



JONES DAY
COMMENTARY

UCP 600: CONFIRMING BANKS AND NOMINATED BANKS

*Fortis Bank S.A./N.V. and Stemcor UK Limited v Indian Overseas Bank*¹ is one of the first cases to consider the language of the current edition of the Uniform Customs and Practice for Documentary Credits² (“UCP 600”) relating to the right of reimbursement owed by an Issuing Bank to a Nominated Bank or Confirming Bank in respect of a negotiated or honoured credit.

UCP 600 is the latest set of contractual rules published by the International Chamber of Commerce which, although without the force of law, parties may agree to incorporate into a credit (at which point the rules will become contractually binding upon them).

This case provides comfort to Confirming Banks and Nominated Banks in respect of their right to reimbursement from the Issuing Bank.

FACTS

MSTC Limited, the Applicant, requested the issue of certain letters of credit (“L/Cs”) by Indian Overseas Bank (“IOB”), the Issuing Bank, in favour of Stemcor

UK Limited (“Stemcor”), the Beneficiary, in connection with certain purchase contracts between Stemcor and a third party.

Each L/C was stated as being subject to UCP 600, contained a request from IOB to Fortis Bank S.A./N.V. (“Fortis”) to advise each L/C to Stemcor and stated that Fortis “may add” its confirmation to that L/C and that the L/C may be “confirmed at the request and cost of [Stemcor]”.

At the request of Stemcor, Fortis added its confirmation to certain of the L/Cs and, in Fortis’s view, became a Confirming Bank in respect of those L/C (the “Confirmed L/Cs”). Fortis subsequently negotiated and honoured each of the Confirmed L/Cs and forwarded each document presented in respect of each of the other L/Cs (the “Unconfirmed L/Cs”) to IOB.

IOB rejected the majority of documents presented by Fortis on the basis of alleged discrepancies, refused payment to Stemcor in respect of each of the Unconfirmed L/Cs and refused to reimburse Fortis for each of the Confirmed L/Cs that Fortis had negotiated and honoured. Fortis sought judgment

¹ [2009] EWHC 2303 (Comm).

² 2007, Revision, ICC Publication no. 600.

against IOB in respect of the failure of IOB to reimburse it in respect of the Confirmed L/Cs.

All but one of the alleged discrepancies alleged by IOB were rejected by the Court.

This *Commentary* considers the Court's judgement regarding Fortis's right to reimbursement in respect of the Confirmed L/Cs under UCP 600 and whether Fortis was an Advising Bank, a Negotiating Bank or a Confirming Bank in respect of the Confirmed L/Cs.

THE ARGUMENTS

Fortis asserted that:

- it was entitled to reimbursement from IOB in respect of the Confirmed L/Cs on the basis that it had duly added its confirmation to each of the Confirmed L/Cs and was therefore a Confirming Bank in accordance with the terms of the Confirmed L/Cs and UCP 600; and
- even if it was not a Confirming Bank, it would nevertheless be a Nominated Bank in respect of the Confirmed L/Cs and consequently entitled to reimbursement from IOB under UCP.

IOB argued that:

- Fortis was not a Confirming Bank (and therefore was not entitled to reimbursement under UCP 600) because each confirmation was made without IOB's authorisation and was therefore a Silent Confirmation; and
- Fortis was not a Negotiating Bank (and therefore was not entitled to reimbursement under UCP 600) because Fortis had not honoured or negotiated a complying presentation as per Article 7(c) of UCP 600³. Additionally, Fortis had failed (as the L/Cs required) to pay or negotiate on sight and in a number of cases the negotiation was made later than five days after the presentation of documents⁴.

THE JUDGMENT

The Court held that, in respect of the Confirmed L/Cs, Fortis was a Confirming Bank under UCP 600 on the basis that each Confirmed L/C stated in the Confirmation Instructions field that Fortis "may add" its confirmation. This, the Court concluded, amounted to authorisation from IOB for Fortis to be a Confirming Bank (which was, in the Court's view, further evidenced by the inclusion of the words that the Confirmed L/Cs may be "confirmed at the request and cost of [Stemcor]").

The Court further held that, had Fortis not been a Confirming Bank, it would nevertheless have been a Nominated Bank (and therefore entitled to reimbursement) because what matters is not the time period within which the L/Cs were honoured or negotiated but whether or not Fortis had actually honoured or negotiated a complying presentation (which it had) and forwarded the documents to the Issuing Bank.

The evidence that Fortis had not negotiated the documents in a manner consistent with Article 7(c) of UCP 600 was not fatal to its claim for reimbursement from IOB.

CONCLUSION

The previous edition of UCP 600 (UCP 500) did not recognise the negotiation of credits by a Nominated Bank or a Confirming Bank. As a consequence, where a Nominated Bank or a Confirming Bank negotiated a credit on the basis of fraudulent documents presented by the Beneficiary, that Nominated Bank or Confirming Bank would not be entitled to reimbursement from the Issuing Bank (and therefore they took the risk of fraud by the Beneficiary)⁵.

³ And was therefore outside of Article 7(c) of UCP 600 which states "An Issuing Bank undertakes to reimburse a Nominated Bank that has honored or negotiated a complying presentation and forwarded those documents to the Issuing Bank. Reimbursement ... is due at maturity".

⁴ Article 14(b) of UCP 600 states that a Nominated Bank shall have "a maximum of five banking days following presentation to determine if a presentation is complying".

⁵ See *Banco Santander SA v Banque Paribas* [2000] 1 All ER (Comm) 776.

However, Article 7(c) of UCP 600 created a new requirement on an Issuing Bank to reimburse a Nominated Bank or a Confirming Bank on maturity of a credit irrespective of whether that Nominated Bank or Confirming Bank negotiated that credit before maturity⁶. This resulted in a change to the party who bears the risk of fraud on the part of the Beneficiary in connection with a negotiated credit from the Nominated Bank or Confirming Bank to the Issuing Bank (and, consequently, to the Applicant).

This case provides a useful clarification of UCP 600 (and additional comfort to Negotiating Banks and Confirming Banks) by confirming that, irrespective of timing, it is the act of negotiating or honouring a complying presentation of documents alone that gives rise to a right of reimbursement under Article 7(c) of UCP 600.

GLOSSARY

Advising Bank: *The bank which, at the request of the Issuing Bank, advises the Beneficiary when the credit has been issued. An Advising Bank owes no obligation to the Beneficiary other than to satisfy itself as to the ostensible authenticity of the credit upon which it is advising.*

Applicant: *The person upon whose request the credit is issued.*

Beneficiary: *The person in whose favour a credit is issued.*

Confirming Bank: *A Nominated Bank may be authorised to pay the Beneficiary in accordance with the terms of the credit. However, a Nominated Bank will have no liability to the Beneficiary to make payment under the credit. However, a Confirming Bank is equally liable to the Beneficiary as the Issuing Bank. If the Confirming Bank negotiates or honours a credit that is subject to UCP 600, that Confirming Bank is entitled to reimbursement from the Issuing Bank.*

Issuing Bank: *The bank which, at the request of the Applicant, issues the credit in favour of the Beneficiary.*

Negotiation: *Where a credit is available by deferred payment, a Nominated Bank or Confirming Bank may negotiate that credit so that the Beneficiary can receive an immediate (discounted) payment on that credit.*

Nominated Bank: *The bank nominated by the Issuing Bank as being the bank at which the Beneficiary may present the documents required by the credit and obtain payment. If the Nominated Bank negotiates or honours a credit that is subject to UCP 600, that Nominated Bank is entitled to reimbursement from the Issuing Bank.*

Silent Confirmation: *If, at the request of the Beneficiary, an Advising Bank adds its confirmation to a credit without the authority of the Issuing Bank, this will be a silent confirmation. An Advising Bank which adds a silent confirmation to a credit will not be a Confirming Bank and consequently will not benefit from the reimbursement right under UCP 600.*

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⁶ This right of reimbursement is available only to a Nominated Bank or a Confirming Bank, not for example a third party forfaiting bank.