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Trade finance is constantly changing and evolving, but the need to deliver quality products and service to customers remains paramount. The letter of credit industry has made great strides in overcoming certain formidable problems of the past, but new challenges emerge which test the skills and methods of today's LC specialists. Among these considerations is the strategic use of technology and digital innovation by banks. In his article, Dennis Noah offers keen perspective on how things were and hypothesizes on where the business of LCs is headed regarding the balancing of LC practice and customer service. To gain insight into how banks are approaching this issue, Noah presents a series of questions to bankers. *DCW* invites and encourages readers to respond with their feedback by following the link on page 28.

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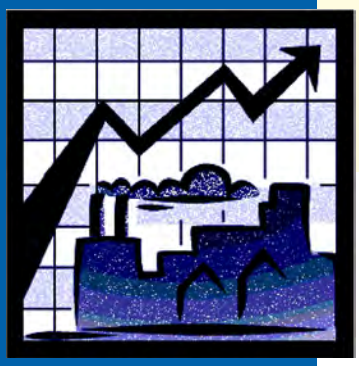

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Future Prospects of US Ratification of UN Convention on Independent Guarantees and Standby Letters of Credit Considered

On 25 May 2021, the US Department of State's Advisory Committee on Private International Law (ACPIL) conducted its annual meeting in which it discussed developments in private international law over the past year and expected work in the coming year. Held in a virtual setting, the meeting was moderated by Sharla Draemel, Attorney-Adviser, and Shubha Sastry, Assistant Legal Adviser, Office of the Legal Adviser, Office of Private International Law of the US State Department. Opening remarks delivered by Richard Visek, Acting Legal Adviser of the US State Department. The meeting was open to the public and attracted 65 individuals with an active interest in the agenda items.

The meeting discussed six international conventions, including the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (UN SBLC Convention), and invited views on each for purposes of assisting the Department of State in its formulation of US private international law treaty priorities.

To open discussion of the UN SBLC Convention and by way of background, it was pointed out that the UN SBLC Convention entered into force in 2000 but only eight UN member states have adopted it through ratification or accession. Although the US signed the UN SBLC Convention in 1997, it has yet to ratify it. Letter of credit specialists and Uniform Law Commission representatives participating at the meeting included Michael Avidon, Buddy Baker, Henry Gabriel, Edwin Smith, Mary Rosen, and Carter Klein. Several spoke in support of the US ratifying the Convention. One noted that if the US did so, other UN member states would likely follow soon thereafter.

In 2016, the UN SBLC Convention was submitted to the US Senate Foreign Relations Committee, but did not get prioritized to be put in line for ratification. Because provisions of the UN SBLC Convention are substantially similar to Revised Uniform Commercial Code (UCC) Article 5 – the US law governing letters of credit – there is the sense that it would not be difficult for the US to implement the UN SBLC Convention. The question is whether it should be prioritized among other private international law treaties.

During the ACPIL meeting discussion, proponents of US implementation of the UN SBLC Convention noted that the US

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was instrumental in the drafting of the UN SBLC Convention. As it covers both independent guarantees and standbys, UN SBLC Convention adoption would go a long way towards reducing uncertainty with both types of instruments by providing a legal structure and more certain use of these undertakings.

Several comments were to the effect that the UN SBLC Convention gives ICC rules (UCP, ISP, URDG) legal status and provides a valuable legal framework governing how SBLCs and bank guarantees should be undertaken, interpreted and enforced.

In response to the comment that letters of credit already have widely used sets of practice rules promulgated by the ICC, it was pointed out that bank guarantees outside of Europe frequently do not use the URDG or any set of rules and that ICC and ISP practice rules do not cover matters beyond their scope, such as fraud, subrogation, and warranties, which the UN SBLC Convention does. Moreover, the Convention would provide standard law in an area where almost no countries outside of the US and China have any statutory framework governing letters of credit; the lack of law in this area was the genesis of the UN SBLC Convention. For instance, even a mature legal system like Canada does not have codified law but instead relies on case law. The UN SBLC Convention would fill a much-needed gap between international parties using SBLCs or bank guarantees.

A US State Department official asked whether there are any objections or obstacles to adoption of the UN SBLC Convention. No meaningful opposition to the Convention was expressed during the meeting. While training in its use is necessary, it was pointed out that the UN SBLC Convention is substantially similar to UCC Article 5 and that the American Bar Association, the Uniform Law Commission, and the American Bankers Association have recommended adoption of the UN SBLC Convention. Other organizations that have endorsed adoption of the UN SBLC Convention include the US Council on International Banking (now known as BAFT), the International Chamber of Commerce, and the Institute of International Banking Law & Practice.

While the likelihood of the US State Department prioritizing the UN SBLC Convention for ratification is unknown at this point, the ACPIL meeting was a positive step towards that goal.

Issuing Bank Payment Delay

A group of LC specialists recently took up discussion of the following situation:
A Negotiating Bank submitted clean documents payable at sight to an Issuing Bank in Bangladesh. No acknowledgement was received from the Issuing Bank, nor was a discrepancy notice or MT799 message stating a reason for delay in payment. Tracers were sent to the Issuing Bank who did not respond or acknowledge the communication. The Beneficiary attempted to contact the Applicant who was not very helpful in expediting a reply. After three months, funds were finally received. (Issuing Bank apparently apologized and blamed the delay on the pandemic.)

The question was asked of other bankers whether anyone has had similar experiences where payment took so exceptionally long, with no communication from the issuer. One other banker had a similar situation with a Bangladesh bank in which it took three weeks to receive payment. While

others said it has been known to happen with banks in other countries and is not limited to banks in Bangladesh, no other country was referenced.

Are such complaints against Bangladesh banks common? Are the complaints justified? Have there been examples of banks inappropriately using the pandemic as an excuse for delays or inaction? Conversely, have Bangladesh banks been of the receiving end of unreasonable payment delays or inaction by banks of other countries? Approached by *DCW*, Editorial Advisory Board member Nesarul Hoque of Bangladesh commented on these questions and the situation.

If you had asked me the same questions 10-15 years ago, I would have hesitatingly agreed with you as I had experiences learning of a few nationalized banks at the time that had no strict policies in place, lacked effective supervision and, above all, inadequate technological capabilities. But today, being a local practitioner in Bangladesh, I am a bit surprised to hear about such inordinate delay in payment of a complying sight bill.

I am not sure whether there is any extraordinary measure from a court that prevented the respective bank from timely honouring its obligation. If there is no court order barring the issuing bank from honouring its obligation, I am sure that this example is quite exceptional in the context of the payment behaviour of Bangladeshi banks overall. Currently, there is effective supervision from banks' corporate head offices and the central bank of Bangladesh. From Bangladesh Bank (the country's central bank), there is an effective real-time dashboard for foreign exchange transactions, including all import and export activities. This dashboard is accessible to all relevant levels, ranging from a bank's CEO to its Head of International Trade Service division to the unit level, in addition to top central bank officials including, but not limited to, Governor, Deputy Governor, Executive Directors, and heads of the Foreign Exchange Policy Department [FEPD] and Foreign Exchange Operation Department [FEOD]. There is also tight supervision of payment status from the corporate head office of any bank and the central bank. Additionally, Bangladesh Bank has a dedicated department to handle any complaint regarding payment, namely, the Financial Integrity & Customer Services Department (FICSD). In my experience, this complaint mechanism is very effective in resolving disputes in a number of cases.

In addition to the issuance of occasional cautionary circulars by the central bank regarding the importance of ensuring on-time payment, each bank has a dedicated compliant cell headed by senior officials, such as Deputy Managing Directors [DMDs], to settle disputes or claims. Bangladesh has been identified for payment delays in the past. Actually, the situation on the ground is far improved now. Delay in payment is now an exception.

During the initial lockdown situation beginning in March 2020, bank branches were opened for a limited time with minimum staffing and a few branches were completely shut down. The banking industry as a whole in Bangladesh was not ready for this abrupt lockdown. During this time, certain branches of banks were not able to make payment on time and, yes, there were some delays. Some bankers were of the opinion that this pandemic was a force majeure situation. This perception was immediately dispelled through formal and informal discussion with industry experts and central bankers, followed by issuance of an ICC Banking Commission Guidance Paper on the subject.

As a whole throughout the world, it is very uncommon for a bank to delay in honoring its obligation. My understanding is that one or two banks within Bangladesh may have delayed in making payment in timely fashion but this also happened in some other countries around the world.

Payment Instructions So Special Specialists Cannot Explain

A group of US-based LC specialists also discussed special payment instructions seen in an export LC issued by a bank in Vietnam. The wording read:

10/ SPECIAL PAYMENT INSTRUCTIONS:
NOTWITHSTANDING THE PROVISIONS OF UCP600, WE ARE ENTITLED TO RELEASE ALL DOCUMENTS TO THE APPLICANT WHEN THE DOCUMENTS CONSTITUTE A COMPLYING PRESENTATION (OR AFTER DISCREPANCIES HAVE BEEN WAIVED) WITHOUT OUR OBLIGATION TO HONOUR THIS L/C. THE PAYMENT OF THIS L/C WILL NOT BE EFFECTED IN CASE THE APPLICANT PRESENTS TO THE ISSUING BANK WITHIN 03 WORKING DAYS BEFORE THE MATURITY DATE ONE ORIGINAL OF CERTIFICATE ISSUED BY VIETNAM CUSTOMS SHOWING THAT THE GOODS ARE NOT ACORDING TO VIETNAM'S QUALITY STANDARD: [DETAILS SUPPLIED] AND REQUEST L/C ISSUING BANK TO STOP PAYMENT.

IF THE L/C ISSUING BANK HAS TAKEN ENGAGEMENT TO PAY AT MATURITY, THIS ENGAGEMENT WILL BE CONSIDERED NULL AND ORIGINAL DOCUMENTS PRESENTED WILL NOT BE RETURNED. IN ANY CASES, ISSUING BANK WILL INFORM NEGOTIATING BANK/PRESENTING BANK BY AUTHENTICATED SWIFT ACCORDINGLY. IF NO NOTICE OF REJECTION IS RECEIVED BY ISSUING BANK WITHIN 03 WORKING DAYS BEFORE THE MATURITY DATE, THE PAYMENT WILL BE EFFECTED AT MATURITY DATE.

Bankers were asked how they would handle advising such an LC. In discussion, specialists said they would contact the seller or buyer to ask if there is an agreement between the two. Overall, bankers were bewildered as to the purpose of such condition. According to a practitioner familiar with the case, the LC supported the sale of waste paper.

One bank consultant in the US suggested that the harsh clause might have been included in this usance payment LC due to an increase in import of waste paper and other scrap materials in Vietnam. He pointed to the government of Vietnam's imposition of restrictions in 2018 and management of inspections by the Ministry of Natural Resource and Environment, which is authorized to revoke business licenses and permits in cases where scrap imports fail to conform to environmental standards, lack information regarding origin, or exceed import quotas.

An LC specialist from Vietnam contacted by *DCW* could not understand the rationale for issuing a credit containing this type of clause since Vietnamese customs authorities do not issue such certificates evidencing that goods do not meet Vietnamese quality standards, nor can they ask an issuing bank to stop payment under their LC. "In reality, we have many scrap material LCs but we do not see LCs like this one. I talk with customers that the LC transaction is a separate transaction

from the sale or other contract on which [it is] based. The applicant should think about their KYC [instead of] asking for a credit issued by a bank with wording like this. I hope this case does not come from a 'well known' bank", the specialist remarked.

Although an LC applicant can request insertion of certain conditions or ask for specific UCP600 articles to be modified or excluded, a would-be issuing bank must always consider whether it is prudent to do so and be mindful of its reputation. Additionally, it is a question of whether a beneficiary and/or nominated bank will accept an LC with such provisions.

Letter of Mandate Key Component of Indian Railways' Green Plan

As part of its plan to achieve net zero carbon by 2030, Indian Railways seeks to rely on solar power to run its trains and officials believe the infrastructure needed to set up of solar plants on railway land represents a INR 150,000- crore (USD 20.6 billion) opportunity for the private sector. To attract private companies for the project, the Ministry of Railways has the ability to offer letters of credit as protection against payment default by railways and has installed delayed payment penalties in the model bidding document for solar power developers as a further safeguard.

As described by India's *Business Today*, provisions for a revolving "Letter of Mandate" issued by Reserve Bank of India (RBI), the country's central bank, serve as "payment security for two months' energy charges similar to LCs … . The revolving Letter of Mandate will have a term of 12 months covering average two months' tariff payments in the first year. For each subsequent 12 months, coverage will be equal to 1.25 times the average two months' tariff payments billing of the preceding 12-month period."

In a 2019 Petition, Indian Railways was successful in seeking authorization for Punjab State Electricity Regulatory Commission to amend its provisions to allow "Letter of Mandate" to be issued by Reserve Bank of India and to be acceptable as a Payment Security Mechanism in lieu of a Letter of Credit.

Indian Letters Underscore Importance of Going Beyond Title to Understand Instruments

Beyond letters of credit, an array of other lettered undertakings have been used in India. While some have common characteristics, each type is titled differently for a reason. However named, it is incumbent on parties entering into a lettered arrangement to carefully review the text and to understand what they are getting. The terms listed below are not defined, nor are the descriptions sufficiently comprehensive. Rather, they are intended as an overview of products that have been seen and offered in the Indian market.

Letter of Mandate is an instrument comparable to a Letter of Credit or Bank Guarantee that is issued by the Reserve Bank of India (country's central bank) and relies on assurances from the Indian government, but is not subject to any ICC rules. LMs are issued on a limited basis for domestic purposes to back certain government contracts. LMs are not widely available to all Indian industries and are not issued to support cross border underlying transactions.

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Letter of Assurance is a type of instrument comparable to a Letter of Credit or Bank Guarantee that had previously been issued by the Reserve Bank of India (country's central bank) and had relied on assurances from the Indian government, but was not subject to any ICC rules. As of 2018, the RBI is reportedly no longer issuing LAs. (For more, see p. 37).

Letter of Comfort is a type of instrument intended to provide a degree of "comfort" that is issued in favor of a creditor to support a counter party's ability to honor its obligations. There are serious questions as to the precise nature of Letters of Comfort. In *Yes Bank v. Zee Entertainment Enterprises*, the Bombay High Court decided in its 19 August 2020 judgment that a letter of comfort would constitute a guarantee only if its terms satisfy the conditions set forth in Section 126 of the Indian Contract Act, 1872 which provides:

> **126. "Contract of guarantee", "surety", "principal debtor" and "creditor".** – A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

Could a Letter of Comfort ever be issued as an independent guarantee? While one Indian lawyer contacted by *DCW* did not rule out the possibility, he is sceptical. Rajesh Narain Gupta, Managing Partner of SNG & Partners said that the Letter of Comfort spelled out in the aforementioned *Yes Bank* case may actually amount to a guarantee. "I think the sole purpose or intent is to adopt this instrument so that there is no legal liability. However, the contents of the document are very relevant to see whether it is just a comfort letter or actually an instrument which can be held to be a guarantee", he added.

Additionally, as a result of the highly publicized USD1.9 billion scam orchestrated by former Indian jeweller Nirav Lodi involving the fraudulent issuance of **Letters of Undertaking** (LOUs) by Punjab National Bank, RBI took action in March 2018 to prohibit issuance of LOUs by Indian banks for imports into India.

Gupta also informed *DCW* he has seen so-called "**Letters of Good Faith**" which serve as introductory letters to induce parties to enter into contract and generally state that party for whom the letter is being issued is a "good enough" business partner.

UAE Trade Connect Platform Launched to Combat Fraud

UAE Trade Connect, a blockchain-based trade finance platform that is initially targeting the scourge of double financing and fraud in the United Arab Emirates, debuted in the UAE in April 2021.

Developed by UAE-based telecommunications company Etisalat and a seven-bank consortium led by First Abu Dhabi Bank, UAE Trade Connect is designed to prevent economic crimes such as under-invoicing, money laundering, and fraud in trade finance. Other banks in the consortium include Commercial Bank International (CBI), Commercial Bank of Dubai (CBD), Emirates NBD, Mashreq Bank, National Bank of Fujairah (NBF), and Rakbank.

As described in published reports, UAE Trade Connect enables banks to feed invoice data into a private permissioned blockchain network and then run through Etisalat's fraud detection system which utilizes AI measures to check invoice data against other invoices and external sources for duplication and fraud. UAE Trade Connect has the ability to look for exact duplicates among invoices as well as close copies which would trigger a warning to banks.

Over time, designers of UAE Trade Connect contend that the system can be expanded to reveal money laundering and sanctions violations. UAE Trade Connect could also be adapted "to handle bills of lading, letters of credit and bank guarantees, all of which involve working with ports, customs authorities, and governments. The documents can each be certified with cryptographic hashes that can be verified and audited on a blockchain transaction", according to SiliconANGLE reporting.

International Updates

BANGLADESH: In a move designed to help banks reduce the public's dependency on bank branches for cash services, banks are aggressively replacing cash deposit machines (CDMs) and ATMs with more versatile and technologically-advanced cash recycling machines (CRMs). Southeast Bank presently has 185 CRMs and has opened LCs to import an additional 300 CRMs by July 2021.

EGYPT: The Suez Canal Authority (SCA) which had been seeking compensation of USD 916 million from ship-owners of the *Ever Given* for disruption caused by the vessel's blockage of canal traffic for six days in March 2021 indicated its willingness to accept a reduced sum of USD 550 million, with USD 200m paid to secure the ship's release and the remaining USD 350m paid "as letters of guarantee issued by an 'A' class bank in Egypt", according to an SCA news release issued 25 May 2021.

INDIA: Low-cost airline GoFirst (formerly known as GoAir) has filed with the Securities and Exchange Board of India to raise funds through an initial public offering. Of the INR 3,600 crore (USD 488.7m) it seeks to generate from its IPO, GoFirst would use INR 279.26 crore for replacement of LCs with cash deposits to secure lease rental payment and maintenance of its aircraft from lessors. The airline which reportedly sustained a 1,278.60 crore net loss in FY20 following a profitable FY19 said that default under several of its aircraft lease agreements could cause lessors to initiate legal proceedings against it and enforce bank guarantees.

JAPAN: Sumitomo Mitsui Banking Corporation (SMBC) announced on 20 May 2021 it has signed on to utilize Contour's digital trade platform. Citing significant changes in the environment for paper-based trade transactions, SMBC indicated it will "proactively engage in the digitization of trade procedures" through use of the Contour platform.

THAILAND: Siam Commercial Bank is now relying on two digital solutions from financial software and services provider Surecomp to support increased demand for trade finance processing in Myanmar and Vietnam. SCB is using Surecomp's IMEX solution to digitize and optimize the back-office trade finance transaction workflow, and allNETT, a front-office, multi-corporate-to-multi-bank platform. ■

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Webinar Sheds Light on North Korea Shipping Tactics

For a number of years, North Korea has orchestrated use of vessels to evade sanctions and serve their economic needs. While the North Korean regime has had some degree of success operating vessels under the radar of the international community, leading information and analytics firm IHS Markit has recently uncovered multiple vessels, previously with unknown flag status, now linked to North Korea.

IHS Markit's research findings is this area were the subject of a recent webinar series, "Hidden Risk in Trade Finance: Undetected North Korea Working Under the Radar", conducted by the London-headquartered company on 12-13 May 2021.

To set the stage, IHS Markit officials referenced recent developments. In late April 2021, the US Government announced seizure of the *Courageous*, an oil tanker used to violate US and United Nations sanctions against North Korea. Similar to *Wise Honest* – another cargo ship previously used by North Korea to skirt international sanctions that was seized by the US in May 2019 — *Courageous* had engaged in illicit ship-to-ship transfers (STS) by switching off its automatic identification system (AIS) and relying on other means of avoiding detection. While these two vessels have been taken out of circulation, North Korea has sought to bolster and alter its fleet in order to carry out its objectives by confusing the true identity of vessels. This year, North Korea has added 13 new vessels to its fleet, according to IHS Markit research confirmed by the North Korean ship registry.

In remarks during the webinar, IHS Markit product management director Byron McKinney highlighted new activity of three vessels sanctioned by regulators which had previously not been seen for ten months or more, but suddenly became available on AIS in March and April 2021. IHS Markit research revealed that the vessel *Rina* made a port call at Longkou (China) to pick up coal and head toward North Korea. *An San 1* is presently operating between North Korean ports and *Ja Song 2* has called on ports in China.

Ravi Amin, IHS Markit trade compliance expert, then mentioned that dark activity occurring near the North Korean coast in the early months of 2021. When dark, vessels can depart from what is stated on bills of lading by dropping off or picking up at North Korean ports such as Nampo.

Amin discussed other vessels utilized by North Korea and elucidated common tactics used to eschew attention. Registered in Liberia, *Green Point* has had long periods of idleness at sea interspersed with AIS outages that provided sufficient time for voyages to and from North Korea. Research also showed its commandeering of a fishing vessel's AIS in which *Green Point* imitated the repetitive movement typical of a fishing vessel. IHS Markit found that *Hong Tai 28* swapped its identity with a very similar cargo vessel such that its spoofing resulted in one MMSI number appearing in two different locations at the same time. Vessel identity swapping also occurred between *New Konk* and *Mouson 328*, allowing them to easily mimic each other and make multiple illegitimate activities, including the offloading oil to North Korea. Now dark, *Mouson 328* has had three flag changes in three years and sought to change its name. *Mouson 328*

repeatedly tried to re-register itself as *Cherry 19* and was eventually successful in re-registering as the Thai-flagged *Smooth Sea*. Among North Korea's fleet, *Sin Phyong 3* was found to have engaged in an STS transfer with oil tanker, *Da Ming 3*, off the coast of eastern China before initiating a 175-day period of dark activity long enough to allow for multiple illicit journeys to/from North Korea.

McKinney then highlighted five key areas of risk awareness, including: 1) the concealing of ships' particulars, including dimensions, vessel type, and photo images; 2) unclear flag and ownership status; 3) frequent "dark activities"; 4) overlapping movement in observed areas; and 5) identity swapping with other ships.

Among their concluding points and practical recommendations, IHS Markit specialists emphasized that practitioners should be mindful of: Spoofing tactics, including MMSI and AIS anomalies and gaps; Port Calls, including vessel types' average number of annual visits and those vessels with less activity; Frequent ownership changes and single-vessel fleets; and flags of convenience/unknown flags. ■

LITIGATION DIGEST

CAMA (Luoyang) Aviation Protective Equipment Co. v. UBAF (Hong Kong) Limited [2018] (Supreme Court Civil Retrial No. 1216) [P.R. China]

Abstracted by Jun XU[1]

Topics: Independent Bank Guarantee; Injunction; Effectiveness; URDG758; Fraud; Advance Payment Guarantee; Performance Guarantee; Good Faith; Abusive Demand; Discrepancy; Extend or Pay Request; Payment Suspension; Non-Documentary Condition; Jurisdiction; Separate Demand

Type of Lawsuit: Instructing Party and Transferee of Subcontract Agreement sued Beneficiary, Guarantor, Supplier and Sub-Supplier and requested court to prohibit Counter Guarantor from honoring Guarantor's claim due to independent guarantee fraud. The trial court, the Henan High People's Court, dismissed the action. Plaintiffs appealed to the Supreme People's Court of P.R. China.

Parties: Appellant/Plaintiff/Instructing Party – CAMA (Luoyang) Aviation Protective Equipment Co., P.R. China

Appellant/Plaintiff/Transferee of Subcontract Agreement – Luoyang Aviation Engineering Construction Co., P.R. China

Appellee/Defendant/Beneficiary/Contractor – Korea Hyundai Engineering and Construction Co., Korea

Appellee/Defendant/Applicant/Supplier – Qatar Hyojong Industrial Co., Qatar

1. Jun Xu is Deputy General Manager at Bank of China, Jiangsu Branch, China. She is a member of ICC Banking Commission's Executive Committee, ICC Market Intelligent Team, ICC Global Survey of Trade Finance Editorial Team, Global Supply Chain Finance Forum(GSCFF), ICC China Banking Committee Forfeiting and Factoring Expert Team. She is also co-leader of ICC SCF Rules Drafting Team, ICC DOCDEX expert, team leader of ICC China Banking Committee Translation Expert Team, and a *DCW* Editorial Advisory Board member.

Appellee/Defendant/Applicant/Sub-Supplier – Luoyang Aviation Construction (Qatar) Co., P.R. China

Appellee/Defendant/Guarantor – UBAF (Hong Kong) Limited, Hong Kong

Counter Guarantor – Bank of China, Henan Branch, P.R. China

Sub-Supplier's Bank – Commercial Bank of Qatar

Presenting Bank – Korea Exchange Bank, Korea

XU

Underlying Transaction: Supply and assembly services of steel pipe piles.

Bank Guarantees: Counter performance guarantee and counter advance payment guarantee for USD5,980,833.40 each. Performance guarantee and advance payment guarantee. Counter guarantees and guarantees were issued subject to URDG758.

Decision: The Supreme People's Court of P.R. China reversed the decision of trial court and ordered Counter Guarantor to terminate payment to Guarantor under the counter advance payment guarantee, but make payment under the counter performance guarantee, and dismissed other claims by Appellants.

Rationale: Guarantor committed guarantee fraud and did not act in "good faith" when it demanded payment from Counter Guarantor based on Beneficiary's presentation under the local guarantee inasmuch as the presentation was discrepant. When there is no evidence of Guarantor fraud in its demand and Counter Guarantor does not honor Guarantor's demand as a result of the injunction order, Counter Guarantor is not necessarily exempted from its payment obligations and shall honor a complying presentation once the injunction order expires or is lifted.

Factual Summary:

On 2 November 2010, Beneficiary signed a contract with Supplier for the supply of steel pipe piles for USD59,808,334, with 10% of the total contract price required as advance payment. The contract required Supplier to provide an unconditional and irrevocable performance bank guarantee and an advance payment bank guarantee each for 10% of the contract price.

After Supplier signed a Subcontract Agreement with Sub-Supplier, on 8 December 2010 Sub-Supplier signed an Agreement of Transfer with Transferee, who was responsible for the performance of the Subcontract Agreement and the advance payment and project payment under the Subcontract Agreement were to be transferred directly to Transferee. Issuance of bank guarantees was to be sought by Transferee or its affiliates.

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On 31 December 2010, Counter Guarantor issued a counter performance guarantee and a counter advance payment guarantee (counter guarantees) on the instruction of Transferee in favor of Guarantor with Supplier and Sub-Supplier as the guaranteed parties (Co-Applicants). Both counter guarantees were to expire 30 January 2012. The counter advance payment guarantee was to become operative following receipt by Sub-Supplier of the advance payment of USD5,980,833.40 from Beneficiary through Supplier. Counter Guarantor stated under both counter guarantees that they would be paid "[u]pon receipt by us of your first demand through authenticated SWIFT message quoting our counter-guarantee reference number and issuing date and stating that you have received a first demand in writing for payment under your advance payment [performance] guarantee in accordance with the terms the guarantee quoted above."

That day, Guarantor issued the requested performance guarantee and advance payment guarantee (local guarantees) in favor of Beneficiary. The advance payment guarantee stipulated that it should become effective from the time of actual receipt by Supplier of the advance payment from Beneficiary. It also stated it would expire on 31 December 2011 or at such time as Beneficiary might inform Guarantor of completion of the performance contract, whichever came earlier.

(1) Demand under the Advance Payment Guarantee

On 14 January 2011, in response to Guarantor's inquiry, Counter Guarantor informed Guarantor by SWIFT of the Sub-Supplier's account information as account no. 45***001 with Commercial Bank of Qatar (hereafter account no. 001).

On 11 February 2011, Guarantor notified Counter Guarantor that Commercial Bank of Qatar had informed it that Supplier had paid USD5,980,833.40 into Sub-Supplier's account no. 45***051 (hereafter account no. 051). Guarantor stated that the counter advance payment guarantee therefore became effective on the day of crediting the advance payment to Sub-Supplier's account.

On 6 December 2011, Counter Guarantor informed Guarantor by SWIFT that it had received payment suspension orders under the counter guarantees on 5 December 2011. Counter Guarantor also stated that Sub-Supplier had notified it of non-receipt of the advance payment from Supplier, and requested Guarantor to confirm whether Supplier had paid the advance payment to Sub-Supplier's account no. 001 at Commercial Bank of Qatar.

The same day, Beneficiary claimed under the advance payment guarantee from Guarantor through Korea Exchange Bank (Presenting Bank), stating that Supplier and Sub-Supplier violated their contractual obligations.

On 9 December 2011, Guarantor claimed via SWIFT under the counter advance payment guarantee from Counter Guarantor, advising of its receipt of Beneficiary's first demand in writing. Guarantor further stated that the counter advance payment guarantee had become effective, as Commercial Bank of Qatar had confirmed transfer of the total advance payment amount from Supplier's account to Sub-Supplier's account held with them in three installments in February 2011.

On 14 December 2011, Guarantor sent its refusal notice to Presenting Bank stating: "(a) The following discrepancy, namely that, contrary to Article 15 of Uniform Rules for Demand Guarantees (ICC Publication No. 758), your client's demand is not supported by a statement, by your client as

the beneficiary, indicating in what respect Supplier and Sub-supplier as a consortium [Co-Applicants] are in breach of their obligations under the underlying relationship, and (b) evidence provided to us that your client's demand was made fraudulently."

On 15 December 2011, Counter Guarantor rejected Guarantor's 9 December demand by SWIFT MT799 for the following discrepancies: "Your demand does not state that 'we have received a first demand in writing for payment under our advance payment guarantee in accordance with the terms of the guarantee.'" Counter Guarantor also informed that Luoyang Intermediate People's Court had issued a court injunction due to the infringement dispute. The same day, Guarantor sent a revised demand by SWIFT to Counter Guarantor stating "we have received a first demand in writing for payment under our advance payment guarantee in accordance with the guarantee quoted above."

On 21 December 2011, Counter Guarantor informed Guarantor via SWIFT that it was unable to make payment due to the court injunction. Meanwhile, Beneficiary filed a lawsuit against Guarantor with the Hong Kong SAR High Court under the advance payment guarantee and Guarantor petitioned to list Counter Guarantor as the third party. Hong Kong SAR High Court upheld Counter Guarantor's objection to jurisdiction.

On 24 October 2012, Court of First Instance of Hong Kong SAR High Court issued its decision (No. HCA 175/2012)[2] and ordered Guarantor to pay USD5,552,787.75 with interest to Beneficiary under the advance payment guarantee. According to the court's order, Guarantor paid the principal amount, interest, commissions, and legal costs in several installments over the next 13 months.

2. *Hyundai Engineering & Construction Co. v. UBAF (Hong Kong) Ltd.* [2012] HKCFI 1628, HCA 175/2012 [Hong Kong], 2013 ANNUAL REVIEW OF INTERNATIONAL BANKING LAW & PRACTICE, p. 414-415, (reprinted below).

Hyundai Engineering & Construction Co. v. UBAF (Hong Kong) Ltd. [2012] HKCFI 1628, HCA 175/2012 [Hong Kong]

Topics: Injunction; Choice of Law; Jurisdiction, Multiple Suits; Counter Guarantees; URDG758 Article 34(a), URDG758 Article 35(a)

Note: In connection with the supply of steel piles through a series of subcontracts by Luoyang Aviation Engineering Construction Co. Ltd (Applicant/Sub-Supplier), a Mainland Chinese Company, Hyundai Engineering & Construction Co. (Beneficiary/Contractor), a Korean Company, made an advance payment of USD 5,980,833.40. To assure performance, UBAF (Hong Kong) Ltd (Guarantor) issued an advance payment guarantee and a performance guarantee in favor of Contractor subject to URDG 758.

The Advance Payment Guarantee of USD 5,980,833.40 provided for honour "upon receipt by [Guarantor] of a first demand in writing stating the following information: (i) the reference number and date of the guarantee under which the claim is made; (ii) the amount which is claimed; and (iii) the supplier ... and [Sub-Supplier/Applicant] as a consortium is in breach of its obligation under the Contract."

To induce Guarantor to issue the guarantees, Sub-Supplier obtained two counter guarantees in favor of Guarantor issued by Bank of China, Henan Branch (Counter Guarantor).

LITIGATION DIGEST

When Applicant/Sub-Supplier failed to deliver the goods, Beneficiary/Contractor demanded payment under the Advance Payment Guarantee. Although it was conceded that at least one demand complied, Guarantor failed to honour its undertaking because Sub-Supplier had obtained an injunction in the courts of Henan Province, China, against Beneficiary/Contractor and the Counter Guarantor against drawing on it or honouring it and later filed a civil complaint.

Subsequently, Beneficiary sued Guarantor for wrongful dishonour in Hong Kong and moved for summary judgment whereupon Guarantor applied for a stay of proceedings in deference to the Mainland China litigation. The Hong Kong SAR High Court, Lok, J., granted summary judgment in favor of Beneficiary and dismissed the application for a stay of proceedings.

Citing case law, the Judge ruled that the only manner in which a party could dispute a drawing on an irrevocable LC was on the basis of fraud because an LC is not dependent on the merit of the underlying contract and that all that is required is that the documents be in order. The Judge also ruled that the Applicant/Sub-Supplier and Guarantor had failed to meet the applicable heightened test for fraud stating, "particularly cogent evidence is required to establish the fraud exception." (¶20) The Judge ruled that in the matter at hand, "the defence of fraud here is just a mere allegation without sufficient proof." (¶22) The Judge also reasoned that "[t]he demand for payment dated 19 December 2011 states that [Supplier to Sub-Supplier] has failed to meet the contractual delivery schedule as provided for in the Contract. It also refers to the fact that the advance payment of US$ 5.98 million has not been returned. The question then has to be asked is whether there is evidence to suggest that [Beneficiary/Contractor] could not have honestly believed in the validity of this demand." (¶24)

The Judge stated that "since there is no reason given by the Mainland Court for its decision, I do not know the factual and legal basis as to why the Mainland Court has granted the Injunction against the relevant defendants. As I have mentioned above, the materials contained in the Civil Complaint hardly support an allegation or inference of fraud, and I do not know whether the Mainland laws on the issues of fraud and performance bond are the same as those in Hong Kong. Hence in my judgment, [Guarantor] has simply failed to discharge the burden of establishing a meritorious defence in the present case." (¶33)

The Judge also noted that "[t]he Advance Payment Guarantee was governed by [URDG758]. Since the [Advance Payment Guarantee] was issued by [Guarantor] in Hong Kong, the governing law is Hong Kong law (see: Article 34(a) of [URDG758]) and there is an exclusive jurisdiction clause in favour of the Hong Kong courts in relation to any dispute between [Beneficiary/Contractor] and [Guarantor] relating to the [Advance Payment Guarantee] (see: Article 35(a) of [URDG 758]). Given such circumstances, [Guarantor] has simply failed to demonstrate that the Mainland Court is clearly and distinctly the more appropriate forum to adjudicate [Beneficiary/Contractor]'s claim." (¶36)

Guarantor had also argued that it was excused from its obligations because it had not been paid on the Counter Guarantees in its favor. The Judge stated that the failure of the Counter Guarantee "is not a valid reason ... since Article 5 of [URDG758] provides that the two instruments are separate and independent. Hence, to the extent that the Mainland proceedings are relevant to the [Counter] Guarantees and the ability of [Counter Guarantor] to effect payment thereon, this has no relevance to this case." (¶42) ■

[JEB/sb]

(2) Demand under the Performance Guarantee

A few weeks after claiming under the advance payment guarantee, on 29 December 2011, Beneficiary claimed under the performance guarantee from Guarantor, again through Korea Exchange Bank (Presenting Bank), due to violation of the contract by Supplier and Sub-Supplier, and requested Guarantor to pay or, alternatively, to extend the expiry date to 31 March 2012.

Guarantor sent a demand by SWIFT to Counter Guarantor on 30 December 2011, informing of its receipt of Beneficiary's complying demand under the performance guarantee and requested Counter Guarantor to make payment or, alternatively, to extend the expiry date of the counter performance guarantee to 30 April 2012.

On 10 and 21 January 2012, Counter Guarantor notified Guarantor via SWIFT that it was unable to make payment due to the injunction order issued on 5 December 2011 by Henan Intermediary People's Court.

On 12 January 2012, Guarantor informed Presenting Bank that it would neither pay USD5,980,833.40, nor extend the expiry date to 31 March 2012. Referring to URDG758 Article 23(a), Guarantor stated that it would suspend payment for a period not exceeding 30 calendar days following its receipt of the demand due to the extension or payment request by Beneficiary and payment would not be made before 28 January 2012.

After Guarantor paid Beneficiary under the performance guarantee on 3 July 2013, Guarantor again sought payment from Counter Guarantor, stating that it had honored Beneficiary's valid demand and that the Hong Kong SAR High Court had examined all evidence presented to Luoyang Intermediary People's Court and found no proof of Beneficiary fraud.

On 2 August 2013, Counter Guarantor responded again that it was still unable to honor due to the court's injunction order.

The trial court, the Henan High People's Court, dismissed the Plaintiffs' claims.

On appeal, the Supreme People's Court overturned the trial court's decision, ordering Counter Guarantor to terminate payment obligations to Guarantor under the counter advance payment guarantee, but make payment under the counter performance guarantee.[3] The court dismissed all other claims by the Appellants.

Legal Analysis:

1. Jurisdiction: Both the Supreme People's Court and the trial court considered the dispute a foreign-related business case as Beneficiary, Supplier and Sub-Supplier were all foreign legal identities.

3. Guarantor also sued Counter Guarantor in another legal case under the same counter guarantee transactions. On appeal, the Supreme People's Court ([2018] Supreme Court Civil Retrial No. 880, [P.R. China]) also overturned the trial court's decisions and ordered Counter Guarantor to honor Guarantor's demand under the counter performance guarantee.

The Supreme People's Court decided that, according to the interpretations of "Independent Guarantee"[4] in Article 1 and "Independent Guarantee Disputes"[5] in Article 2 of *PRC Independent Guarantee Provisions*, the local guarantees and counter guarantees were independent demand guarantees based on their content and the payment obligations of Counter Guarantor and Guarantor were independent of the underlying transaction and guarantee application.

The Supreme People's Court considered that since the case involved foreign-related independent guarantee disputes, matters of contract performance and applicable law should be determined separately. The Supreme People's Court determined that PRC law should govern the case and it was improper for the trial court to determine applicable law only according to the conflict of laws of foreign-related tort responsibility.

The Supreme People's Court decided that applicable law for the fraud dispute should be PRC law because URDG758 did not cover guarantee fraud issues. As the business place of the Counter Guarantor and issuance and payment of the counter guarantee were all in China, the Supreme People's Court determined that the case should also be governed by PRC law according to *Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China* Articles 41[6] and 44,[7] and Article 22[8] of the *PRC Independent Guarantee Provisions.* The court also noted that the parties did not exclude URDG758 Article 34(b).

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4. PRC Independent Guarantee Provisions Article 1 [Key Terms] provides, in part: "For the purpose of these Provisions, "Independent Guarantee" refers to an undertaking given in writing by a bank or a non-bank financial institution as the Issuer to the Beneficiary, by which the Issuer undertakes to pay the Beneficiary an amount up to the maximum amount of the guarantee upon the Beneficiary's demand for payment and presentation of documents complying with the terms and conditions of the Guarantee."

5. PRC Independent Guarantee Provisions Article 2 [Scope] provides: "For the purpose of these Provisions,"Independent Guarantee Disputes" refers to disputes arising out of the issuance, revocation, amendment, transfer, payment and reimbursement and so forth of Independence Guarantees."

6. Article 41: The parties concerned may choose the laws applicable to contracts by agreement. If the parties do not choose, the laws at the habitual residence of the party whose fulfillment of obligations can best reflect the characteristics of this contract or other laws which have the closest relation with this contract shall apply.

7. Article 44: The laws at the place of tort shall apply to liabilities for tort, but if the parties have a mutual habitual residence, the laws at the mutual habitual residence shall apply. If the parties choose the applicable laws by agreement after any tort takes place, the agreement shall prevail.

8. PRC Independent Guarantee Provisions Article 22 [Choice of Law] states, in part:

> "Where no governing law is specified in a foreign-related Independent Guarantee, and the Issuer and the Beneficiary fail to reach consensus on the governing law prior to conclusion of court arguments in the trial proceedings, the dispute between the Issuer and the Beneficiary shall be governed by the law of the Issuer's habitual residence; and where an Independent Guarantee is issued by a legally registered branch of a financial institution, the law of the branch's registration place shall govern."
>
> "In relation to disputes of foreign-related Independent Guarantee fraud, if the parties fail to reach consensus on the governing law, the law of the habitual residence of the Issuer of the Independent Guarantee, under which the payment is requested to be suspended, shall govern. Where an Independent Guarantee is issued by a legally registered branch of a financial institution, the law of the branch's registration place shall govern. Where the parties have the same habitual residence, the law of such habitual residence shall govern."

The Supreme People's Court did not support the arguments by Appellants that a court in China may only hear the dispute regarding the Guarantor's demand under the counter guarantee and did not have jurisdiction concerning post-payment reimbursement by Counter Guarantor to Guarantor. The Supreme People's Court referred to *PRC Independent Guarantee Provisions* Article 2 which includes disputes arising out of reimbursement and considered the scope of hearing the case should include reimbursement.

2. Guarantee Fraud: The trial court rejected Appellants' arguments that Beneficiary had made fraudulent demands under the guarantees and the payments by Guarantor under the two guarantees were not malicious.

The trial court determined that based on *PRC Independent Guarantee Provisions* Article 14,[9] the court should examine whether the Guarantor's payments were made in good faith under the local guarantees. The trial court did not consider the Guarantor's action of accepting the Hong Kong SAR High Court's decision and making payment as malicious, nor did it contradict ICC's 'pay first, argue later' principle, said the trial court, for processing demands under independent guarantees. Furthermore, the trial court determined that Appellants failed to provide evidence that Co-Applicants had performed their obligations under the Contract; instead, Appellants only stated that one Co-Applicant – Supplier – was in breach of the underlying contract.

The trial court did not accept Appellants' arguments that the demands presented by Guarantor on 9 and 15 December 2011 under the counter advance payment guarantee were untrue and that there were contradictory statements. The trial court did not find that Guarantor committed fraud, therefore payment should not be terminated under the counter advance payment guarantee. It decided that, even if the Beneficiary's demands were discrepant or contradictory, Guarantor's right to make a separate demand should not be prohibited according to URDG758 Article 18(a), and Guarantor's demand under the counter guarantee should not affect its paying Beneficiary under the local guarantees in good faith as per URDG758 Article 5(b).

However, the Supreme People's Court overturned the trial court's decision. The court decided that Guarantor committed fraud and Counter Guarantor was justified in denying payment under the counter advance payment guarantee according to *PRC Independent Guarantee Provisions* Articles 11[10]

9. PRC Independent Guarantee Provisions Article 14 [Suspension of Payment], third paragraph, states: "Where the Issuer has paid in good faith under the Independent Guarantee which has been issued upon instructions of the Instructing party, a People's Court shall not suspend the payment under another independent Guarantee whose purpose is to secure the Issuer's right to reimbursement."

10. PRC Independent Guarantee Provisions Article 11 [Termination] states, in part: "A party's claim that the rights and obligations under an Independent Guarantee have terminated shall be supported by a People's Court:

(1) Where the expiry date or expiry event specified in the Independent Guarantee has occurred, and the Beneficiary has failed to present documents compliant with the terms and conditions of the Independent Guarantee on or before its expiry;
(2) Where the complete amount payable under the Independent Guarantee has been paid;
(3) Where the amount available under the Independent Guarantee has been reduced to zero;
(4)Where the Issuer receives any document issued by the Beneficiary to release the Issuer from its payment obligation under the Independent Guarantee; or
(5) Where any other termination event by operation of law or as agreed by the parties occurs.
...

and 12.[11] Referring to *PRC Independent Guarantee Provisions* Article 12(5) the Supreme People's Court determined:

> "Guarantor stated in its demand on 15 December 2011 to Counter Guarantor that 'We have received a first demand in writing for payment under our advance payment guarantee in accordance with the guarantee quoted above.' In fact, Guarantor did not receive a complying demand under the advance payment guarantee at that time. The time Guarantor received Beneficiary's complying presentation was on 19 December 2011. Therefore, the demand made by Guarantor on 15 December 2011 to Counter Guarantor did not match the real situation, and Guarantor knew such fact. The statement in the complying demand by Guarantor on 15 December 2011 did not occur until 19 December 2011. Where Guarantor did not receive Beneficiary's complying presentation under the local advance payment guarantee, it refused to pay Beneficiary on 14 December 2011 and was knowingly aware that it had no rights to demand payment. However, Guarantor informed Counter Guarantor on 15 December 2011 that it had received the complying demand. Guarantor concealed the truth and falsely presented a demand appearing on its face to be in compliance with the counter advance payment guarantee in order to induce Counter Guarantor to pay. Such act was an abuse of its right to demand payment, and it constituted fraud."

Unlike the Hong Kong SAR High Court, the Supreme People's Court did not consider Guarantor's payment to Beneficiary as "payment in good faith". The Supreme People's Court stated:

> "Although Guarantor paid Beneficiary under the advance payment guarantee according to the Hong Kong SAR High Court's decisions made on 24 October 2012, such decisions were made based on the complying demand by Beneficiary to Guarantor on 19 December 2011. This case determined that Guarantor itself committed fraud when it claimed from the Counter Guarantor on 15 December 2011. Therefore, Guarantor's payment based on Hong Kong SAR High Court's decisions did not fall within the circumstances of 'payment in good faith' described in Article 14 third paragraph of *PRC Independent Guarantee Provisions*."

Appellants also argued that Beneficiary had committed fraud due to abuse of demanding rights under the guarantee. The Supreme People's Court considered that Appellants' petition in the first instance was only raised for the injunction order under the counter guarantee instead of the local guarantee and rejected Appellant's petition for following reasons:

> "The court shall only examine whether Guarantor has committed fraud or not in its demand under the counter guarantee, and it has no relationship with the fact whether the demand Beneficiary presented is fraudulent or not. To say the least, though Guarantor has paid

11. PRC Independent Guarantee Provisions Article 12 [Fraud] states: "Independent Guarantee fraud shall be found by a People's Court under one of the following circumstances:
(1) The Beneficiary acting in collusion with the Guarantee Applicant or any other party has fabricated the underlying transaction;
(2) Any of the third-party documents presented by the Beneficiary is forged or contains false information;
(3) Any court judgment or arbitral award finds that the party obligated on the underlying transaction shall not be liable for payment or damages;
(4) The Beneficiary acknowledges that the obligations under the underlying transaction have been fully discharged or that the payment triggering event specified in the Independent Guarantee has not occurred; or
(5) The Beneficiary otherwise knowingly abuses its right to demand payment when it has no such right.

Beneficiary according to the Hong Kong SAR High Court's decisions. Beneficiary's demand to Guarantor was complying based on the facts found by the trial court and it is unable to prove that Beneficiary has abused its right of claim according to Article 12(5) of *PRC Independent Guarantee Provisions* as alleged by Appellants based on the existing evidence. At the same time, there is no proof evidencing that Guarantor paid despite being knowingly aware of Beneficiary's fraud. Therefore, whether Beneficiary has committed fraud or not is not the focus of this case in examining whether Guarantor has committed fraud in its demand under the counter guarantee."

Based on this analysis, the Supreme People's Court decided: "Guarantor committed counter advance payment guarantee fraud. According to Article 11 and 12 of *PRC Independent Guarantee Provisions*, Counter Guarantor shall terminate performing payment obligations under such guarantee."

However, the Supreme People's Court decided that Guarantor did not commit fraud under the counter performance guarantee. That is, it found that Guarantor's demand on 30 December 2011 complied with the counter performance guarantee and URDG758. The Supreme People's Court rejected Appellants' arguments that Guarantor's notice of payment suspension to Beneficiary on 12 January 2012 constituted refusal of Beneficiary's demand. The Supreme People's Court stated:

"Firstly, different from the circumstances of the counter advance payment guarantee, where Guarantor claimed from Counter Guarantor on 15 December 2011 under the counter advance payment guarantee when it had not received Beneficiary's complying demand, Guarantor did receive Beneficiary's complying demand under the performance guarantee on 29 December 2011 when it claimed from Counter Guarantor under the counter performance guarantee. Secondly, since Counter Guarantor had already informed Guarantor of the Chinese court's injunction order for the counter performance guarantee, and Guarantor was unable to determine whether Beneficiary had committed fraud, Guarantor's SWIFT message on 12 January 2012 was not evidence that Guarantor had determined Beneficiary fraud and hence refused to pay Beneficiary."

The Supreme People's Court noted that there was no evidence of fraud regarding Guarantor's demand on 30 December 2011. The Supreme People's Court said of the injunction order received by Counter Guarantor:

"The injunction order in its nature is a measure of property preservation, and only a temporary payment suspension due to judicial enforcement. It does not necessarily exempt the payment obligor from a final payment obligation. Upon expiration of the injunction order or relative final decision, Counter Guarantor shall still perform its payment obligations. Therefore, the court does not support the petition of Appellants to terminate payment under the guarantee."

3. Effectiveness of Counter Advance Payment Guarantee: The trial court rejected the arguments by Appellants that the counter advance payment guarantee was not effective because advance payment was made to account no. 001. It noted that Counter Guarantor had informed Guarantor of account no. 001 for advance payment on 14 January 2011, and Guarantor did not object to such information, nor did it inform Counter Guarantor that the advance payment had been made to account no. 051. Instead, Guarantor notified Counter Guarantor on 11 February 2011 that Supplier had made full advance payment through Commercial Bank of Qatar to Sub-Supplier into account no.

051. The trial court considered that Guarantor's action breached the principle of good faith although Guarantor argued that account no. 001 was an account denominated in Qatar Riyals instead of being a USD account. The trial court quoted URDG758 Article 7 and further stated:

> "The advance payment was remitted to Sub-Supplier before the Guarantor's demand. Furthermore, Counter Guarantor did not state in the counter advance payment guarantee or SWIFT message of 14 January 2011, that the guarantee shall not become effective if payment was not made to account no. 001, neither did it specify a document to indicate compliance with such condition. Instead, Counter Guarantor only stipulated that the counter advance payment guarantee should become effective from the time of the actual receipt of the advance payment by Supplier from Beneficiary."

Nor did the Supreme People's Court accept the argument that the counter advance payment guarantee had never become effective. The court noted that the effectiveness condition stated in the counter advance payment guarantee was met when Supplier received the proceeds of the advance payment of USD5,980,833.40 received from Beneficiary. Referring to URDG758 Article 4, as well as the previous URDG458[12] Article 6, and *PRC Independent Guarantee Provisions* Article 4 regarding the rules of guarantee issuance and effectiveness, the court considered that the concerned parties had established an effective condition of the guarantee. The Supreme People's Court stated:

> "Independence is one of the core characteristics of an independent guarantee and the documentary condition is an important embodiment of independence. According to URDG758 Article 7 [Non-documentary conditions], the concerned parties should specify a document to indicate fulfilment of an effective condition while stipulating the effective conditions in the guarantee."

The Supreme People's Court, noting that the actual account designated for receiving the advance payment was with Commercial Bank of Qatar instead of with Counter Guarantor or any of its branches, further stated:

> "Counter Guarantor was unable to determine whether the Sub-Supplier had received the advance payment or from its own record. Under such circumstances, Counter Guarantor only stipulated that the counter guarantee should become effective when the Sub-Supplier received the advance payment without stipulating a document fulfilling such condition, or having another index that could determine the fulfillment of the condition. Therefore, the counter guarantee would become effective upon its issuance."

Comments by Jun XU:

1. Payment in Good Faith: It is worth noting that the *PRC Independent Guarantee Provisions* establishes extremely high standards for the determination of guarantee fraud and protects a guarantor making payment in good faith in a counter guarantee transaction. After the Provisions came into effect in 2016, it has been quite rare for a guarantee applicant to obtain an injunction court order successfully from the Supreme People's Court.

12. In the case of Guarantor suing Counter Guarantor, ([2018] Supreme Court Civil Retrial No. 880, [P.R. China]), the court considered URDG458 and found URDG758 Article 4 did not change regarding the rules of guarantee effectiveness in essence.

This case is thought to be the first case heard by the Supreme People's Court based on the *PRC Independent Guarantee Provisions* deciding that a guarantor committed counter guarantee fraud and did not make payment in good faith.

The court's analysis about "payment in good faith" is reasonable. According to URDG758: "**Demand guarantee** or **guarantee** means any signed undertaking, however named or described, providing for payment on presentation of a **complying demand**." It was improper for Guarantor to claim from Counter Guarantor by refusing Beneficiary's demand on the one hand, and falsely stating that Beneficiary's demand was complying on the other hand. As a local guarantee and a counter guarantee are independent of each other, and a counter guarantor will only examine a guarantor's demand under its counter guarantee instead of a beneficiary's demand under the local guarantee, it is critical for a guarantor to act in good faith.

2. Separate Demand: The trial court improperly applied URDG758 Article 18(a) regarding the separate demand in analyzing whether Appellants' request for termination of payment under the counter advance payment guarantee was justified.

In this case, a new, separate, complying demand was presented by Beneficiary under the local advance payment guarantee after Guarantor's refusal of Beneficiary's first demand on 9 December 2011 due to discrepancies. Guarantor was obliged to honor the corrected demand under the local advance payment guarantee according to URDG758.

However, Counter Guarantor relied only on Guarantor's demand and not on Beneficiary's demand to determine whether to honor or not. When Guarantor made a misrepresentation about the compliance on 15 December 2011 in its separate [second] demand regarding Beneficiary's demand presented on 9 December 2011, Counter Guarantor suspended payment due to a court injunction although Guarantor's second demand appeared to be complying on its face. The fact that Beneficiary's separate [second] demand complied under the local advance payment guarantee on 19 December 2011 does not automatically excuse Guarantor's false statements in its demand on 15 December 2011 referring to Beneficiary's original demand on 9 December 2011. The Supreme People's Court correctly focused on Guarantor's separate demands under the counter advance payment guarantee.

3. Discrepancy: Appellants argued that Counter Guarantor was entitled to refuse payment because Guarantor mistakenly wrote the reference number of the guarantee as GC…000165" instead of GC…0000165.

The Supreme People's Court rejected such argument. The court noted that Guarantor only missed one "0" in the first paragraph of the SWIFT message, but correctly quoted the guarantee reference number in the heading and second paragraph of the SWIFT message. The Supreme People's Court correctly decided that Counter Guarantor could not be misled for the missing "0" according to *PRC Independent Guarantee Provisions* Article 7.[13] The Supreme People's Court's rationale is consistent with ICC's position on the examination of documents. ■

13. Article 7 [Compliance], second paragraph, states: "Documents which do not appear on their face to be completely consistent with the terms and conditions of the Independence Guarantee or with one another shall be found by a People's Court to be complying on their face if no different meaning is thereby caused."

Cover

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FEATURE

THAT WAS THEN, THIS IS NOW: HOW TO BALANCE STANDARD LC PRACTICE AND CUSTOMER SERVICE IN A COMPLEX WORLD?

by Dennis L. NOAH*

The letter of credit industry has changed drastically since I first began in banking in 1970. We issued LCs on paper using typewriters and carbon paper. At that time, SWIFT did not exist. Instead, we relied on telex using antiquated manual test keys. Travelers' letters of credit were frequently issued, the wording of standbys generally fit on one page, and standbys were not as globally recognized. The terms and conditions of import and export LCs were simply written but open to interpretation. We defined a late presentation if the ship arrived in the importing country before the documents reached the issuing bank. Documents were always sent in two batches one day apart due to the unreliability of the mail. Bankers' acceptance financing was huge with an active secondary market, primarily in New York City. I began my international banking career as an FX trader under the Bretton Woods system of rates and then as a BA trader. I bought and sold acceptances for profit as well as funding. It was a full-time job with a staff to handle the processing. While it was seemingly a simpler time, it was fraught with problems of inconsistency in the handling and interpretation of letter of credit terms.

We utilized (UCP) 222 and called them "The Rules". We were well-versed in The Rules, but they were open to interpretation and not as specific as today's UCP600 and ISP98. As a US bank, the truly difficult disagreements we encountered were mainly with banks outside the US. Our disagreements with domestic customers and banks were not as challenging. The Rules were written for a time when the architects of these industry standards traveled to international meetings by steamship as there were no commercial flights across the Atlantic. From our perspective, one of the frequent debates with non-US banks was if the LC's merchandise description was properly stated on the commercial invoice presented.

We called on subject experts typically based in NY, Chicago, and the large US west coast cities to inquire how matters of dispute should be resolved. In the US, we attempted to unify different perspectives through the Council on International Banking (CIB), Mid America Council on International Banking (MACIB), and Western Council on International Banking (WCIB). The efforts were marginally successful and pointed to the need for more precise standard practice. In addition,

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we did not have the excellent global relationships of today with banks and international organizations. For instance, we never defined the meaning of "about" preceding an amount or units of merchandise. I was in many discussions that extended into the early morning hours on this point. Our global industry is now more precise, consistent, and reliable.

However during that era we were more freely able to interpret contested LC terms. If in doubt, we usually defaulted to focusing on what our customer wanted and needed to happen in their transaction. In other words, we saw customer service as our top priority in handling letters of credit and the rules were general enough that we could do so. We operated with the mindset that customer service came first and the rules were secondary. In my opinion we now have changed perspectives as we have more precise standards of practice. We trust that practice will allow good customer service to follow. If not, then we must always follow the rules. I am not suggesting that the latter is wrong or that we no longer care about customer service, but our focus is more oriented toward standard practice. All of us have frequently denied a beneficiary payment for a discrepancy even though the customer may believe differently. In such instances, beneficiaries may contend that we are an impediment to customer service and too focused on the rules.

How do you balance the requirements of standard letter of credit practice and customer service in a more complex world?

I believe effective, professional, and sincere communication is the key to customer service. Communication was formerly conducted primarily by telephone and more personal. Today the majority of time we contact our customers via an electronic means, either through our letter of credit systems or emails. This certainly makes our workflows more efficient by reducing telephone time and providing for electronic interaction. This has huge advantages, but is a less personal form of communication. In some cases it is easier, but is it effective? Sending an email is a method to avoid a contentious telephone conversation with an upset customer. In the simplest terms, the LC industry is a people business but we have made it less personal.

How do you offer a service that your customers appreciate?

In the early days of LC electronic communications with our customers, our bank placed a daily trivia question on the opening page. The goal was to personalize our customer interactions. This was wildly popular with our electronic access customers, although not so much with our security people and programmers. The current systems may not allow as much flexibility and personalization in communicating discrepancies for example. Telephone calls tend to reduce processing volumes. I believe that if a customer phones with a disagreement on a bank decision, it provides us an opportunity to solidify the relationship. I found the best method to calm the situation is to say that I am sorry you are having this issue; let's see how we can address it. Note the word "we". While the bank may be correct in its decision, it does insert the LC user as part of the solution without judging the concern.

How do you handle exporter concerns about discrepancies in a positive manner?

I also found it is important that a bank's operations specialists call their customers or visit them. If I saw a customer with repeated discrepancies, I would call them and offer a bit of advice or training. Obviously this cannot be undertaken for all customers, but it could make a big difference in certain cases. Another method is keeping the relationship manager informed so this person can discuss the situation with the customer. This presents an opportunity for the RM to strengthen the relationship. I do not think there is a total solution to being more personal in electronic communications. However, I do believe customers are more understanding of the impersonal nature of electronic contacts. Nevertheless, the bank still should attempt to find ways to strengthen the relationship. In my experience, errors and alleged errors are the best opportunities to demonstrate that we bankers value customers.

How do you approach this issue of customer service in relation to today's less personal contact?

The ICC's April 2020 Guidance Paper on the Impact of COVID states the point well: "It should not be forgotten that a very simple way to resolve most issues is to encourage and promote dialogue between the commercial parties, as well as between the issuing bank and the nominated/confirming bank, or the counter-guarantor and the guarantor." Truer words have never been spoken about customer relationship challenges.

This reminds me of a pre-pandemic issue when working at a bank some years ago. We advised an LC to a customer but it was payable at the counters of the issuer. We checked and found the documents to be in conformity. The documents were dispatched via courier who confirmed a timely receipt at the issuing branch. When we did not receive any communication, we traced but still had no response after three attempts. Our customer was becoming anxious and suggesting it was our fault. The previous month I had visited the issuing branch and developed an excellent relationship with the manager. I called him at 1:00 am (my time) and we exchanged pleasantries. He then immediately said that he knew they owed the money, but that the applicant had not paid. He recognized that this was not a valid reason to delay paying a conforming drawing. He said he was concerned about the reaction of the head office of not receiving payment from the applicant. I also knew his boss who was the executive in charge of all international branches. He said he would call me back. One hour later, he called and said the funds were on their way. It was USD 2 million that I received the next day. This was relationship banking at its finest and validation that my trips to our foreign correspondents were of significant value.

During the pandemic, have you seen an increased need to have dialogues with your foreign counter-parties to resolve LC issues?

This raises another, I would suggest, historic customer relationship challenge: The impact of the pandemic. As a retired banker, I have never experienced anything like the COVID's devastating jolt to all aspects of business and economies. I am sure that staffing shortages is a subject of concern for banks in many countries as well as for commercial customers within the letter of credit industry. In addition, the decisions to issue or confirm a letter of credit are based upon the creditworthiness of the party. Commercial entities have experienced significant loss of revenue because of lost business or the need to reduce and even shutdown their productive activities. Importers who were

FEATURE

financially secure prior to COVID now have weaker P/Ls. This presents another relationship issue with banks' decisions to provide credit.

How is your bank dealing with your staffing shortages and handling credit decisions due to weaker financials of your customers?

Another problem to emerge during the pandemic is the increase of cybercrime directed at financial institutions and their customers. In the report issued by BAE Systems, The Covid Crime Index 2021, a survey revealed that 74% of FI respondents experienced a rise in malicious activity during the pandemic, with 29% related to criminal activity. Over half (51%) of the financial institutions surveyed had to reconfigure their security strategies due to remote working which required an average of 18 weeks to implement. More than three-fourths (77%) of the FIs reported an increase in concern for the next year in the rise of cybercrime. The Index concluded that online fraud targeting FIs increased due to a massive shift to remote working, even as FIs experienced IT security budget cuts averaging 26%, thus reducing their ability to guard against the cybercriminals.

In addition, the significant increase in consumer demand for online shopping made customers more vulnerable to online fraud. The report found that a majority of consumers (55%) consider cybercrime protections when selecting their banks. About three quarters of consumers noticed an increase in cybercrime or suspicious activity, according to the Index. The Index found that 25% of consumers believe that their FI could do more to protect them and over a half of consumers think it is the job of their FI to do so.

The pandemic has created unexpected challenges for banks beyond the impact to customer service and letter of credit issues but also suspicious activities related to cybercrime. This has created more demands on banks for customer IT protections within shrinking budgets and customer expectations.

How has your bank addressed these IT security issues relating to customer expectations?

YOUR CHANCE TO COMMENT...

Please send your thoughts on each of the above questions in bold to info@doccreditworld.com or click here to respond to the questions. We will compile feedback for a future report published in *DCW*. All comments will be kept confidential and anonymous.

Cover

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ARTICLES

POTENTIAL IMPACT ON LC PARTIES DUE TO DELAYS IN TRANSIT

by Peter SPROSTON*

Most of us are well aware of the recent incident in the Suez Canal in which *Ever Given*, an enormous container ship, ran aground in high winds thus blocking the canal for almost a week. The impact on global supply chains and the costs incurred ran into the billions of dollars. This may well have caused delays in both the shipping and delivering of goods. Specifically for the Letter of Credit industry, was there a material impact upon the way in which LCs were handled? What are the potential effects, hypothetically at least, on LC flows should another such event occur with longer lasting delays?

Due to the interlocking nature of the contracts involved in LC flows, between seller and buyer and between these parties and their respective banks, we must perforce consider the sales contract and take at least a cursory look at the contractual rights and obligations arising thereunder to the extent that this affects the LC itself and vice versa. The following cannot purport to be an exhaustive overview but should at least give some insight into the matter.

Are the contractual parties willing to amend the sales contract and LC to match the revised situation regarding the previously agreed loading and delivery obligations? It appears that regarding mercantile contracts time (for performance e.g. of delivery) can be expressly or impliedly to be of the essence.[1] Where both parties concur that time is of the essence regarding a

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1. *Bowes v Shand* (1877) 2 App. Cas. 455, 463, 464 et al per Chitty on Contracts, volume 1, pp 1240 para 21-013 ff

particular stipulation in the contract, thereby making it a condition, breach thereof would entitle the innocent party to terminate the contract and claim damages from the perpetrator for committing a fundamental breach of the contract.[2] Force majeure is not considered at this time but later in the article.

Or might an amendment only to the LC be construed as a variation of the underlying contract? This is a consideration often overlooked by operations staff when asking for, or agreeing to, an LC amendment. There is English case law[3] stating that mutually agreed changes to the LC were construed to vary the underlying commercial contract. The foregoing presumes that both parties were, or rather became, *ad idem* to the initial agreement. This might have consequences regarding subsequent dispute(s) as to whether a specific contractual term(s) has been breached or, by virtue of variation, not.

Can the appropriate amendments to the LC text be obtained if required viz. latest date of loading– the latest date of presentation of the documents if based on loading date e.g. 'within 21 days of the latest date of shipment' or phrases of similar effect? This would be an issue if the vessel concerned calls at various ports along its planned route to collect/discharge additional cargoes. Factors relating thereto could apply if there is a chain of linked transactions. The intransigence of one party in the chain could have a knock-on effect on all subsequent transactions e.g. creating problems in complying with presentation periods or the LC validity itself, depending on the relevant LC term.

What if the LC has not been issued as contractually required prior to the unexpected transit delay and/or the first date of the shipping period? How might the contracting parties act? The following scenarios[4] may emerge:

1. The bank(s) must advise the LC to the beneficiary within the appropriate period[5]
2. The appropriate period can be split into the following sub-sets:
   a) A specific date for issuance is stated in the contract or a mechanism for defining the date can be ascertained, or;
   b) If the contract is of a particular type, e.g. FOB or CIF (or a variation), then the LC issuance date may be determined by naming a date or by providing a mechanism for ascertaining the date[6] (this point will be discussed in more detail below), or;
   c) The appropriate date is to be based on a test of reasonableness.

2. per Chitty on Contracts, volume 1, pp 1243 para 21-015.

3. *Alan (WJ) & Co. Ltd v. El Nasr Export and Import Co* [1972] 2 QB 189 holding that LC amendment(s) may, if they depart in any respect from the terms, express or implied, of the original sale contract, constitute a binding variation.

4. Based on Raymond Jack, *Documentary Credits*, 2nd ed. [Butterworths 1993] pp 42 para 3.15 ff.

5. *Bunge Corp v. Vegetable Vitamin Foods Private Ltd* [1985] 1 Lloyd's Rep 613 at 617.

6. *Sohio Supply Co v. Gatoil (USA) Inc* [1989] 1 Lloyd's Rep 588 and/or *Transpetrol Ltd v. Transol Olieprodukten Nederland BV* [1989] 1 Lloyd's Rep 309.

In *Pavia*[7] it was held that the LC must be opened for the entire shipping period, ergo including the first date thereof. However there is precedent for holding that the LC should be issued a reasonable time before the first shipment date.[8] The issue of deciding what a reasonable period is, depending upon the specific circumstances of the case, may cause a degree of dissent between the contracting parties and/or the relevant court. The foregoing applies to CIF contracts. Regarding FOB contracts, Diplock J held that the LC must be opened no later than the earliest shipping date.[9]

What motives might a buyer have in delaying the opening of the requisite LC? His credit facility with the intended LC issuing bank might be (almost) fully utilised, hence a delay could avoid the need to seek a temporary increase in the credit line that might demand more collateral security and/or be at higher terms than his existing line. Market trends might indicate a weakening sales price for the product that would diminish his profit margin. Perhaps the purchase price is now, or anticipated to become, lower than the current market price, tempting the buyer to find some means of reneging on the contract.

What options are available to a willing seller if the buyer, for whatever reason, fails to open the LC within the appropriate or contractually agreed time? As the buyer is under an obligation to open a contractually compliant LC in due time, failure to do so would entitle the seller to construe this as a repudiation of the contract and thus terminate it. Opening a workable LC may well be deemed a condition precedent to the seller's performance of the contract obligation i.e. to ship the goods. In such case, according to Denning LJ, 'the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit', a view duly supported by Sir Nicholas Brown-Wilkinson V-C.[10]

It might be that the seller chooses not to cancel but to carry on with the contract despite the buyer's delay in opening the LC. If that is the case the seller might forfeit the right later to cancel the contract and indeed might be deemed by such action to have affirmed the contract. By extension, it might be construed that the seller still intends to avail himself of the LC. The seller's right to terminate the contract and claim damages is thus waived. The way to rectify this situation, assuming time was originally made of the essence in the contract, is for the seller once more, by serving notice on the buyer to perform within a reasonable time,[11] to make time of the essence. If the buyer then fails to open the LC within the time subsequently stipulated, the seller is entitled to cancel the contract.

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7. *Pavia & Co SpA v. Thurmann-Nielsen* [1952] 2 QB 84.

8. *Sinason-Teicher v. Oilcakes and Oilseds Trading Co* [1954] 1 WLR 935; affd [1954] 1 WLR 1394, [1954] 2 Lloyd's Rep 327.

9. *Ian Stach Ltd v. Baker Bosley Ltd* [1958] 2 QB 130.

10. *Trans Trust SPRL v Danubian Trading Co* [1952] 2 QB 297 resp. *British and Commonwealth Holdings plc v. Quadrex Holdings Inc* [1989] QB 842.

11. "A reasonable time" is open to legal construction and subject to the conditions and assumptions prevailing at the time in question.

Consider now the situation when the LC has been issued and documents have not yet been presented but there is a delay in shipping the goods. Can a unilateral recission by either party to the contract be considered acceptable and legal in the circumstances? This question arises as at least two LC terms may become impossible to perform, e.g. complying with the latest date of shipment and presenting documents within the period defined in the LC.[12] This can be rectified by the buyer, acting at the seller's request, instructing the issuing bank to make an appropriate amendment to the LC. Although unlikely, hypothetically the issuing bank might decline to amend the LC due to circumstances surrounding its client, the buyer/applicant, preferring instead to render the LC potentially unworkable for the seller. This opens up a fascinating and wide-ranging topic due to the interlocking contractual obligations involved in LC transactions! Putting that risk aside, and assuming the issuing bank declines to provide the amendment as requested, what remedies are available to the seller?

Clearly the seller is dependent on the buyer/applicant to obtain an LC amendment. However, it was held that the seller could not cancel the contract without first giving the buyer the opportunity of rectifying the situation or giving the buyer due notice of the seller's intention to cancel.[13] It is quite possible that the buyer and seller agree that the LC is nevertheless to be availed in payment of documents presented, even when documents are found to be discrepant by the banks concerned; the buyer simply instructing the issuing bank to take up and pay the documents 'as presented'. In this case the seller has to make a commercial decision. The goods will have been shipped and, depending on the transit duration, might have been discharged to the buyer by the time shipping documents reach the issuing bank, albeit discharge having been effected against a letter of indemnity (LOI) and not an original bill of lading.[14] In my experience this is in fact a fairly common occurrence in dealings between mutually trusted parties. This has developed into a practical necessity as the ICC has found that some 70% or more of documents presented under LCs are initially deemed to be discrepant.[15] The obvious risk is that the buyer might renege on his undertaking to the seller and instruct his bank to reject the documents presented and return same to the seller. What then?

The seller has no claim upon the bank assuming the documents are held not to comply with the terms and conditions of the LC. Must the seller thus waive his right to payment for the goods delivered? It has been held that the seller was indeed entitled to payment as property in the goods had passed to the buyer.[16] In another case, although documents presented were clearly discrepant the buyer took possession of the goods as shipped; the court held that the LC was not the exclusive

12. Assuming the latter condition stipulates that documents are to be presented within the validity of the LC which, by virtue of the delay in shipment, might expire before documents can be presented to the bank(s).

13. *Panoutsos v. Raymond Hadley Corpn of New York* [1917] 2 KB 473.

14. For more on this topic, see "Letters of Indemnity and Banks' Collateral Security", Peter Sproston, Feb 2021 *DCW*, p. 27.

15. https://eximconsulting.wordpress.com/category/discrepancies/

16. *Newman Industries Ltd v. Indo-British Industries* [1956] 2 Lloyd's Rep 219.

source of payment.[17] These cases held the LC to be a conditional mode of payment. Lord Denning[18] stated that 'In my opinion a letter of credit is not to be regarded as absolute payment unless the seller stipulates, expressly or impliedly, that it should be so.' An earlier case[19] held the LC to be an absolute means of payment, in which the seller's documents were rejected by the bank. The goods were sold for the seller's account upon arrival and the seller subsequently sued the buyer for damages. In his summary, McNair J stated that the buyer had performed his payment obligation by providing an LC via a reliable and solvent bank and that the seller did not have the option to present documents direct to the buyer and furthermore that, whilst the LC as issued did not comply with the contract of sale, the divergencies therefrom had been waived by the seller (see above on this point). As the documents did not conform with the terms of the LC, the seller was held to be the party liable in damages.

It is suggested that an important issue is whether a buyer takes possession of the goods or not in determining whether a buyer may be held liable for payment. In this case, if the seller cannot obtain payment via the LC provided (e.g. having presented discrepant documents to the bank) but the buyer has nonetheless taken possession of the goods, seller could sue in conversion for the value of the goods. Alternatively, if the goods' value has subsequently increased, the seller could sue in quasi-contract for the proceeds of his tort.[20] Should the seller have retained the original bills of lading (or same had been returned by the bank(s) involved together with the other shipping documents) the seller would have a claim on the carrier in conversion for misdelivery of the goods (e.g. against an LOI).[21]

There is a closing caveat to this section regarding a buyer's obligation to provide an LC via a reliable and solvent bank. It was held that the insolvency of an LC issuing bank, having accepted bills of exchange drawn upon it, that its dishonour of said bills rendered the buyer liable for payment based on *WJ Alan* whereby an LC is deemed to be a conditional, and not an absolute, means of payment. The buyer thus had to pay twice, a decision subsequently confirmed by Ackner J.[22]

Can an LC be deemed void for payment purposes if documents are presented after the latest date for shipment in the LC has passed? A priori one would assume this to be the case. But what if the buyer and seller agreed to amend the underlying contract to permit a later date of shipment due to delays in shipping the goods e.g. due to closure of the Suez Canal, but the buyer failed to amend the LC? As noted above, the seller could present documents under the LC and expect the buyer to

17. *Saffron v. Societe Miniere Cafrika* [1958] 100 CLR 231.

18. *WJ Alan & Co Ltd v. El Nasr Export and Import Co* [1972] 2 QB 189.

19. *Soproma SpA v. Marine and Animal By-Products Corp.* [1966] 1 Lloyd's Rep 367.

20. Goff & Jones *The Law of Restitution* (3rd edn) ch 32.

21. *Mannesman Handel AG v. Kaunlaran Shipping* [1993] 1 Lloyd's Rep 89 at 91.2.

22. *E D and F Man Ltd v. Nigerian Sweets and Confectionery Co Ltd* [1977] 2 Lloyd's Rep 50.

instruct the issuing bank to accept them despite the discrepancy. If, as one would expect, the bank(s) reject the seller's documents, could the seller then refer the bank(s) to the amendment agreed in the underlying contract and demand that payment be made on the grounds that, as noted earlier, an LC amendment can be deemed to vary the underlying commercial contract?

It is suggested that bank(s) will resist this interpretation as it contradicts UCP Article 4(a) and, without an express instruction from the applicant/buyer, a bank has no mandate to amend the LC issued on his behalf or, should it do so, become liable for damages for breach of the original mandate. Seller's recourse is then to the buyer alone or, if the buyer declines to amend the LC or honour the varied terms of the contract, the seller could, if still in possession of the original bills of lading, try to withhold or redirect the goods if they have not already been discharged.

At what point might force majeure[23] permit the parties to declare the original contract void and, perforce, the LC designated as the agreed means of payment? It was held in earlier so-called Suez Canal cases[24] that following a closure of the canal the contracts of sale were deemed not to have been frustrated due to that event. The alternative route around the Cape of Good Hope was triple the distance with correspondingly higher freight costs. Seller's claim that this frustrated the contract was not accepted; the court holding that although the performance was thereby varied, it was not such a fundamental change as to frustrate the seller's contractual obligation nor because it became commercially unprofitable.[25] In the former case, a date for delivery had not been fixed, it being a CIF delivery contract. If the goods concerned were perishable and/or a definite date for delivery had been fixed or there had been a dearth of shipping to carry the goods on the alternative route, it appears these could have proven sufficient grounds to hold the contract frustrated.[26]

The difference between the legal concepts of contract frustration and force majeure may, paraphrasing *Chitty*,[27] be explained thus: frustration is solely concerned with unforeseen events which occur *after* the date of formation of the contract that renders contractual performance more onerous or even impossible whereas force majeure events can be defined and expressly provided for in the appropriate contract clause *ab initio*. What this means in practice is that the wider the force majeure clause is drafted, the narrower is the practical scope of the doctrine of frustration. Thus, if an event occurs for which force majeure clausing has provided, the contract is not frustrated. The benefit of providing for force majeure events, according to *McKendrick*,[28] is that an unforeseen event, such as

23. In effect the legal concept of frustration defined by *McKendrick on Contract Law* (5th edn) Palgrave Macmillan2003 at 14.9 pp 313 as ' frustration can be invoked only where the supervening event *radically* or *fundamentally* changes the nature of performance: it cannot be invoked simply because performance has become more onerous.' Blackburn J formulated the doctrine of frustration in the early case of *Taylor v Caldwell* [1863] 3 B & S 826 at 836.

24. *Tsakiroglou & Co Ltd v. Noblee Thorl GmbH* [1962] A.C. 93.

25. *Blackburn Bobbin Co v. Allen & Sons* [1918] 2 K.B. 467.

26. *Ocean Tramp Tankers Crop v. V/O Sovfracht (The Eugenia)* [1963] 2 Q.B. 226.

27. *Chitty on Contracts* (vol 1, 29th edn) Sweet & Maxwell, London, 2004 at pp 1311 ff & 23-002 ff.

28. *McKendrick on Contract Law* (5th edn) Palgrave Macmillan 2003 at 14.9 pp 314.

the closure of the Suez Canal, would not necessarily act to frustrate the contract leading to its termination 'irrespective of the wishes of the parties'. Hence the contractual parties could continue their relationship by revising the contract terms to their mutual benefit.

Keeping the foregoing in mind, let us consider the possible outcomes in the following situation: goods have been shipped within the prescribed time-frame and thus comply with the specific condition stipulated in the LC issued to the seller. Delivery, however, is compromised by the unforeseen closure of the Suez Canal. Assuming the contract has not made a force majeure provision for this, the buyer, perhaps for entirely commercial reasons, holds the contract frustrated. Notwithstanding this, the seller decides to present LC compliant documents to the bank and gets paid. Obviously the buyer cannot unilaterally withdraw the LC and the bank will have acted in compliance with the applicant/buyer mandate, hence no reimbursement can be claimed from that quarter. The buyer could decline to take title to and possession of the goods when the vessel arrives at the discharge port. Strictly speaking, because the bank paid against compliant documents, it has obtained title to the goods but would have no use for them other than a fire sale disposal. The carrier will want a decision on discharging the goods and, whilst waiting, will be accruing demurrage costs. Thus is chaos predestined! For those with an interest in seeking to divine the outcome, various sources can be recommended.[29]

Regarding banks handling LCs and transactions subject to ICC rules, force majeure events as discussed above would not excuse banks from checking and/or paying against documents according to UCP Article 4, URDG 758 Article 5, and ISP98 Rule 1.08. The circumstances surrounding and defining force majeure events are dealt with in a recent ICC guidance paper.[30] Bankers contacted for input on this article reported no material impact upon their trade finance flows and their responses can be summarised thus: 'The Suez Canal closure has had moderate impact on our LC business, as trading companies involved quickly renegotiated contract terms and delivery dates as needed, and LCs were amended accordingly. The form was in most cases by simple email exchange, with acknowledgement of agreement on both sides, as time was short to get all the amendments processed.' Thanks are due and gratefully given to the respondent bankers for taking the time to provide their input. ■

29. Treitel, The Law of Contract, Chitty on Contracts, Ewan McKendrick on Contract Law were used in this article

30. https://iccwbo.org/publication/guidance-paper-on-the-impact-of-covid-19-on-trade-finance-transactions-issued-subject-to-icc-rules/

TEXT

KSEBL (INDIA) ORDER

NOTE: The following Order pertaining to conditions for 'Letter of Mandate' was issued on 20 March 2020 by Kerala State Electricity Board Limited (India). Source: www.kseb.in

Abstract

Acceptance of 'Letter of Mandate' issued by Reserve Bank of India in lieu of the Bank Guarantee from Southern Railway against Security Deposit by deleting Clause No.3 of the 'Letter of Mandate' – Sanctioned – Orders issued.

CORPORATE OFFICE (SPECIAL OFFICER (REVENUE))

B.O.(FTD) No.226/2020 (SOR/RG.II/SD-Bank Guarantee/Railway/2019-20)
Dated, Thiruvananthapuram, 20.03.2020.

Read:- (1) Letter No.BD(T) No.351/11.1.003/2019-20 dated 09.08.2019 from Reserve Bank of India.
(2) Letter No.E/46/ET/1/KSEB dated 19.12.2019 from Southern Railway.
(3) Note No.SOR/RG.II/SD-Bank Guarantee/Railway/2019-20/461 dated 29.02.2020 of Special Officer (Revenue) submitted to the Full Time Directors (Agenda No.29/03/20).

ORDER

M/s. Southern Railway is consumer being several HT/EHT connection in the office of the Special Officer (Revenue). As per Kerala Electricity Supply Code 2014, it is mandatory that HT/EHT consumers should have Security Deposit equivalent to at least twice their average monthly bill amount. As per Regulation 70 of the Supply Code there is an option for HT/EHT consumers to place upto 50% of their security deposit in the form of Bank Guarantee from any nationalized/scheduled commercial bank instead of cash.

For meeting the purpose of Bank Guarantee, the Railway usually submitted "Letter of Assurance" issued by the Reserve Bank of India and the same was accepted by KSEBL. Now all the 'Letter of Assurances' submitted by M/s. Southern Railway instead of Bank Guarantee were expired on 30.06.2018. Two months before the expiry date of the 'Letter of Assurance' already submitted, the Railway was intimated to furnish new/revalidate the expiring 'Letter of Assurance'. But Railway informed that now the Reserve Bank of India is not issuing the 'Letter of Assurance' and also requested to accept 'Letter of Mandate' forwarded by Reserve Bank of India in the place of Letter of Assurance/Bank Guarantee, stating that it will fulfill KSEBL's requirements. They also requested not to insist Bank Guarantees from Commercial Banks. On going through the conditions mentioned in the 'Draft

Letter of Mandate' forwarded by Railways, it is seen that the 'Letter of Mandate' can be revoked by Railway at any time by issuing a notice in writing to Reserve Bank of India even without informing the State Distribution Utilities. On comparing the 'Letter of Assurance' earlier being issued by the Reserve Bank of India with the 'Letter of Mandate', it is seen that 'Letter of Assurance' issued by RBI was as good as Bank Guarantee assuring payments by RBI till the expiry of tenure of the 'Letter of Assurance' and there was no clause for revoking the assurance of the remittance before the validity of letter of assurance. But in the case of Clause No.3 of 'Letter of Mandate' Railway will have the option to revoke it at any time by issuing a notice to Reserve Bank of India. Hence, there is an inherent risk of revoking the 'Letter of Mandate' by Railway and hence it could not be treated at par with the Bank Guarantee.

Clause No.3 of 'Letter of Mandate' - *"or until we shall have expressly revoked it by notice in writing delivered to you and you have acknowledge receipt of such notice whichever is earlier",*

If the Railway is willing to make amendment to the Clause No.3 of the "Letter of Mandate' by deleting the condition, then the amended Letter of Mandate can be accepted in the place of Bank Guarantee as it eliminate the risk of revocation of the Letter of Mandate by the Railways without informing State Distribution utilities.

Railway had forwarded a copy of Office Memorandum No.23/22/2019-R&R issued by the Ministry of Power, Government of India dated 6th August 2019 conveying the approval of the competent authority that for the purpose of scheduling as per Ministry of Power's order dated 28.06.2019, the 'Letter of Mandate' issued by Reserve Bank of India, can be considered as payment security mechanism.

Railway as per letter read 3rd above now requested to consider the following points.

i) As Ministry of Power has communicated its acceptability of 'Letter of Mandate' as a payment security mechanism, it shall be applicable to all the state electricity boards that includes KSEBL, hence separate assurance directly to KSEBL is not warranted and the 'Letter of Assurance' issued earlier was also not directly addressed to KSEBL.

ii) In the 'Letter of Mandate' format it is clear that Railway has authorized Reserve Bank of India to unconditionally debit its account for any claim

insist for any documents from SEB and hence there shall be no difficulty in encashment.

iii) Southern Railway is availing Traction Power Supply in the State of Tamil Nadu, Kerala and Andhra and except Kerala no SEB is having the provision for payment of 50% of Security Deposit in the form of Bank Guarantee.

M/s. Southern Railway have assured to provide additional details and any clarification on 'Letter of Mandate' issued by RBI if further required by KSEBL.

The matter was placed before Full Time Directors as per note read 3rd above.

The Full Time Directors, in the meeting held on 03.03.2020 resolved to accord sanction for the following –

1) To suggest Railway to make amendment to the Clause No.(3) of the 'Letter of Mandate' by deleting the condition "or until we shall have expressly revoked it by notice in writing deliver to you and you have acknowledge the receipt of such notices whichever is earlier".

2) To accept the 'Letter of Mandate', if the Letter of Mandate is amended as suggested above.

Orders are issued accordingly.

By Order of the Full Time Directors
Sd/-
LEKHA. G
COMPANY SECRETARY (IN-CHARGE)

To

The Chief Electrical Distribution Engineer,
Headquarters Officer, Southern Railway, Electrical Branch, Chennai.

Copy to:-

1. The Financial Adviser/The Chief Internal Auditor.
2. The Chief Engineer (IT).
3. The TA to Chairman & Managing Director/Director (Distn., IT&HRM/ Director (Trans. System Operation, Corporate Planning, Safety & REES)/ Director (Generation Civil)/Director (Generation-(Electrical) &SCM).
4. The PA to Director (Finance)/Senior CA to Secretary (Administration).
5. The Company Secretary-in charge.
6. The Special Officer (Revenue), KSEBL.
7. Library/Stock file.

Forwarded / By Order

Senior Superintendent

Cover

SUSTAINABILITY
IN TRADE AND TRADE FINANCE

12 HOURS OF ONLINE TRAINING

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CONTENT OVERVIEW

The e-learning is designed to be an introduction to the E&S issues, sometimes referred to as sustainability issues, that are frequently encountered, managed and mitigated in the course of daily trade finance business activities.

The series of seven modules considers the background to these issues, provides some approaches that trade can employ and exemplifies best practice examples of sustainability in trade finance and related activities. It provides participants with an understanding and language of the key issues to enable development and activation of E&S practices within the Participant's organisation.

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- Sustainability Issues and Themes
- Climate Change, Population Growth and Urbanisation
- Working with Sustainability in Trade and Trade Finance
- Governance
- Environmental Risk Management Frameworks
- Onboarding, Due Diligence, Transaction Assessment and Monitoring
- Standards, Conventions and International Regulation
- Best Practices and Guidelines

The course includes 7 Interactive Lessons, 6 Case Studies and an Assessment in Sustainability in Trade and Trade Finance.

TARGET MARKET

- Trade Finance professionals;
- Sustainability professionals within a banking environment providing support services to banking teams including Trade Finance; and
- Legal and compliance teams that support trade finance activities within financial institutions.

BENEFITS

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- experts
- Working to support sustainability

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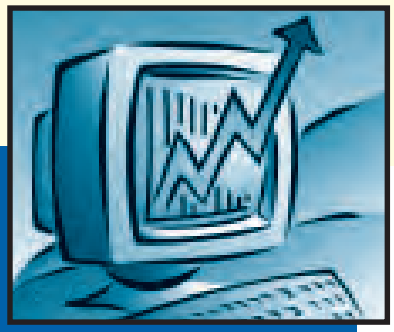

STATISTICS

US BRANCHES/AGENCIES OF NON-US BANKS

DCW reports the most current data on top US branches and agencies of non-US banks in terms of LC activity. Net Standby LCs are after subtracting respective amounts conveyed to others. Net LCs are totals for Net Standby LCs and Commercial & Similar LCs. Amounts are in USD 1,000s.

4TH QUARTER 2020

Rank	Institution	City	State	Standby LCs to US Addresses	Standby LCs to Non-US Addresses	Net Standby LCs	Commercial & Similar LCs	Net Letters of Credit
1.	STANDARD CHARTERED BK NY BR	NEW YORK	NY	13,943,248	4,150,896	18,038,894	1,267,030	19,305,924
2.	SUMITOMO MITSUI BKG NY BR	NEW YORK	NY	17,646,055	2,127,776	18,746,058	193,160	18,939,218
3.	MIZUHO BK NEW YORK BR	NEW YORK	NY	17,920,418	6,892,026	16,301,450	247,587	16,549,037
4.	MUFG BK NY BR	NEW YORK	NY	11,545,166	3,685,844	13,429,609	983,054	14,412,663
5.	ROYAL BK CAN 3 WRLD FNCL BR	NEW YORK	NY	10,945,008	1,452,549	11,303,079	0	11,303,079
6.	CREDIT AGRICOLE CORP NY BR	NEW YORK	NY	9,659,261	4,894,898	10,759,228	381,901	11,141,129
7.	DEUTSCHE BK AG NY BR	NEW YORK	NY	8,085,760	1,315,940	8,830,957	254,901	9,085,858
8.	BNP PARIBAS NEW YORK BR	NEW YORK	NY	8,567,658	880,828	7,905,938	235,555	8,141,493
9.	SOCIETE GENERALE NY BR	NEW YORK	NY	4,769,010	3,203,915	7,970,145	33,517	8,003,662
10.	CREDIT SUISSE NY BR	NEW YORK	NY	1,080,359	6,823,075	7,285,301	0	7,285,301
11.	BANK OF NOVA SCOTIA NY AGY	NEW YORK	NY	4,791,400	1,911,530	5,632,140	0	5,632,140
12.	COMMERZBANK AG NY BR	NEW YORK	NY	4,463,156	601,314	5,064,470	13,745	5,078,215
13.	UBS AG STAMFORD BR	STAMFORD	CT	5,422,543	640,957	4,985,334	0	4,985,334
14.	LANDESBANK HESSN-THRN NY BR	NEW YORK	NY	2,616,628	2,364,020	4,879,530	0	4,879,530
15.	NATIXIS NY BR	NEW YORK	NY	8,159,522	829,791	4,601,696	26,335	4,628,031
16.	BAYERISCHE LANDESBANK NY BR	NEW YORK	NY	888,538	3,507,480	4,396,018	0	4,396,018
17.	RABOBANK NEDERLAND NY BR	NEW YORK	NY	4,554,274	134,511	4,161,431	66,009	4,227,440
18.	UNICREDIT BK NY BR	NEW YORK	NY	2,950,793	707,714	3,618,838	21,845	3,640,683
19.	BANK OF MONTREAL CHICAGO BR	CHICAGO	IL	3,639,657	1,564,539	3,590,926	19,071	3,609,997
20.	BNP PARIBAS SF BR	SAN FRAN.	CA	3,424,206	8,110	3,148,934	0	3,148,934
21.	AUSTRALIA & NEW ZEALND NY BR	NEW YORK	NY	2,366,540	515,278	2,881,818	16,710	2,898,528
22.	NORDEA ABP NY BR	NEW YORK	NY	1,255,319	1,575,475	2,830,794	0	2,830,794
23.	TORONTO-DOMINION BK NY BR	NEW YORK	NY	5,651,351	1,893,572	2,770,779	0	2,770,779
24.	CANADIAN IMPERIAL BK NY BR	NEW YORK	NY	1,931,298	920,503	2,707,910	0	2,707,910
25.	INTESA SANPAOLO SPA NY BR	NEW YORK	NY	2,197,868	148,025	2,232,897	180,285	2,413,182
26.	BANCO SANTANDER SA NY BR	NEW YORK	NY	2,321,779	60,524	2,382,303	0	2,382,303
27.	LLOYDS BK CORP MKTS PLC NY BR	NEW YORK	NY	1,351,343	956,178	2,307,521	0	2,307,521
28.	BARCLAYS BK SEVENTH AVE BR	NEW YORK	NY	1,534,039	711,325	2,245,364	0	2,245,364
29.	NATIONAL AUSTRALIA BK NY BR	NEW YORK	NY	1,834,408	216,553	2,050,961	0	2,050,961
30.	CREDIT INDUS ET CMRL NY BR	NEW YORK	NY	1,476,835	546,943	2,023,778	0	2,023,778
31.	DNB BK ASA NY BR	NEW YORK	NY	1,656,417	226,048	1,862,008	0	1,862,008
32.	LANDESBK BADN WURTTMB NY BR	NEW YORK	NY	378,628	1,372,152	1,750,780	0	1,750,780
33.	SVENSKA HANDELS AB PUBL NY BR	NEW YORK	NY	1,489,556	185,711	1,675,267	0	1,675,267
34.	BANK OF NOVA SCOTIA HOU BR	HOUSTON	TX	371,841	1,288,746	1,574,344	0	1,574,344
35.	BANCO BILBAO VIZCAYA NY BR	NEW YORK	NY	1,011,662	470,860	1,301,111	0	1,301,111
36.	BANK OF CHINA NY BR	NEW YORK	NY	775,070	317,918	1,092,988	0	1,092,988
37.	NATIONAL BK OF CANADA NY BR	NEW YORK	NY	83,783	799,477	878,912	0	878,912
38.	STATE BK OF INDIA NY BR	NEW YORK	NY	854,957	3,810	858,767	0	858,767
39.	ICICI BK NY BR	NEW YORK	NY	763,450	471,085	809,231	2,773	812,004
40.	BNP PARIBAS CHICAGO BR	CHICAGO	IL	829,498	1,187	795,828	0	795,828
41.	CHINA MERCHANTS BK CO NY BR	NEW YORK	NY	2,992	163,800	166,792	466,482	633,274
42.	INDUSTRIAL & CB OF CHINA NY BR	NEW YORK	NY	517,658	3,188	520,846	90,363	611,209
43.	NATIONAL BK KUWAIT SAK NY BR	NEW YORK	NY	712,532	47,521	600,718	0	600,718
44.	SWEDBANK AB NY BR	NEW YORK	NY	426,075	93,249	519,324	0	519,324
45.	COMMONWEALTH BK AUS NY BR	NEW YORK	NY	287,689	192,499	480,188	0	480,188

STATISTICS

Rank	Institution	City	State	Standby LCs to US Addresses	Standby LCs to Non-US Addresses	Net Standby LCs	Commercial & Similar LCs	Net Letters of Credit
46.	MUFG BK LOS ANGELES BR	L. ANGELES	CA	349,875	116,877	466,752	0	466,752
47.	DZ BK DEUTSCHE ZNTRA NY BR	NEW YORK	NY	403,271	5,847	409,118	0	409,118
48.	ARAB BKG CORP NY BR	NEW YORK	NY	257,989	61,722	319,711	73,153	392,864
49.	KOREA DEVELOPMENT BK NY BR	NEW YORK	NY	408,165	3,200	375,847	0	375,847
50.	RIYAD BK HOU AGY	HOUSTON	TX	321,363	42,850	364,213	0	364,213
51.	MEGA INTL CMRL BK CO NY BR	NEW YORK	NY	1,183	0	1,183	300,000	301,183
52.	MEGA INTL CMRL BK LA BR	L. ANGELES	CA	379	0	379	300,000	300,379
53.	KOOKMIN BK NY BR	NEW YORK	NY	72,088	194,383	266,471	2,336	268,807
54.	UNICREDIT NY BR	NEW YORK	NY	181,620	8,281	189,901	53,202	243,103
55.	NORDDEUTSCHE LANDSBK NY BR	NEW YORK	NY	192,660	17,036	209,696	0	209,696
56.	KBC BANK NV NY BR	NEW YORK	NY	202,285	2,749	205,034	0	205,034
57.	UBS AG NY 787 7TH AVE WMA BR	NEW YORK	NY	95,456	68,396	163,852	0	163,852
58.	MASHREQBANK PSC NY BR	NEW YORK	NY	48,257	6,150	54,407	87,532	141,939
59.	ITAU CORPBANCA NY BR	NEW YORK	NY	0	135,888	135,888	0	135,888
60.	BANCO LATINOAMRCNO NY AGY	WHITE PLNS	NY	0	3,086	3,086	129,421	132,507
61.	BANCO DE CREDITO E INV MIA BR	MIAMI	FL	22,501	103,674	126,175	1,889	128,064
62.	SHINHAN BK NY BR	NEW YORK	NY	8,124	77,813	85,937	27,589	113,526
63.	MALAYAN BKG BERHAD NY BR	NEW YORK	NY	110,559	0	110,559	0	110,559
64.	CHINA CONSTRUCTION BK NY BR	NEW YORK	NY	106,493	0	106,493	0	106,493
65.	MUFG BK CHICAGO BR	CHICAGO	IL	69,583	0	69,583	31,786	101,369
66.	MITSUBISHI UFJ TR & BKG NY BR	NEW YORK	NY	1,360	96,637	97,997	0	97,997
67.	NATIONAL BK EGYPT NY BR	NEW YORK	NY	74,405	110	74,515	22,056	96,571
68.	BANK HAPOALIM BM NY BR	NEW YORK	NY	79,404	247	79,651	13,186	92,837
69.	SUMITOMO MITSUI TR BK NY BR	NEW YORK	NY	48,056	43,135	91,191	0	91,191
70.	MEGA INTL CMRL SILICON VAL BR	SAN JOSE	CA	81,561	0	81,561	0	81,561
71.	BANK OF BARODA NY BR	NEW YORK	NY	5,642	24,010	29,652	50,331	79,983
72.	GULF INTL BK NY BR	NEW YORK	NY	13,067	0	13,067	59,437	72,504
73.	ITAU UNIBANCO MIAMI BR	MIAMI	FL	0	65,856	65,856	0	65,856
74.	BANCO DE SABADELL SA MIA BR	MIAMI	FL	26,825	34,614	61,439	2,003	63,442
75.	KEB HANA BK NY AGY	NEW YORK	NY	42,928	0	38,250	19,810	58,060
76.	WOORI BK NY AGY	NEW YORK	NY	46,179	7,500	53,679	418	54,097
77.	OVERSEA-CHINESE BKG LA AGY	L. ANGELES	CA	52,151	0	52,151	0	52,151
78.	UNITED OVERSEAS BK LA AGY	L. ANGELES	CA	50,091	1,164	51,255	0	51,255
79.	NATIONAL BK PAKISTAN NY BR	NEW YORK	NY	8,557	22,500	31,057	12,053	43,110
80.	BANCO DO BRASIL SA NY BR	NEW YORK	NY	10,975	19,143	30,118	11,781	41,899
81.	UNITED OVERSEAS BK NY AGY	NEW YORK	NY	33,243	1,000	34,243	0	34,243
82.	UNITED BK AFRICA NY BR	NEW YORK	NY	0	979	979	31,952	32,931
83.	LAND BK OF TAIWAN LA BR	LOS ANGELES	CA	30,306	0	30,306	0	30,306
84.	OVERSEA-CHIN BKG CRP NY AGY	NEW YORK	NY	28,064	810	28,874	0	28,874
85.	SHIZUOKA BK NY BR	NEW YORK	NY	27,036	0	27,036	0	27,036
86.	ALLIED IRISH BKS NY BR	NEW YORK	NY	24,208	0	24,208	0	24,208
87.	BANK OF CHINA CHICAGO BR	CHICAGO	IL	22,979	0	22,979	0	22,979
88.	CHIBA BK NY BR	NEW YORK	NY	21,921	0	21,921	0	21,921
89.	BANK OF CHINA LA BR	L. ANGELES	CA	19,937	0	19,937	0	19,937
90.	TURKIYE VAKIFLAR BK NY BR	NEW YORK	NY	9,738	8,437	18,175	298	18,473
91.	WOORI BK LA BR	L. ANGELES	CA	15,787	1,877	17,664	756	18,420
92.	BANCO INTERNACIONL MIA AGY	CRL GABLES	FL	0	700	700	14,926	15,626
93.	BANK OF INDIA NY BR	NEW YORK	NY	12,025	0	12,025	2,061	14,086
94.	CTBC BK CO NY BR	NEW YORK	NY	5,777	7,800	13,577	249	13,826
95.	BANK OF EAST ASIA NY BR	NEW YORK	NY	13,762	0	13,762	0	13,762

STATISTICS

Rank	Institution	City	State	Standby LCs to US Addresses	Standby LCs to Non-US Addresses	Net Standby LCs	Commercial & Similar LCs	Net Letters of Credit
96.	UBS AG MIAMI BR	MIAMI	FL	0	11,976	11,976	0	11,976
97.	INDUSTRIAL BK OF KOREA NY BR	NEW YORK	NY	5,174	6,765	11,939	0	11,939
98.	FEDERATION DES CAISSES FL BR	HALLANDLE	FL	11,905	0	11,905	0	11,905
99.	BANCO DAVIVIENDA SA MIA BR	MIAMI	FL	0	10,608	10,608	0	10,608
100.	SHANGHAI CMRL BK SF BR	SAN FRAN.	CA	2,685	0	2,685	7,397	10,082
101.	ROYAL BK OF CANADA NY BR	NEW YORK	NY	2,961	4,462	7,423	0	7,423
102.	NORINCHUKIN BK NY BR	NEW YORK	NY	4,973	0	4,973	0	4,973
103.	BANK OF E ASIA LA BR	ALHAMBRA	CA	4,617	0	4,617	0	4,617
104.	SHANGHAI CMRL BK NY BR	NEW YORK	NY	1,658	0	1,658	2,393	4,051
105.	AGRICULTRL BK OF CHINA NY BR	NEW YORK	NY	3,457	0	3,457	0	3,457
106.	BANCO NACION ARG NY BR	NEW YORK	NY	0	80	80	2,954	3,034
107.	BANK OF TAIWAN LA BR	L. ANGELES	CA	2,751	0	2,751	0	2,751
108.	BANGKOK BK PUBLIC CO NY BR	NEW YORK	NY	2,678	0	2,678	0	2,678
109.	NONGHYUP BK NY BR	NEW YORK	NY	2,613	0	2,613	0	2,613
110.	BANCO PICHINCHA CA MIA AGY	CRL GABLES	FL	0	2,500	2,500	0	2,500
111.	HUA NAN CMRL BK LA BR	L. ANGELES	CA	2,403	0	2,403	0	2,403
112.	BANCO BRADESCO SA NY BR	NEW YORK	NY	64	1,950	2,014	0	2,014
113.	BANCO POPULAR DE PR NY BR	NEW YORK	NY	1,855	0	1,855	0	1,855
114.	BANCO DO BRASIL SA MIAMI BR	MIAMI	FL	0	1,819	1,819	0	1,819
115.	E SUN CMRL BK LOS ANGELES BR	INDUSTRY	CA	1,710	0	1,710	0	1,710
116.	CHANG HWA CMRL BK LA BR	L. ANGELES	CA	1,698	0	1,698	0	1,698
117.	P T BK NEGARA INDO PER NY AGY	NEW YORK	NY	0	0	0	1,696	1,696
118.	LAND BK OF TAIWAN NY BR	NEW YORK	NY	1,330	0	1,330	0	1,330
119.	BANK SINOPAC LA BR	L. ANGELES	CA	922	0	922	0	922
120.	FIRST CMRL BK CO NY BR	NEW YORK	NY	891	0	891	0	891
121.	TAIWAN BUS BK LA BR	L. ANGELES	CA	887	0	887	0	887
122.	TAIWAN CO-OP BK LA BR	L. ANGELES	CA	827	0	827	0	827
123.	FIRST CMRL BK LA BR	L. ANGELES	CA	653	0	653	92	745
124.	BANK HAPOALIM BM PLAZA BR	NEW YORK	NY	0	730	730	0	730
125.	BANK OF CMNTNS SF BR	SAN FRAN.	CA	8	712	720	0	720
126.	BANCO DE CREDITO MIAMI AGY	CRL GABLES	FL	0	687	687	0	687
127.	CHANG HWA CMRL BK NY BR	NEW YORK	NY	684	0	684	0	684
128.	BANK OF CMNTNS NY BR	NEW YORK	NY	441	0	441	0	441
129.	BANCO LA NACION ARG MIA AGY	MIAMI	FL	0	0	0	397	397
130.	TAIWAN CO-OP BK NY BR	NEW YORK	NY	231	0	231	0	231
131.	STATE BANK INDIA CHICAGO BR	CHICAGO	IL	0	179	179	0	179
132.	TAIWAN BUS BK NY BR	NEW YORK	NY	173	0	173	0	173
133.	BANCO REPUBLICA ORIENTL NY BR	NEW YORK	NY	0	149	149	0	149
134.	BANK OF GUAM SAN FRAN BR	SAN FRAN.	CA	134	0	134	0	134
135.	GUNMA BANK NY BR	NEW YORK	NY	112	0	112	0	112
136.	CHINA CITIC BK INTL NY BR	NEW YORK	NY	0	0	0	102	102
137.	NATIONAL BK OF PAKISTN WA BR	WASH.	DC	0	9	9	0	9
138.	TAIWAN CO-OP BK SEATTLE BR	SEATTLE	WA	2	0	2	0	2
139.	BANK OF TAIWAN NY BR	NEW YORK	NY	824	0	0	0	0
	TOTALS			180,874,404	62,106,437	208,876,438	5,763,579	214,640,017

SCAM SURVEY

Coastal Oil CFO Pleads Guilty to Fraud

According to Singapore's *The Business Times*, Ong Ah Huat, Chief Financial Officer of Coastal Oil Singapore, has pled guilty to 15 counts of fraud involving letters of credit. Prosecutors alleged that Ong conspired with three others to take approximately USD 320 million from banks in Singapore and Hong Kong.

Prosecutors alleged that Coastal Oil Singapore began facing severe cash flow problems in 2016. Ong joined Coastal Oil Singapore the same year, and according to prosecutors, he learned that the company's co-director Tan Sing Hwa had devised a plan to obtain credit to address the company's problems. Tan created forged invoices and contracts to apply for LCs and loans, and used proceeds to keep the company afloat. Ong went along with the plan, and according to prosecutors, assisted in creating the forged documents.

Within the period of June 2017 to December 2018, the co-conspirators defrauded China Merchants Bank (Singapore) and seven banks in Hong Kong: Bank of Communications; BNP Paribas SA; Cooperative Rabobank; DBS Bank; HSBC; OCBC; and Standard Chartered Bank. Coastal Oil survived for a time, though it went into liquidation in mid-December 2018. Soon thereafter, two fuel intermediaries, Sinfeng Marine and OCBC Hong Kong, brought complaints to the police regarding the fraud.

Ong was charged with a total of 58 offences – mainly abetment of forgery and cheating – in 2020. Ong pled guilty to 15 of the charges, and was sentenced to a prison term of nine years. A case involving 63 charges against the company's treasury manager, Huang Peishi, is still pending. Tan and Carol Zong, an assistant treasury manager allegedly involved in the scheme, have fled Singapore.

(Sources: *The Business Times*; *The Straits Times*)

Jacob Manning,
Scam Survey Editor

Jacob Manning, a Partner at the law firm of Dinsmore & Shohl, is a member of the Pennsylvania, Ohio, and West Virginia Bars. His practice focuses on business and commercial litigation and appellate practice. Manning is also an Associate Fellow of the Institute of International Banking Law & Practice.

Court of Appeals Affirms Fraud Conviction

The United States Court of Appeals for the Fifth Circuit affirmed the conviction of Yanna Gassaway, who was convicted of wire fraud related to a high yield investment scam. Since Gassaway had already served the prison term to which she was sentenced, the Court's decision means that Gassaway will still serve a term of supervised release and is required to pay restitution.

Gassaway was indicted with one count of wire fraud in June 2015. The indictment alleged that Gassaway, a resident of Atlanta, Georgia, solicited investors in Texas, promising exorbitant returns from investments in high yield or prime bank investments. The Court of Appeals also referenced that she promised to invest in a bank guarantee. Despite her promises, Gassaway did not invest the funds and instead used the funds for her own purposes, including purchasing real property. Gassaway was alleged to have caused more than USD 320,000 in losses.

The case was tried before a judge in November 2018 and Gassaway was convicted of the sole count in the indictment. Gassaway appealed to the United States Court of Appeals for the Fifth Circuit and the Court affirmed her conviction on 12 May 2021. It found that there was sufficient evidence presented of her guilt, among other things, including Gassaway's promise to "invest $450,000 in a bank guarantee".

Gassaway was sentenced to 20 months in prison and three years of supervised release. Gassaway had already served the prison term prior to the Court of Appeals' decision. Thus, she will still serve the term of supervised release, and must pay restitution in the amount of USD 324,840.

(Sources: *United States v. Gassaway*, 19-20154 (5th Cir. 2021); *United States v. Gassaway*, Case No. 4:15-cr-00301 (S.D. Tex.))

INFORMATION DIGEST

UAE Central Bank Issues Thematic Review of Sanctions Screening Procedures; Takes Action

Following its September 2020 review of the sanctions screening systems of 30 supervised financial institutions (FIs), the Central Bank of the UAE (CBUAE) issued "Sanctions Screening Testing Thematic Review: Lessons Learned and Expectations" in January 2021. Overall results are reported in an anonymized manner in order to allow FIs to self-assess how their individual current practices measure up to CBUAE's expectations and determine where improvements are required.

Each of the ten "Lessons Learned" contained in the CBUAE's Review emanate from deficiencies identified among one or more FIs and are followed by a statement of expectation from the CBUAE. "Lessons Learned" and notable areas of concern observed include:

1) **Out-of-the-Box Solutions** – Certain FIs using "out-of-the-box" solutions exhibited limited knowledge of the solutions' capabilities and configurations.

2) **Documented Methodology** – FIs should have a clear, comprehensive, and documented methodology articulating its plan for executing its sanctions screening obligations.

3) **System Effectiveness versus System Efficiency** – Certain FIs ignored system efficiency in favor of high effectiveness. In addressing system inefficiencies caused by mounting backlogs of uninvestigated alerts, the Review was particularly stern: "Delays in alert clearing are not tolerated by the CBUAE."

4) **Ownership and Accountability** – For a few FIs, clear ownership and accountability of certain elements of their sanctions screening program was not evident.

5) **Regular Testing and Tuning** – A number of FIs did not test and tune their systems on an ongoing basis.

6) **Data Quality Issues** – FIs with incomplete and/or inaccurate customer information could be vulnerable to potential sanctions breaches.

7) **Risk-based Approach** – Many instances where FIs were unable to demonstrate an understanding of the risks involved with, for instance, aliases and vessel names.

8) **Internal Skill Set** – Some FIs insufficiently trained employees to adequately manage its sanctions screening systems.

9) **Vendor Dependency** – Significant reliance among some FIs on vendors' software with little to no customisation of the procured solution.

10) **Weak Manual Systems** – A number of FIs were using manual processes that offered limited functionality.

Produced by the CBUAE's AML/CFT Supervision Department, the nine-page Review represents a "first phase of implementing enhancements to the CBUAE's onsite and offsite examination methodology to assess sanctions related controls." As stated in Review, CBUAE's overarching expectation is that all FIs "achieve a high level of compliance with related regulatory obligations and meet global benchmarks to ensure performance is in line with global peers."

The full report is available under the "Best Practices and Awareness" tab on the AML page of the CBUAE website.

Shortly after the Review's release, the CBUAE announced imposition of financial sanctions on 11 banks operating in the UAE, pursuant to Article 14 of the Federal Decree Law No. (20) of 2018 on Anti-Money Laundering and Combating the Financing of Terrorism and Financing of Illegal Organisations (AML/CFT Law). The total monetary penalty assessed against the banks, which were unnamed in the CBUAE announcement, was AED 45,758,333 (USD 12.4 million).

In its statement, CBUAE explained that: "The financial sanctions take into account the banks' failures to achieve appropriate levels of compliance regarding their AML & Sanctions Compliance Frameworks as at the end of 2019." CBUAE added: "All banks operating in the UAE have been allowed ample time by the CBUAE to remedy any shortcomings and were instructed in the middle of 2019 to ensure compliance by the end of that year, informing them that further shortcomings would result in penalties ... ."

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