



JONES DAY
COMMENTARY

UCP 600: RETURN OF DOCUMENTS— THE CLOCK IS TICKING

*Fortis Bank S.A./N.V. and Stemcor UK Limited v Indian Overseas Bank*¹ is a follow-up to an earlier judgment in the same case². It is also one of the first cases to consider the language of the current edition of the Uniform Customs and Practice for Documentary Credits³ (“UCP 600”) relating to the obligations of a bank when dealing with discrepant documents presented to it in respect of an English law letter credit incorporating UCP 600.

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

This case provides clarification as to the meaning and interpretation of the relevant provisions of UCP

600 and provides important guidance to banks when dealing with discrepant documents (and the serious consequences that may result from a failure to comply with those requirements).

THE RELEVANT PROVISIONS OF UCP 600

Article 16 of UCP 600 establishes the practice for banks dealing with discrepant documents presented under a credit. It requires that a notice be sent by the bank to the presenter (an “Article 16 Notice”) stating that there is a discrepancy and, consequently, the credit will not be honoured or negotiated.⁴

The Article 16 Notice must also state how the bank will deal with the discrepant documents (which will often include title and other important documents) that it is in possession of. UCP 600 sets out four

1 [2010] EWHC 84 (Comm).

2 *Fortis Bank S.A./N.V. and Stemcor UK Limited v Indian Overseas Bank* [2009] EWHC 2303 (Comm). This dealt with the right of reimbursement owed by a Bank to a Nominated Bank or Confirming Bank in respect of a negotiated or honoured credit. For more information on this, see *Jones Day Commentary* entitled “UCP 600: Confirming Banks and Nominated Banks” (October 2009), available at <http://www.jonesday.com/ucp-600-confirming-banks-and-nominated-banks-10-29-2009/>.

3 2007, Revision, ICC Publication no. 600

4 Article 16(c) of UCP 600.

options in this regard, including a statement in the Article 16 Notice that:

- the bank is holding the document pending further instructions from the presenter (a “Hold Notice”)⁵; or
- the bank is returning the documents to the presenter (a “Return Notice”)⁶.

Article 16(f) of UCP 600 states that if the bank fails to serve an Article 16 Notice in accordance with Article 16 of UCP 600 (or otherwise comply with Article 16 of UCP 600), the bank will be precluded from claiming that the documents presented were discrepant (and therefore will be obliged to honour that discrepant presentation).

FACTS

MSTC Limited, the Applicant, requested the issue of certain letters of credit (“L/Cs”) by Indian Overseas Bank (“IOB”, or the “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 confirmed, negotiated and honoured certain of the L/Cs (the “Confirmed L/Cs”) and forwarded the relevant documents relating to the Confirmed L/Cs to IOB.

IOB rejected the majority of documents presented by Fortis (and therefore refused to reimburse Fortis) in connection with the Confirmed L/Cs on the basis of certain alleged discrepancies and issued the required Return Notices and a Hold Notice to Fortis. Following receipt of these notices by Fortis, there was an exchange of correspondence between IOB and Fortis relating to the rejection of the documents by IOB. However, all documents were eventually returned to Fortis by IOB (89 to 104 days after receipt in respect of the

documents subject to the Return Notice and 34 days after receipt in respect of the documents subject to the Hold Notice).

The Court was asked to consider whether or not IOB had complied with its obligations in relation to Article 16 of UCP 600 in respect of the Return Notices and the Hold Notices and, if not, whether IOB was consequently precluded from relying on the documentary discrepancies in accordance with Article 16(f) of UCP 600 (and would therefore be obliged to reimburse Fortis notwithstanding the fact that Fortis’s presentation was discrepant).

THE ARGUMENTS

Fortis asserted that, whilst not explicitly set out in UCP 600:

- where a Return Notice is issued by a bank following a discrepant presentation (or, where a Hold Notice is issued, upon receipt of instructions from the presenter to return the documents), Article 16 of UCP 600 requires that the documents be returned to the presenter, and therefore Article 16(c)(iii) should be construed as involving an undertaking by the bank to act in accordance with the relevant notice;
- the precluding language in Article 16(f) of UCP 600 should apply where the bank does not act in accordance with the Return Notice and/or Hold Notice; and
- Article 16 of UCP 600 should be construed as requiring the discrepant documents be returned reasonably promptly after the issue of a Return Notice (or after receipt of a request to return the documents from the presenter following the issue of a Hold Notice)⁷ and that the time period in question was not reasonable.

In arguing that it should not be under an obligation to honour discrepant presentations, IOB argued:

- unlike the previous edition of UCP 600 (UCP 500), UCP 600 does not expressly require a bank to act in accordance with a Return Notice or a Hold Notice and

⁵ Article 16(c)(iii)(a) of UCP 600.

⁶ Article 16(c)(iii)(c) of UCP 600.

⁷ Fortis also provided evidence that the ICC had stated that, in similar circumstances, the discrepant documents “should be returned without delay and by expeditious means”.

therefore such a requirement could only be implicit which, they contended, would not be the correct interpretation of Article 16 of UCP 600; and

- it is not correct to apply English law rules of interpretation or construction to the terms of international code (including UCP 600), particularly when purporting to incorporate implicit terms.

THE JUDGE'S APPROACH

The Judge decided that a purposive approach to the construction of UCP 600 was appropriate and that the Court should generally seek to construe UCP 600 so as to reflect "the best practice and reasonable expectations of experienced market practitioners". However, the Judge decided that the UCP 600 Drafting Group's commentary on UCP 600 is merely a discussion of UCP 600 and did not carry any evidential status as to the interpretation of UCP 600.

THE JUDGMENT

In finding in favour of Fortis, the Court held that:

- there is an implicit obligation in Article 16 of UCP 600 to act in accordance with the terms of a Return Notice and/or a Hold Notice, and therefore discrepant documents must actually be returned to the presenter following the issue of a Return Notice (or after receipt of a request to return the documents from the presenter following the issue of a Hold Notice);
- whilst Article 16(c) of UCP 600 requires a Return Notice to state that the Bank "is" returning the documents, it is not necessary that the Bank actually be in the process of returning the documents at the moment in time when the Return Notice is issued provided that they are returned thereafter; and
- where a Return Notice is issued but, upon receipt of that Return Notice, the presenter states that the documents should not be returned (which the presenter may do if, for example, the presenter is

disputing that the documents are discrepant), the Bank must nevertheless maintain strict compliance with its Return Notice and return the documents to the presenter.

Finally, whilst the Court did not set out specific requirements in relation to the time period within which discrepant documents must be returned by the Bank to the presenter, it declared that the return of such documents should be undertaken with "reasonable promptness" (which may take into account the particular circumstances facing the Bank⁸). Applying this principle to the facts, the Court held that IOB's delay was unreasonable in the circumstances and consequently involved a failure to comply with the provisions of Article 16 of UCP 600 (and accordingly the preclusion provisions of Article 16(f) of UCP 600 would apply). Finally, where a delay in returning the documents was "reasonable", the Bank should nevertheless inform the presenter of the delay and the reasons for that delay.

IOB's behaviour following the issue of the Return Notices (and receipt of a request to return the documents that were the subject of the Hold Notice) therefore precluded it from relying on the documentary discrepancy and IOB was obliged to honour each discrepant presentation in full.

CONCLUSION

This case has clarified the duties of a bank that receives discrepant documents from a presenter, namely:

- to issue an Article 16 Notice to the presenter;
- to comply with that Article 16 Notice (this requirement was implied by the Courts into UCP 600); and
- if the Article 16 Notice is a Hold Notice (or, upon receipt of a request from the presenter to return the documents, the Article 16 Notice is a Return Notice), the bank must return those documents to the presenter reasonably promptly after the issue of a Return Notice (or after receipt of a request to return the documents from the presenter following the issue of a Hold Notice).

⁸ Absent any special circumstances, both experts in the case agreed that normal practice would see documents being returned within one or two business days. The Court also states that where the return of the documents is prevented by circumstances beyond the Bank's control, the *force majeure* provisions in Article 36 of UCP 600 could be relied upon.

Any failure by a bank in receipt of discrepant documents to comply with all of the above is likely to result in the application of the preclusion provisions of Article 16(f) of UCP 600, thereby requiring the bank to honour the presentation notwithstanding the fact that the presentation was discrepant.

This case therefore provides a useful clarification of UCP 600 on the obligations on banks in receipt of discrepant documents and is a timely reminder for banks that, unless they comply with these obligations, they may be unable to rely on (and therefore may be required to honour) a discrepant presentation.

COMMENTARY

This case seems to reach the correct conclusion. If a bank states that it will return documents but does not do so, or only does after an unreasonable delay, the beneficiary may lose opportunities to deal with the documents or may lose the ability to re-present complying documents before the L/Cs expire. It may also (as the facts of this case illustrate) involve the incurrence of significant demurrage or storage costs.

While delays in this case were excessive, one could see that the issue may be less clear where the documents were not returned for a week or so and, therefore, the lesson should be to ensure that such actions are taken as promptly as possible.

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