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Implied obligation under Article 16(f) of UCP 600 to return rejected documents reasonably promptly

Fortis Bank S.A./NV and Stemcor UK Ltd v Indian Overseas Bank [2010]
EWHC 84 (Comm)

In our International Trade and Commodities Legal Update February 2010, we reported that the beneficiaries under five letters of credit (L/Cs) issued by Indian Overseas Bank (“IOB”) had succeeded in defeating all save one of IOB’s defences based on alleged documentary discrepancies under the L/Cs. The sole discrepancy that was upheld by the court gave rise to a “preclusion point” under Article 16(f) of UCP 600 as incorporated into the L/Cs. The court has now dealt with the preclusion point as a preliminary issue at a subsequent hearing.

Background

The ICC Uniform Customs and Practice for Documentary Credits (“UCP”) governs the operation of letters of credit where its provisions have been incorporated into the documentary credit. UCP 600 is the latest revision of the rules and came into effect on 1 July 2007. There is, therefore, little case-law on the interpretation of its provisions.

UCP 600

Article 16 of UCP 600 deals with “discrepant documents, waiver and notice”. Where the issuing bank determines that a presentation does not comply with the documentary requirements of the letter of credit, it can refuse to honour or negotiate the presentation. However, Article 16 (c) requires the bank to give formal notice to the presenter, stating each discrepancy in respect of which it is refusing to honour or negotiate. This Article 16 (c) notice must also state *inter alia* either that the issuing bank is returning the documents (a “return” notice) or that it is holding the documents pending further instructions from the presenter (a “hold” notice). Article 16(d) requires the Article 16 (c) notice to be communicated to the presenter before close of business on the fifth banking day following the day of receipt. Article 16(f), which deals with preclusion, states as follows:

“If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation”.

The wording of the equivalent provision in UCP 500, the predecessor to UCP 600, differed in that it contained an express obligation on the issuing bank to act in accordance with its disposal statement by actually returning the documents to the presenter or holding the documents at the presenter’s disposal pending further instructions. If it did not do so, it would be precluded from relying on that statement. There is no such express wording in Article 16(f).

Issues in the present case

IOB had rejected a number of drawings under the L/Cs by sending either “return” notices or “hold” notices to F, but it did not return the discrepant documents to F until some weeks later.

The court was invited to consider whether Article 16(f) imposed an implied obligation on IOB as the issuing bank to act in accordance with the disposal statement made in its Article 16 (c) notices to F (i.e. to return the documents to F and / or hold them pending F’s instructions) and, if so, how soon it had to do so.

Commercial Court decision

Mr Justice Hamblen found that best practice and the “reasonable expectations of experienced market practitioners” meant that a disposal statement by an issuing bank carried with it an implied obligation to act in accordance with the statement made. This reflected what had been required under UCP for 40 years and was what any bank would be expected to do in such circumstances. In particular, he said, failing to deal with the documents as stated could lead to very serious consequences, for example where documents of title affecting the beneficiary’s rights and security were involved (in this case, the documents included bills of lading relating to the merchandise shipped under the sale contracts). If the issuing bank said it was returning the documents but did not do so or did so only after some considerable delay, the beneficiary could lose the opportunity to deal in the documents or even to re-present conforming documents before the L/C expired.

As to the time period within which IOB would have been expected to act on their refusal notices, the judge accepted expert evidence that it was normal and expected international banking practice for documents to be returned and document disposal instructions to be complied with reasonably promptly. Most international banks could rely on speedy methods, such as a courier, to return the documents within one or two banking days.

The judge rejected IOB’s argument that they were not in breach of any duty to return the documents with reasonable promptness because F had asked them to retain the documents and not return them. The judge said that this request was no more than a demand by F for payment under the L/Cs and did not undermine IOB’s obligation to return the documents that were the subject of the “return” notices.

As regards the “hold” notices, the judge also rejected IOB’s argument that F had not given them valid instructions to return the documents because F had insisted on the bills of lading being endorsed to them before being returned, which IOB said F had no right to do under the UCP. The judge held that F had negotiated the documents under the relevant L/C, was their owner and was entitled as a matter of law to request the endorsements. However, even if that were not so, IOB could still have returned the documents unendorsed, as they ultimately did.

Consequently, the judge held that the claimants had made out their case on preclusion and IOB could not rely on the relevant documentary discrepancy because they had not acted on their disposal statement reasonably promptly.

Conclusion

Despite the change in wording, it seems that UCP 600 does not bring with it any real change on the preclusion point. The moral would seem to be that if you are a bank with discrepant documents, you hold on to them at your peril.

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