning.[28]

---

[23] [1991] 2 Lloyd's Rep 443. It is submitted that the case does not really support the point Selvam JC was making.

[24] The answer to that question was clearly in the negative, as the Court of Appeal was of the view that under Art 16(b), the *bank* alone should make the determination whether to accept the documents. *See, eg,* the judgments of Lloyd LJ at 451, and of Farquharson LJ, at 454, *ibid.*

[25] It has been rightly observed that this strict approach towards the bank would serve as "an efficient counterweight to the strict-compliance rule that sometimes cuts against the interest of the beneficiary.": John F Dolan, *The Law of Letters of Credit – Commercial and Standby Credits, 1990 Cumulative Supplement* (1990), at S 6-35.

[26] [1992] 2 SLR 64. At 76, Chao Hick Tin J also disallowed the issuing bank from raising discrepancies not found in the first telex it sent to the negotiating bank. The court merely said that Art 8(e) and (f) of the UCP 1974 (Article 8 being the predecessor of the present Art 16) was "very clear" in not allowing a "second bite". No further reasons were given for this position.

[27] Suit No 2594 of 1987, 10 May, 1993 (unreported). Goh Joon Seng J held that the position in *Amixco* is "common sense since it might be possible for the discrepancies to be rectified and the documents to be represented within the time limits of Arts 46 and 47(a)." He further held: "If therefore, the issuing bank rejects the documents and states only one discrepancy but later tries to raise other discrepancies for the purpose of refusing the documents, obviously this is contrary to UCP 1983 and also contrary to what would be fair treatment of the beneficiary." The bank there was not allowed a "second bite" as it had sent its rejection notice after the "reasonable time" allowed under Art 16.

[28] It is submitted that in the *Union Bank* case, the application of *Amixco* was inappropriate, as the bank there was not attempting to being up *new* discrepancies after raising initial

It is submitted that the alternative approaches suggested ensure that a bank produces the proper reasons for refusing to honour draft at the time of refusal, as Selvam JC intended, while leaving the general contractual principle with its exceptions intact. Furthermore, under the suggested approaches the situation where a statute may impose a time limit remains unchanged, as is appropriate given that it has no bearing on cases like the present.

Nonetheless, judging from these recent decisions, the thinking of the High Court is quite clear: a bank will not be allowed to raise discrepancies other than those stated in its notice of rejection given within the reasonable time period under Article 16 of the UCP. It is submitted that this view is sound. The wording of paragraphs (d) and (e) supports this position. If the matter should arise again in a Singapore court, however, it is hoped that the reasoning in this case will be reconsidered, as the same result can be arrived at either by applying the existing exceptions, or by holding that the inclusion of Article 16 in the parties' contract represents their express opting out from the general principle. Also, it is necessary to distinguish between the cases which are truly attempts at a "second bite at the cherry", and those which are not. The latter need not involve the general contractual principle at all, and can be resolved by reference to the terms of the UCP itself.[29]

HSU LOCKNIE*

objections, but was attempting to rely on discrepancies which it did not even state within a reasonable period. Such a situation fell clearly into Art 16 paras (c), (d) and (e). It was not therefore a case of trying to get a "second bite"; there was in effect no initial "bite".

[29] *Ibid.*

* LLB (NUS); LLM (Harv); Advocates & Solicitor (Singapore); Lecturer, Faculty of Law, National University of Singapore.