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Documentary Credit WORLD

In This Issue...

24 FEATURE

■ REIMBURSING A CONFIRMING BANK

An English court recently took up the interpretation of UCP600 Article 7(c) and whether adding two additional words would clarify its meaning at the very time a UCP revision was set aside for the foreseeable future. In his analysis of *Deutsche Bank AG v. CIMB Bank Berhad*, Roger Fayers examines the arguments of the parties. The arguments included those from the confirming bank that contended that reading into Art. 7(c) added words reflects "the inexorable logic of the letter of credit machinery". The issuing bank countered that if the UCP600 drafters "wished to achieve this effect" then the words would have been written into Art. 7(c). The two words are: "states it". In arriving at its decision, the Court observed that "UCP is revised periodically, and that is the occasion for introducing changes if thought desirable."

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Documentary Credit WORLD

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EPA Proposed Rule Comment Period Nears End

The US Environmental Protection Agency (EPA) Administrator signed the proposed rule, *Financial Responsibility Requirements Under CERCLA Section 108(b) For Classes of Facilities in the Hardrock Mining Industry,* in late 2016 and it was subsequently published in the *Federal Register* on 11 January 2017. The proposed rule contains standby LC implications and was the subject of comment by IIBLP (see page 34).

The period to comment on the proposed rule ends on 11 July 2017. The Rule Summary and Additional Resources are available.

ICC Banking Commission Aims to Accelerate Digitalisation

On 6 June 2017, the ICC Banking Commission announced formation of a digitalisation of trade finance working group. Efforts will be devoted toward helping the trade finance industry realise digitalization benefits such as increased transparency, time and cost savings, fewer errors, and reduced compliance and operational risk. According to an ICC news statement, working group's core activities include:

"E-compatibility" of ICC rules for trade finance -- The group will evaluate ICC rules in order to assess e-compatibility and ensure they are 'e-compliant'.

Standards -- The group will develop a set of minimum standards for the digital connectivity of service providers particularly across legal, liability, information security, and technology.

Legal status -- The group will examine the legal and practical issues related to the validity and value of data and documents in digitised form, including a comparison of third party rights under paper and electronic bills of lading.

China Amps Up Fight against Suspicious Transactions with New Measures

China's "Administrative Measures for the Reporting of Large-sum Transactions and Suspicious Transactions by Financial Institutions" (the Measures) take effect 1 July 2017. The People's Bank of China (PBOC), the country's central bank, promulgated the regulations in December 2016 which are aimed at tightening requirements for financial institutions to curb financial terrorism and money laundering.

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The Measures replace prior regulations in place since March 2007. Comprised of 30 articles grouped in six chapters, the new Measures are geared toward raising the level of scrutiny on big money transactions and dubious deals.

Chapter 1 of the Measures prescribes general provisions for financial institutions on reporting large-sum transactions and suspicious transactions to the China Anti-Money Laundering Monitoring & Analysis Center.

In Chapter 2 the PBOC sets forth reporting standards in greater detail, mandating that Chinese financial institutions report large domestic cash deposits, withdrawals, and fund transfers. Per Article 5 of the Measures, the China Anti-Money Laundering Monitoring & Analysis Center must be notified of: daily individual or cumulative transactions of Chinese RMB 50,000 (or those of other currency equivalent to USD 10,000) or more, domestic fund transfers of RMB 500,000 (USD 100,000) or more, and cross-border transfers of RMB 200,000 (USD 10,000) or more. Article 7, however, exempts from reporting several types of non-suspicious large sum transactions.

Subsequent chapters on reporting suspicious transactions, internal management measures, legal liabilities, and supplementary provisions provide guidance on how Chinese financial institutions shall fulfill anti-money laundering obligations. For instance, financial institutions are required to: carry our "real-time monitoring" of stipulated terrorist lists (Article 18); have full-time staff in place responsible for transactions reporting (Article 20), and retain transaction records for at least five years (Article 22).

According to the PBOC, documents, reports, and transactions will be published to guide financial institutions in performing data interface duties and developing sound transaction-monitoring systems. The PBOC also reports efforts to develop a more robust and efficient second generation system that performs large-sum and suspicious transaction report analysis.

Iran Finds China's Certificate of Origin Policy Problematic

According to a 31 May 2017 report by *IranOilGas Network*, Iranian petrochemical exporters face new challenges in cargo dealings with China. Chinese banks that previously accepted certificates of origin for export products presented by companies now demand official authorities to approve the authenticity of those certificates of origin. A Central Bank of Iran official contends the policy change relates to China's efforts to combat money laundering.

Hossein Yaghoubi, Central Bank of Iran's (CBI) general manager of international affairs, believes the situation can be overcome: "This is not very complicated. The Iranian organization which issues a certificate of origin for these export cargos can also approve its authenticity."

Yet Yaghoubi revealed that groups of Iranian exporters have expressed their concerns in writing to the CBI about the new practice. He indicated the matter is being examined, as reported in *IranOilGas Network*.

Similar challenges exist in countries such as Turkey and the UAE, but Yaghoubi explained that China is "the main problem" due to the large volume of Iran petrochemical export cargos loaded for Chinese destinations.

Maersk Enters the Trade Finance Arena

Denmark-based AP Moller - Maersk, one of the largest container shipping companies globally, have announced the set up of "Maersk Trade Finance".

"Maersk Trade Finance" is a reaction to the fact that the shortage of trade finance across businesses is cited as one of the main obstacles in the global commerce It is an effort to combine the traditional cargo services with pre-shipment and post shipment credit facilities.

"Maersk Trade Finance" is an online digital platform.

It is not the first time transport companies have entered into the Trade Finance arena. In many ways it seems natural – even logical – to combine the transport of the goods with financing. In fact, Maersk have stated that the goods will be the only collateral required.

It is refreshing to see that entities outside of Trade Finance are attempting to innovate Trade Finance. It is fair to say that the entities inside Trade Finance have not been too successful in doing that. It is still uncertain if the blockchain technology will be the foundation for the future Trade Finance. However at face value it is a fact that "Maersk Trade Finance" is easier explained than how the blockchain technology can support Trade Finance.

The Maersk Way

As described on the Maersk Trade Finance website, its service does not change the shipping product offered or the shipping contract signed with shippers in terms of pricing or services, but it does impact certain aspects of the B/L process. These include:

- The Bill of Lading should always be "Negotiable Shipped on Board" and NOT "Seaway"
- The Bill of Lading will be consigned "To the order of Sunrise A/S".
- The exporter will only obtain a copy for records and customs clearance for shipments funded by Maersk and not the original B/L.

There are however some built-in challenges that will make the "Maersk Trade Finance" pilot less effective. For example the funds are provided to Indian exporters in foreign currency. Because Maersk is a foreign entity in India, they cannot lend in rupees and they cannot finance imports either. Therefore Maersk may consider applying for a banking licence. This is of course one way of solving it. Another way would be to team up with local banks that actually do have a banking license in the relevant country.

"Maersk Trade Finance" is a promising initiative. Personally however, I would rather have seen a closer co-operation between the parties involved in the trade cycle.

— Kim Sindberg

Sberbank, Steel Company Complete Blockchain LC Transaction

Russia's largest bank, Sberbank, and steel and mining company, Severstal, relied on blockchain technology to successfully conduct a letter of credit transaction. Announced in June 2017, Sberbank claims the blockchain-based LC transaction to be the first of its kind in Eastern Europe. Utilizing the prototype developed by Sberbank, subsidiary BPS-Sberbank issued an international LC backing a contract signed with Severstal of Belarus to deliver steel. Sberbank served as confirming bank.

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DOMESTIC CORRESPONDENT REPORT: BANGLADESH

A workshop titled "Review of the Trade Services Operations of Banks 2016" was held at the Bangladesh Institute of Bank Management (BIBM) on 18 June 2017. The objectives of the review were:

- to discuss overall activities influencing trade services operations of banks in 2016;
- to discuss regulatory and operational aspects of trade services of banks in Bangladesh;
- to examine trends in trade services operations of banks for the period 2011-2016; and
- to identify key challenges ahead for trade services operations and a future course of action.

The research team was comprised of Dr. Shah Md. Ahsan Habib, Professor & Director (Training) BIBM (Team leader); Ms. Antara Zerin, Assistant Professor, BIBM; Md. Tofayel Ahmed, Lecturer, BIBM; Anisur Rahman, Joint Director, Bangladesh Bank; Mahmudur Rahman, SVP, Islami Bank Bangladesh Ltd; and ATM Nesarul Hoque, Vice President, Mutual Trust Bank Limited. The review report identified eight notable observations and recommendations:

1) **As a group, private commercial banks (PCBs) are the major market shareholders in trade facilitation.** Close to four-fifths of export proceeds entering the country and over four-fifths of all import payments were made through PCBs in 2016. In terms of trade facilitation, the dominance of PCBs widened in 2016 compared to 2015. In connection with trade financing, one notable observation in 2016 was the attainment of a considerable increase in growth because of the notable contribution of PCBs. Foreign commercial banks (FCBs) also achieved marginal positive growth which had been negative in the previous year. The growth rate for state-owned commercial banks (SCBs) remained negative in 2016. As a bank group, PCBs were also the most dominant shareholder in trade financing, remittance services, and maintenance of foreign currency accounts. PCBs became the key source for export financing, replacing SCBs during 2015-2016. As a whole, PCBs' market share in trade facilitation increased in 2016.

2) **The documentary credit continued to be the most prominent payment technique for import and export transactions in Bangladesh in 2016**, as it has been in previous years. Though extensive use of the documentary credit primarily started in response to regulatory compulsion, the LC remains the most dominant payment technique even after removal of restrictions on some areas of transactions. This is in sharp contrast to global practice where most payment transactions take place through open account. An increase in cash in advance for import transactions in terms of volume and a decrease in imports in 2016 may be explained by the change in exporters retention quota (ERQ) cash in advance limit by Bangladesh Bank in 2015. Documentary collection remained the country's second most important trade facilitation tool. In export processing zones (EPZs) however, the situation is different. Although documentary credits and documentary collections are predominantly used for imports, traders relied heavily on open account and documentary credits in exports. Of the different LC types, back-to-back and transferable LCs are

very common, however there has been a downward trend in use of transferable LCs. In offshore banking, usance bill payable at sight (UPAS) LCs remains the key component in the asset side.

3) Concerning pre-shipment finance, packing credit (PC) was not the main component, but rather **Secured Overdraft (SOD) or Export Cash Credit accounted for about half of the total pre-shipment credit in 2016**, as was the case in 2015. It has been observed that banks are more interested in offering SOD or Export Cash Credit instead of PC in order to charge relatively higher interest rates. It is against the spirit of Bangladesh Bank's policy of supporting exporters with lower interest rates and the government's position to support exporters with soft loan facilities. It has also been observed that, due to policy changes, export development fund (EDF) facilities are becoming increasingly attractive to traders. Along with increased funds allocation, there should be greater transparency between banks and policy makers for effective use of funds.

"The root cause might be use of the same SWIFT template from generation to generation without carefully consideration of its content ... "

4) **Poor drafting of LC clauses and inappropriate use of INCOTERMS in LC operations emerged as a concern** for many of trading clients of Bangladesh banks. Such practices are unfortunate when the country has such a large number of certified specialists in the industry. The root cause might be use of the same SWIFT template from generation to generation without carefully consideration of its content, changing guidance regarding practice rules, and the underlying transaction. It is essential that efforts are devoted to working on these issues in order to preserve the country's reputation for sound practice and professionalism.

5) **Correspondent banking relationships remained a critical factor for trade facilitation in 2016.** In some instances, there were cases where a global bank has withdrawn its correspondent relationships from the entire country. There are now more regional banks in the Bangladesh market that are actively engaged in the country's trade finance business. A few newly established banks are relying on local private commercial banks to facilitate cross border transactions. For credibility, Bangladesh Bank may consider assessing and publishing annual status reports on correspondent banking relationships. In addition, in recent months, a few third parties are also beginning to play very important roles as intermediaries between banks and earning fees and commissions. As a result, some local banks are already facing challenges. Banks and regulators need to work together confront this issue.

6) **In several instances banks have had to create forced loan against imported merchandise (LIM) and loan against trust receipts (LTR) due to non-compliance of importers.** In some cases, non-compliance on the part of exporters resulted in non-performing loans (NPL). There are also instances of funds diversion and cancellation of contacts. Generally, the available data on trade financing indicates a very small volume of NPLs. Sometimes this data could be misleading as classified data is commonly shown as part of term loans. NPL data on trade financing should be

disclosed separately for better transparency. In spite of improvements, there are instances of payment delays and cases of non-payment that should be handled with greater care. Considering the unique nature of trade transactions and their growing complexity, a separate bench in the country's court system may be needed to ensure effective adherence of regulatory measures. In regard to growing expansion of the use of UPAS and other financing issues in offshore banking, the country needs regulatory guidelines immediately.

7) Incidences of trade based money-laundering is an area of growing concern for policy makers and central banks around the globe. **Although Bangladesh's AML rules are in line with globally accepted standards, there is still considerable room to improve their enforcement and in identifying applicable red flags.** Authorized Dealers (ADs) need to be more vigilant regarding legal compliance and recognizing appropriate pricing for exportable and importable products as a way to address TBML. Compliance is already the greatest concern for banks and greater compliance requirements are affecting operational costs of trade financing. However it is essential that compliance with AML rules should be a collective concern. Collective efforts from the foreign exchange policy department (FEPD) and the Bangladesh Financial Intelligence unit (BFIU) of Bangladesh Bank and custom authority are a prerequisite for greater enforcement of AML rules.

8) **Enforcement of online reporting and monitoring system by the Bangladesh Bank has brought positive change in terms of declining irregularities among banks and improvement in data accuracy.** In particular, reporting practices by banks improved remarkably in terms of accuracy. Bangladesh Bank is working to improve reporting efficiency by offering training, however this should be considered a continuous process in order to ensure greater efficiency and a minimal information gap. Improvements were observed with regard to monitoring and coordination among stakeholders. The AD Forum is a good initiative by the Bangladesh Bank for ensuring greater coordination among the central bank and authorized dealers. Introduction of Dashboard, an integrated online arrangement, and greater coordination among customs and Bangladesh Bank officials has recently helped identify several cases of irregularities and frauds. Since the obligation of ensuring fair and competitive pricing for imports and exports lies with banks, they have devise an effective mechanism to implement this obligation. Though customs officials have offered a list of minimum prices for select tradable items, the problem still needs to be addressed. The country needs greater coordination among different stakeholders to address pricing issues and country risks for competitiveness and regulatory compliance.

— ATM Nesarul Hoque

(continued from page 5)

According to a Sberbank press release, the deal allows for a complete LC cycle: from the point when the applicant applies for the LC to providing a package of documents and monitoring the progress of document verification.

Sberbank Senior Vice President Igor Bulanstev stated: "Sberbank was one of the first organisations to begin working on practical application of blockchain because we view it as a very promising technology, including for use in international letter of credit transactions."

Iran Gas Refinery Project Backed by LC

The Persian Gulf Petrochemical Industries Company (PGPIC) has opened a $2 billion letter of credit to finance construction of the Persian Gulf Bid-Boland (Bid-Boland II) Gas Refinery.

According to a 1 May 2017 report by *IranOilGas Network*, $200,000 has already been allocated towards the LC. PGPIC Managing Director Adel Nejad Salim added: "The remaining amount of the L/C is also available and is expected to be gradually injected into the project as it progresses ... The construction of this refinery has already made beyond 40% headway."

The report did not explain what is meant by "gradually injected" nor did it reference the LC's documentary requirements.

The gas refinery is designed to produce 46 million cubic meters per day (mcm/d) of sweet gas, 1.5 metric tons per year (mt/y) of ethane for Gachsaran Petrochemical Company's Olefins plans, 1 mt/y of propane and 500,000 tones/year of butane for exports, and 1.8 mcm/d of sour gas to be injected into oil reserves, as reported by *IranOilGas Network*.

IranOilGas Network reports that Bid-Boland II serves as the ethane feed supplier for Gachsaran Olefins project, as well as its downstream projects, including Mamasani, Dehdasht, Boroujena and Kazeroun polyethylene projects. Commissioning of the Bid-Boland II is scheduled to commence March 2018 and be completed by 2019.

QUOTE TO NOTE

"The number of people working directly on "controls" at JPMorgan Chase, America's biggest bank, jumped from 24,000 in 2011 (the year after the Dodd-Frank act, the biggest reform to financial regulation since the 1930s) to 43,000 in 2015. That works out at one employee in six."

— *The Economist*
6 May 2017

Parties Agree to Fourth Amendment of LC Reimbursement Deal

Renaissance Reinsurance Limited as Borrower entered into a Fourth Amendment of a Letter of Credit Reimbursement Agreement. Bank of Montreal serves as Documentation Agent for the LC, Bank of Montreal (London Branch) as Lender, Citibank Europe as Collateral Agent and Lender, and ING Bank N.V. (London Branch) as LC Agent and Lender.

Effective 25 May 2017, the Fourth Amendment amends the previous LC Reimbursement Agreement dated 23 November 2015, formerly modified to support the obligations of the Borrower's syndicate, according to a US Securities and Exchange Commission filing.

Pursuant to the Fourth Amendment, a USD 380 million LC has been reduced to USD 180 million and a GBP 90 million LC has been cancelled.

UPDATES

Nigeria's Central Bank Caps LCs at USD 158,000

In the face of heightened dollar scarcity and necessity to ensure even distribution of available foreign exchange funds to manufacturers, the Central Bank of Nigeria (CBN) has fixed the maximum value approval per letter of credit at 50 million Nigerian naira (USD 158,000).

An unnamed bank source explained that LCs above USD 158,000 must be approved by the managing director, are dependent upon forex availability within the period, and require the excess amount to be provided by an autonomous source, reported *The Nation*.

In one instance, a USD 200,000 LC request was adjusted to USD 158,000 before it was approved. In another case, a businessman was able to open three LCs totaling USD 250,000 in order to import raw materials for his company.

The Nation reports that this CBN intervention has consequently impacted production volumes of major manufacturers and hurt turnover of prominent businesses.

However, Johnson Chukwu, Cowry Assets Limited's Managing Director, commented that forex earnings have subsequently bolstered and that the USD 158,000 LC ceiling is a significant improvement compared to companies' inability to even access USD 10,000 earlier this year, reported *The Nation*.

Alpha Natural Resources Secures New LC Facility

On 2 May 2017, Alpha Natural Resources (ANR) announced that it has paid off its term loan under a USD 125 million credit agreement entered into at the time of the company's emergence from Chapter 11 bankruptcy (Exit Facility). ANR also entered into a new USD 60 million accounts receivable purchase facility with Hitachi Capital America Corporation (HCA) and a new USD 200 million letter of credit facility with Citibank.

According to an ANR press release, the accounts receivable purchase with HCA will provide ANR with additional liquidity up to USD 60 million, a portion of which will be utilized to replenish liquidity used to pay off the existing term loan.

The new LC facility replaces the previous one established as part of the Exit Facility, ANR stated.

International Updates

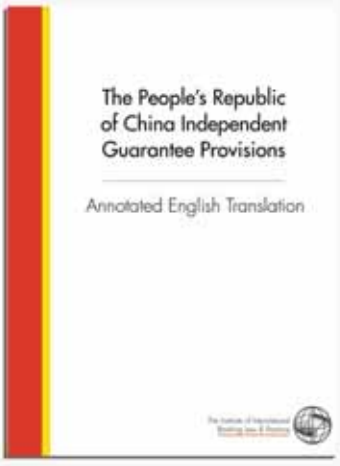
SAUDI ARABIA: In the wake of the country's decision on 5 June 2017 to sever diplomatic relations with Qatar, the Saudi Arabian Monetary Authority (SAMA) has reportedly ordered local lenders to refrain from increasing their exposure to any Qatari clients. According to published reports citing unnamed sources, the order includes LCs and trade finance facilities.

ZIMBABWE: The foreign currency crisis and dubious creditworthiness of local banks has prompted foreign financial institutions to exclusively demand fully-funded confirmed LCs from Zimbabwean banks, reports *Bulaway 24 News*. Bank guarantees and unconfirmed LCs from local banks have been rejected as foreign banks are unwilling to accept the risk of local banks and suppliers are refusing to provide goods on the basis of unconfirmed LCs. ■

Cover

On 1 December 2016, the Supreme People's Court of China passed Provisions for independent guarantees. These provisions will have tremendous impacts on both domestic and international guarantees involving China. IIBLP has the information you need to make necessary adjustments to your guarantee dealings with China.

Annotated English Translation



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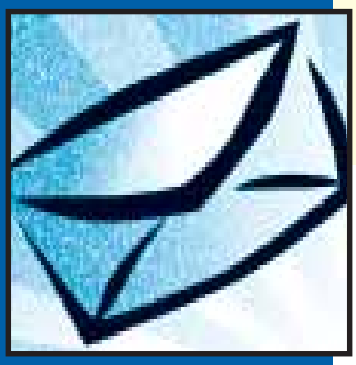

THE READERS SPEAK

SECTION 232 INVESTIGATION REFERENCED IN AN LC

A *DCW* Reader writes:

Someone recently brought to my attention the following wording contained in an LC:

> Pursuant to the United States sanctions and the relevant laws and regulations applicable to us as well as trade restriction resulting from the ongoing section 232 investigation, antidumping and countervailing duty investigations, we shall not handle or deal with any documents, shipments, goods, payments and/or transactions that may relate directly or indirectly to any sanctioned countries, trade restrictions, designated persons or organizations in relation to the aforementioned sanctions, laws, trade restrictions and regulations. Accordingly, any presentation that may violate this condition may be rejected without any liability on our part.

Do you see any concerns with this worlding?

A **Section 232 investigation** is conducted under the authority of the US Trade Expansion Act of 1962, as amended. The purpose of the investigation is to determine the effect of imports on the national security. Investigations may be initiated based on an application from an interested party, a request from the head of any department or agency, or may be self-initiated by the Secretary of Commerce.

The Secretary's report to the President, prepared within 270 days of initiation, focuses on whether the importation of the article in question is in such quantities or under such circumstances as to threaten to impair the national security. The President can concur or not with the Secretary's recommendations, and take action to "adjust the imports of an article and its derivatives" or other non-trade related actions as deemed necessary.

(Source: US Dept. of Commerce's Bureau of Industry and Security)

DCW Responds:

One could understand such a clause in an advice by a nominated negotiating bank but not in an LC or confirmation. Having issued the LC or confirmation, the issuer or confirmer is liable unless there is a violation of a government order or sanction that is in place in which case the bank may not be able to act or any payment must be made into a blocked account. The existence of an investigation does not constitute any determination regarding the transaction.

Comments to all queries posed are not necessarily those of DCW *and are not provided as legal advice. If legal advice or other expert assistance is required, the service of a competent professional should be sought.*

RESPONSES TO THE ICC DECISION ON UCP

Members of the LC community were invited to share their thoughts on the ICC's April 2017 decision not to proceed with a revision of the UCP600 rules. Viewpoints appeared in last month's *DCW* issue and additional perspectives are presented here.

"I partially share the view of ICC. I agree with ICC that the current combination of UCP and ISBP should be sufficient from a rules and practices point of view. Given the current technological and regulatory developments, timing for a UCP revision now would not be the best. I do see however a difference between understanding the rules and practices and having an awareness on how the behaviour of banks in the application of rules impacts Trade Finance products. In my view, understanding is only one of the two legs. The more important leg is the behavioural leg. This should be addressed much better in the future to ensure that companies that purchase Trade Finance products receive reliable financial products provided by responsible institutions.

I think that Trade Finance as an industry is rapidly approaching or even already on a crossroad which will determine the heading of the industry for the years to come. This crossroad will shape the products and will determine who are the most suitable players to offer these products to the companies who are actually trading and require modern services and financing. The big questions for me are for how long we will be on this crossroad and how are we going to generate to the same level of rules and practices and general acceptance thereof on a global scale, the way we did in the traditional Trade Finance industry. Because I do believe that all the parties that are active in international trade require this common ground to have a stable trade environment for the decades ahead of us.

– Ed Jongenelen (Netherlands)

"The current UCP600 rules are grey in some areas. The ISBP offers further guidelines to clarify these grey areas but are not globally accepted and may not provide legal protection to the banks. Furthermore, there are some products that are not covered such as Commodity Finance, Syndicated LCs, Risk Participations, Fronting LCs and Compliance and Regulatory concerns.

Clarity is required for standby LCs that are issued subject to UCP, particularly elimination of transport document rules. Also, UCP600 Article 14(d) and its "not conflict with" standard for data in documents is problematic.

Commodity Finance sometimes requires "LOI" (Letter of Indemnity), Escalation / Auto-reduction Clause and provisional pricing of which none is covered in the UCP.

I would suggest an interpretation of the current UCP's treatment for SBLCs to be more in line with ISP98."

– banker at US branch of large non-US bank

READERS SPEAK

"I agree with ICC on non revision of UCP and instead choosing the rules to be more widely available among practitioners. The ICC Banking Commission shoud issue guidance papers on the spesific issues regarding UCP and documentary credits. For example on transferable credits, back to back credits, revolving credits, installment credits, assignment of proceeds, and other topics with various scenarios discussed. This would be similiar to those guidance papers like the sanctions paper and inventory finance paper it has issued before. Creation of each specific issue might be assigned to a particular ICC national comitteee and could be discussed at Banking Commission meetings thereafter. For example, ICC Turkey might take up the structure and workflow of back to back credits."

– Hasan Apaydin (Turkey)

"Yes, I support the ICC decision to concentrate on training and easier access to ICC rules and practice rather than revising UCP. In my point of view, lack of understanding of the rules is the main problem today. It starts with bad drafting of a sales contract and the LC wording, continues with presentation of discrepant documents, and in the long run causes delays in payments or raises disputes between the parties involved. And the practice is the most important thing here. You can be well educated by rules but don't know next to anything about their correct usage or don't understand them in the right way. To avoid it you must be in touch with this business day-by-day using updated information. But today we have to collect such data from different sources and some information is not available easily. For example, it is no secret that a lot of trade finance players have no access to expensive DC-PRO portal and to the latest ICC Opinions which have restricted distribution. ISBP is a separate publication without a mandatory link to it in UCP that creates difficulties in argumentation of each party's decision in examination of documents. As regards education as a starting-point, I'd like to note that a majority of training courses organized all over the world are mostly in English and oriented to banks that makes LC business highly tailored and, I would say, even foggy for corporates and national regulators. So, there are a lot of things to discuss.

I think that next UCP revision is a matter of time. We also feel discomfort when we see different approaches among banks to LCs payable by negotiation or LCs requiring a sight draft that has no sense. Some UCP articles need slight modifications after the lapse of time. But mostly UCP articles are workable and they don't need fundamental changes now.

If I were revising UCP I would add articles for standbys if UCP is to remain applicable for standbys. At present, a lot of standbys are subject to UCP today because banks and corporates use UCP for commercial LCs and know how the rules works. ISP98 is also very good rules for standbys but people are used to 'have UCP in their pocket' and therefore prefer UCP to ISP98 very often.

Additionally, I would gather practices and experiences that banks of different countries have with commonly used means of financing (discounting, post-financing, usance payable at sight LCs, etc.) and include basic principles in ISBP. I would also merge ISBP with ICC Opinions into one resource available in electronic form at the ICC website so that their content can be revised when it is necessary with simple navigation to particular UCP articles and change ISBP & ICC Opinions status from practical to more forcible. And digitalization of trade finance is a great challenge for LC business now. I hope that such process will take place in cooperation between ICC and technical support in respect of the current UCP and by deep involving digitalization in its next revision."

– Irina Chuvakhina (Belarus)

LITIGATION DIGEST

Kolmar Group AG v. Jiangsu Textiles Industry (Group) Import & Export Ltd. [2016] (Su 01 Xie Wai Ren No.4)[China]

by Jun XU*

Topics: Sales Contract; Contract to Provide LC; Arbitration; Foreign Arbitration Recognition by China; Foreign Arbitration Enforcement by China; Singapore International Arbitration Center

Type of Lawsuit: Seller sued Buyer for default in the underlying contract and requested the recognition and enforcement of Singapore International Arbitration Center's arbitration award by the court in China.

Parties: Plaintiff/Seller– Kolmar Group AG Switzerland

Defendant/Buyer– Jiangsu Textile Industry (Group) Import & Export Co. Ltd., Nanjing, China

Underlying Transaction: Styrene

Decision: The Nanjing Intermediary People's Court entered judgment for the Seller.

Rationale: Both China and Singapore are members of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards.* When the underlying contract provides that disputes are subject to arbitration in Singapore and interpretation of Singapore laws and when there is no evidence that the arbitration award made in Singapore is against the public policies of China, based on the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and Civil Procedure Law of the People's Republic of China, the court recognizes and enforces the arbitration award made by Singapore International Arbitration Center.

* Jun Xu, Deputy General Manager, Bank of China, Jiangsu Branch, China; Member of ICC Banking Commission's Executive Committee, a Member of ICC DOCDEX, and a *DCW* Editorial Advisory Board Member.

LITIGATION DIGEST

Factual Summary:

Seller and Buyer signed a sales contract for styrene on 17 Nov. 2014. Seller prepared goods as per the contract. However, since Buyer did not cause issuance of a letter of credit as agreed in the sales contract, Seller terminated the contract.

According to the contract, in the event of a dispute, the dispute should be submitted to the Singapore International Arbitration Center (SIAC) for arbitration according to its arbitration rules in Singapore and subject to Singapore law. On 22 Jan.2015, Seller initiated an arbitration request with SIAC, seeking compensation for losses, interest, and related charges. On 27 Jan. 2015, SIAC sent emails to both parties requiring them to nominate an arbitrator within 14 days upon receipt of the notice, stating that the chair of the arbitration tribunal would otherwise make the nomination according to SIAC Arbitration Rules.

On 14 Mar. 2016, SIAC issued its arbitration award in favor of Seller. According to the SIAC arbitration award, Buyer's conduct constitutes material default and Buyer should compensate Seller USD 924,000 plus interest, legal fees, and arbitration fees. The award also stated that the Buyer did not respond as required nor nominate any arbitrator.

However, since Buyer ignored the arbitration award, Seller petitioned the Nanjing Intermediary People's Court for recognition and enforcement of the SIAC Arbitration Award. The court entered in judgment for Seller.

Legal Analysis:

1. Foreign Arbitration Recognition and Enforcement: Buyer claimed that Seller's request for enforcement of the award should not be supported since neither did SIAC properly notify the award to the designated arbitrator by Buyer timely nor did it deliver the award to the proper place of Buyer according to the international Convention participated by China. Buyer's arguments are: (1) During the course of the arbitration, Seller did not specifically notify Buyer of the arbitrator nomination, deadline of the nomination, or the nominated arbitrator; (2) The contract based on which the award was made is in violation of the laws of PRC. The contents of the contract involve an illegal futures transaction and the nature of such transaction is under determination. As the award violates relative Chinese laws, recognition and enforcement of the award should be proceeded after determination of the nature of the contract signed by both parties; (3) Buyer did not receive the arbitration award. According to evidence provided by Seller, the award was delivered to a former employee of Buyer who had already resigned when the award was delivered.

Nanjing Intermediary People's Court stated:

> "[T]he arbitration award was made in Singapore, and both China and Singapore are the contracting countries of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, according to Article 283 of Civil Procedure Law of the People's Republic of China, when

determining whether the arbitration award should be recognized and enforced, the relative rules in the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* shall be applied. Only under the circumstances where the evidence provided by the [Buyer] indicates that the arbitration award falls within the scope of *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* Article V 1, the people's court may decline to recognize and enforce the arbitration award at the request of the Buyer."

The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* Article V(1) stipulates:

"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Arbitration Rules: The court noted that, according to Article 3 of the SIAC Arbitration Rules, the initiator (Seller) should forward a copy of the arbitration notice to the respondent (Buyer). Article 4 requires the respondent to respond in writing to the initiator within 14 days upon receipt of the arbitration notice. Article 8(2) stipulates that if the party fails in the nomination of an arbitrator within 14 days upon receipt of the arbitrator nomination notice or according to the agreed methods, the chairman of the center shall nominate on that party's behalf.

The court determined that, according to the contract agreed between both parties, a dispute should be submitted to Singapore International Arbitration Center for arbitration. Buyer's arguments that Seller did not notify them of the arbitrator, arbitration time, and other details were not supported by the court since they did not nominate an arbitrator within 14 days upon receipt of the arbitration notice. The court considered that the appointment of the arbitrator by the arbitration tribunal was in compliance with the arbitration rules.

LITIGATION DIGEST

Comments by Jun XU:

1. Recognition and Enforcement of Foreign Arbitration Award: Following *Kolmar Group AG v. Jiangsu Textiles Industry (Group) Import & Export Ltd.* [2016](Su 01 Xie Wai Ren No.3) (China)[1], Nanjing Intermediary People's Court issued its judgment recognizing Singapore's arbitration award. However, it did so based on a different legal basis, Article 283 of Civil Procedure Law of the People's Republic of China.

Article 283 stipulates: "If an award made by a foreign arbitral organ requires the recognition and enforcement by the people's court of the People's Republic of China, the party concerned shall directly apply to the intermediate people's court in the place where the party subject to enforcement has his domicile or where his property is located. The people's court shall deal with the matter in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principles of reciprocity".

Despite the fact that the recognition and enforcement of a foreign judgment or arbitration is on a case-by-case basis, it is still a step forward for the courts of China as it is an indication of the court's openness.

2. Contract: The court was not in favor of the Buyer's arguments that the contract based on which the arbitration award was made was in violation of the laws of China. The court considers that both parties had agreed in the contract that it was to be interpreted according to Singapore law and Buyer did not provide sufficient evidence proving that the recognition and enforcement would be against the public policies of China. It is an indication that the court in China respects the parties' choice of jurisdiction, which is also an important basis the judgment was made. ■

1. This case is the first time that a PRC court has recognized and enforced a Singapore civil judgment. It is also the first time that such judgment has been made according to a reciprocal relationship between P.R. China and a foreign country.

Union of India v. M/S Indusind Bank Ltd.
No. 9087-9089 Supreme Court (Sept. 2016) [India]

Topics: Bank Guarantee; Expiry Date

Note: The Textile Commissioner of India (Commissioner), a government official, issued a memorandum on 11 June 1995 under the Imports and Exports (Control) Act that, export of raw cotton and cotton waste during September 1995-August 1996 were "permitted only against an irrevocable letter of credit." Exporters were also required to "furnish a bank guarantee" in favor of India (Beneficiary) at the rate of 10% of the contract price, to be in force for 6 months "with a provision for claims for an additional three months, after the last shipment date."

Four exporters (Exporters) entered four sales of contracts with a Singaporean company in January 1996, and on 31 January 1996 Exporters applied "together with a bank guarantee" for permission to export. The guarantee was issued by M/S Indusind Bank (Guarantor) in favor of Beneficiary.

Subsequently, Exporters were permitted to export 9,175 bales of cotton before 31 July 1996, and the permitted export shipment date was extended three times until 28 February 1997.

Text of LC:

"Unless a demand or claim under this guarantee is made against us within three months from the above date (i.e. On or before 30.4.97), all your rights under the said guarantee shall be forfeited and we shall be relieved and discharged from all liabilities hereunder."

When Exporters failed to furnish the supporting documents regarding export of goods allocated to them within the stipulated period, Commissioner asked them for the necessary documents within 15 days but no later than 20 January 1997, and informed that a failure to do so would result in a drawing on the guarantees. When Exporters still had not furnished the documents, Commissioner drew on the guarantee on 15 May 1997. Guarantor refused to honor the guarantee, stating that the guarantees could only be drawn before 30 April 1997, within the extended period originally required by the export permission. Commissioner notified Guarantor that, Guarantor was "not absolved of its obligation" of payment in light of the 8 January 1997 amendment to Section 28 of the Indian Contract Act.

In 1999, when Commissioner contacted Exporters and Guarantor again requesting payment and received no response, Commissioner and Beneficiary filed three summary suits against Exporters and Guarantor in the High Court of Bombay. By order in 2001, amended in 2002, the High Court of Bombay granted unconditional leave to Guarantor and conditional leave to Exporters to defend the suit. Beneficiary subsequently appealed to the Division Bench, which dismissed the appeal in 2003. The suits were decreed ex parte against Exporters in 2004.

In a subsequent contest, a learned Single Judge decided on 22 February 2008 that, because the demand guarantees were in force on 8 January 1997 when the Contract Act amendment (Amendment) was made, the clause in the guarantees "extinguishing rights and discharging liability of the Guarantor if a claim was not made within three months of the date of expiry of the bank guarantee" became subject to Amendment and void, and that the drawing was valid. On appeal on 22 February 2011, a Division Bench of the Bombay High Court reversed, stating that although Amendment applied, the suits should be dismissed because the bank guarantees were not drawn on within the prescribed period. Subsequently, Beneficiary appealed to the Supreme Court of India. On 15 September 2016, the Supreme Court in an opinion by R.F. Nariman, J., dismissed the appeal.

Beneficiary claimed that the 1997 amendment to Section 28(b) should apply therefore voiding the condition which restricted the guarantee's revocable period. Guarantor contended that, the amendment should not apply, since the bank guarantees themselves were dated 31 January 1996 and thus should not be affected by the amendment made a year later. Guarantor also made a secondary argument that even if the amended Section 28 applies, since the amendment had the limited objective of following a Law Commission Report, the clause in the bank guarantees would not be affected. In particular, Guarantor argued that the revised Section 28 suggested by the Law Commission was not enacted verbatim in Section 28(b), and that the crucial words "or on failure to make a claim" are missing from the amended Section 28.

LITIGATION DIGEST

The Court accepted Guarantor's initial argument, stating "On a conspectus of the aforesaid decisions, it becomes clear that Section 28, being substantive law, operates prospectively as retrospectivity is not clearly made out by its language. Being remedial in nature, and not clarificatory or declaratory of the law, by making certain agreements covered by Section 28(b) void for the first time, it is clear that rights and liabilities that have already accrued as a result of agreements entered into between parties are sought to be taken away. This being the case, we are of the view that both the Single Judge and Division Bench were in error in holding that the amended Section 28 would apply."

The Court ruled that the applicable law to the agreement regarding the bank guarantee was that in place on 31 January 1996; the 1997 amendments to Section 28 did not apply. ■

[AWL / AYW]

Societe Anonyme Marocain De L'Industrie Du Raffinage v. Bank of America No. 653329/15, 2016 WL 488665 (N.Y. Sup. Ct. Feb. 8, 2016) [USA]

Topic: Fraud; US UCC § 5-109(a); Independence; Choice of Law; US UCC § 5-116(b); Prevailing Party's Fees; US UCC § 5-111(e)

Type of Lawsuit: Buyer / Applicant sued to enjoin Issuer from honoring further demands on a standby LC; Seller / Beneficiary intervened, moving for summary judgment against Issuer for wrongful dishonor; Issuer cross-claimed and moved for dismissal.

Parties: Buyer / Applicant – Societe Anonyme Marocain De L'Industrie Du Raffinage (Counsel: Jeffrey Kuhn, Esq. of DLA Piper)

Issuer – Bank of America, N.A. (Counsel: Tracee Davis, Esq., of Zeichner Ellman & Krause LLP)

Seller / Beneficiary – Petraco Oil Co. LLP (Counsel: Anthony J. Mavronicolas, Esq., of Mavronicolas & Dee LLP)

Underlying Transaction: Contract for the purchase of 1,000,000 barrels of crude oil at a price of approximately USD 54,000,000.

LC: Standby LC for USD 45,000,000. Obtained as security for payment of 70% of purchased oil. There was no security for the balance of the purchase price. The standby was subject to UCP600, was silent as to applicable law, and was issued in Scranton, Pennsylvania, USA.

Decision: The Supreme Court of New York, New York County, Ramos, J., applying Pennsylvania's revised UCC Article 5, denied Seller/Beneficiary's motion for summary judgment and granted Issuer's cross-motion to dismiss.

Rationale: Presentation demanding payment must accompany conforming materials required by the text of the LC itself. When an issuer has reasonable knowledge that a beneficiary is requesting payment by knowingly presenting a false invoice, the issuer may reject the demand for payment without incurring liability for wrongful dishonor.

Factual Summary:

Buyer/Applicant and Seller/Beneficiary entered into a contract for the purchase of 1,000,000 barrels of crude oil. Pursuant to the agreement, Buyer/Applicant was required to obtain a standby LC as security for seventy-percent of the oil purchased. Thirty-percent of the transaction was not secured. The application for the LC was submitted by Carlyle Global Marketing Strategies Commodities Funding 2014-1, Ltd. (Third Party Purchaser) on behalf of Buyer/Applicant. The LC was issued in Scranton, Pennsylvania for USD 45,000,000. Payment on the LC required presentation of (1) an unpaid invoice on the secured quantity of oil, (2) a signed statement by a representative of Seller/Beneficiary, and (3) a letter of indemnity. The text of the LC provided that "any payment" made would reduce the LC's value.

Upon delivery of the oil to Buyer/Applicant, Seller/Beneficiary issued two invoices, one covering thirty-percent of the oil for an amount of USD 16,144,372.16, and another covering seventy-percent of the oil for USD 37,670,201.78. Following Buyer/Applicant's failure to make payment on the secured, seventy-percent invoice, Third Party Purchaser wired USD 37,670,201.78 directly to Seller/Beneficiary's account in Austria as payment of the invoice for that amount.

Contending that the Third Party Purchaser's transfer of funds did not reduce the obligation on the standby LC because it did not explicitly reference the LC, Seller/Beneficiary presented Issuer with a newly drafted invoice demanding payment of USD 44,978,417.50. Issuer, noting "discrepancies in the letter of indemnity" and omission of a unit price on the new invoice, rejected Seller/Beneficiary's demand. Using an amended letter of indemnity, Seller/Beneficiary made a second presentation, which was also rejected by Issuer. After the second presentation, Issuer informed Seller/Beneficiary that Seller/Beneficiary had been paid for the seventy-percent quantity of oil with Third Party Purchaser's funds, reducing its obligation accordingly.

Seller/Beneficiary then made a third presentation to Issuer seeking payment of USD 16,144,372.19, offering an invoice referencing the seventy-percent quantity of oil and original due date. Issuer again rejected Seller/Beneficiary's request because "the [LC] only secured payment for 70% of the oil delivery…the third presentation resulted in an attempt to overdraw on the [LC]" as its value had been reduced by payment with Third Party Purchaser's funds.

Buyer/Applicant sued Issuer to enjoin any further demands on the LC. Seller/Beneficiary intervened, cross complaining against Issuer for wrongful dishonor seeking USD 16,144,372.19 plus interest and moving for summary judgment. Issuer moved to dismiss Seller/Beneficiary's cross

action. The Supreme Court of New York, New York County, Ramos, J., granted Issuer's cross-motion to dismiss.

Legal Analysis:

1. Fraud, UCC § 5-109(a): Seller/Beneficiary argued that the payment by Third Party Purchaser was not specific to the invoice in that amount but could be applied to any portion of the purchase price and did not reduce the amount, due under the standby because the wire did not expressly state that the funds were related to the standby obligation. Issuer responded that honoring the third presentation would constitute a facilitation of fraud against Buyer/Applicant by over-drawing on the LC, as the Third Party Purchaser's payment had extinguished the amount due on the seventy percent invoice. The Judge concluded that the standby LC was security for the seventy-percent quantity of oil. Because Seller/Beneficiary's third presentation constituted an attempt to draw on the LC using a paid invoice, the Judge stated that "[Seller/Beneficiary's] conduct raise[d] a serious showing of fraud" and concluded that Issuer was not liable for wrongful dishonor.

2. Independence; Choice of Law, UCC § 5-116(b): Seller/Beneficiary argued its third presentation was an appropriate method under English law to allocate payment on the oil. Buyer/Applicant joined Issuer arguing that the LC was not governed by English law and Seller/Beneficiary's conduct constituted fraud under appropriate Pennsylvania Law. The Judge noted that, while the contract between Buyer/Applicant and Seller/Beneficiary was governed by English law, the location where the LC was issued dictated Issuer's liability. Because the LC was issued in Pennsylvania, Issuer was subject to the "doctrine of the independence principle" whereby Issuer was required to honor only if Seller/Beneficiary's presentation apparently complied with the LC's terms.

3. Prevailing Party's Fees, UCC § 5-111(e): On denying Seller/Beneficiary's motion for summary judgment and granting Issuer's cross-motion for dismissal, the Judge referred to a Special Referee the issue of calculating reasonable attorneys' fees and litigation expenses with an order "to hear and report with recommendations" the parties' settlement, if any. ■

[MJK]

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FEATURE

MUST A CONFIRMING BANK 'PAY TO BE PAID'?

by Roger FAYERS*

Suppose an issuing bank, on being sued for refusing to reimburse its confirming bank, suspects that no payment had in fact been made by the confirmer to the beneficiary. In the course of the pleading stages of a case, can the issuing bank ask a court for leave to serve a formal Request for Further Information by asking for details of how the confirmer made payment to the beneficiary? I will put this question in its procedural context later but first I will explain how Justice Blair in *Deutsche Bank AG v. CIMB Bank Berhad*[1] answered the question as a matter of principle.

The Parties' Cases

I turn straight to the arguments made respectively on behalf of the claimant confirming bank (Deutsche Bank) and the defendant issuing bank (CIMB).

Those made by Deutsche Bank were as follows:

(1) The principle is that an issuing bank under a letter of credit must accept on its face the statement by a nominated bank (here, the confirming bank) that it has paid the beneficiary.

(2) From this it follows that:
  (a) when a nominated bank forwards complying documents to an issuing bank and states that it has paid the beneficiary then the issuing bank must fulfil its undertaking under UCP600 Article 7(c) to reimburse the nominated bank;
  (b) if an issuing bank fails to reimburse the nominated bank then the nominated bank can sue upon that undertaking;
  (c) to obtain judgment on such a claim, the nominated bank need only show that the issuing bank was obliged at the time and on the basis of the information and documents then available to the issuing bank to reimburse the nominated bank.

(3) UCP600 Article 7(c) must therefore be construed as an issuing bank's undertaking "to reimburse a nominated bank that *states it* has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank". The reading-in to Article 7(c) of the two italised words reflects the inexorable logic of the letter of credit machinery and the "cash principle".

---

* Roger Fayers, Barrister (UK), is a former legal advisor in the Department of Trade and Industry and a *DCW* Editorial Advisory Board member.

1. [2017] EWHC 1264 (Comm).

(4) The effect of the issuing bank's argument to the contrary is that the undertaking under Article 7(c) article is to "reimburse a nominated bank that satisfies the issuing bank or a competent court it has honoured or negotiated ...". This is uncommercial, unworkable, and plainly not what the parties must be taken to have intended.

UCP600 Article 7(c):

"An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary."

As against this, CIMB made the following arguments:

(1) The honouring of the presentations made by the beneficiary is a fundamental element of these proceedings since the confirming bank is claiming reimbursement from the issuing bank for payments that it allegedly made to the beneficiary.

(2) The issuing bank cannot be obliged to make any reimbursement to the confirming bank if that confirming bank has not in fact honoured the presentations made to it by the beneficiary.

(3) The confirming bank seeks to treat its statement as to payment as conclusive, but conclusive evidence provisions are to be strictly construed.

(4) There is no warrant for reading words into UCP600 Article 7(c); if the drafters of this provision had wished to achieve this effect they could simply and easily have done so.

(5) Challenging the question of payment does not infringe the autonomy principle, which has to do with the autonomy of the credit from the sale or other contract on which it may be based.

(6) Field 47A(5) of the Swift messages does not seek to re-write the nature of the issuing bank's reimbursement obligation, but is concerned merely with the method and timing of payment.[2]

(7) The spectre that the requirement for a bank to have to prove it has honoured a presentation would create chaos is fanciful.

The Judgment

The judge defined the issue of principle as being whether an issuing bank can inquire at all as to whether a confirming bank has made payment or whether it must simply take the confirming bank's word for it. Both parties recognised that the starting point was UCP600 Article 7(c) which deals with the issuing bank's undertaking to the nominated bank in these terms:

2. The judge agreed; it did not affect the matter for decision.

> "An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary."

The relevant operative words in this provision are that an "issuing bank undertakes to reimburse a nominated bank that *has honoured* … a complying presentation" (italics added). So far as relevant, the term "honour" is defined in UCP600 article 2 to mean "pay at sight".

The comparison with first demand bonds

In seeking to insert the words "states it" before the italicised wording and treating the confirming bank's statement as conclusive, or at least conclusive in the absence of fraud, Deutsche Bank was seeking to equate the reimbursement obligation owed by an issuing bank to a confirming bank under Article 7(c) to an issuer's obligation to the beneficiary under a first demand bond which arises on the making of a compliant demand. In support they pointed to UCP600 Article 13 which deals with the situation in which reimbursement is to be obtained by the claiming bank (here the confirming bank) from a party other than the issuing bank, described as the "reimbursing bank". However, as the judge pointed out, this was not the position in this case; no third party of this kind was concerned. Whilst it was correct that UCP600 Article 13(b) does provide that an issuing bank will be responsible for loss of interest and expenses incurred "if reimbursement is not provided on first demand by a reimbursing bank", the judge did not think it followed that the same applies as between issuing bank and confirming bank where no third party bank was involved and where the wording of the relevant UCP600 provision is different.

The court did accept, as Deutsche Bank pointed out, that case law does draw a close comparison between letters of credit and first demand bonds in the context of a bank's liability to pay the beneficiary – a liability that arises on presentation of conforming documents or a compliant demand independent of disputes between buyer and seller under the underlying contract.[3] It accepted, too, Deutsche Bank's submission that UCP600 Article 7(c) similarly recognises that "An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary". But this, the judge considered, did not advance their argument since the present case did not concern the undertaking to the beneficiary. What the judge was concerned with was the relationship between the two banks and specifically with the question whether payment to the beneficiary by the confirming (*ie* nominated) bank was a prerequisite of the obligation of the issuing bank to reimburse the confirming bank.

Deutsche Bank also submitted that its cause of action for reimbursement accrued when a conforming demand was made upon the issuing bank. But this was essentially the same point raising the same question of whether the confirming bank must have paid the beneficiary in order to have the right to reimbursement or whether a statement to that effect is enough. The judge did not

3. Citing well known authorities such as *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, at 170-1.

consider that the decision in *Wuhan Guoyu Logistics Group Co Ltd v. Emporiki Bank of Greece SA*[4] supported this submission since the court there was considering when the position crystallises as between beneficiary and bank (not as between bank and bank). He also observed that Deutsche Bank accepted that no authority or commentary had been found that directly supported its contention, though Deutsche Bank did assert that in general terms it was consistent with the 'cash principle' and upholding it would avoid the possibility of abusive inquiries into a confirming bank's payment arrangements being made that were intended to cause delay.

Case and textbook authorities

There were, however, statements in the authorities that did support the defendant issuing bank's contentions. The judge cited passages from *United City Merchants v. Royal Bank of Canada,*[5] *Credit Agricole Indosuez v. Generale Bank*[6] and *Fortis Bank v. Indian Overseas Bank*[7] as well as from textbooks – Jack, *Documentary Credits,* 4th edn (2009) at 9.54, Brindle and Cox, *The law of Bank Payments,* 4th edn at 8-051, and *Encyclopaedia of banking Law* at F[303] – indicating reimbursement being dependent upon the making of an actual payment under the credit and that what matters is the fact of honouring or negotiating a complying presentation. Further, as already mentioned, the operative words in UCP600 Article 7(c) itself are that an "issuing bank undertakes to reimburse a nominated bank that *has honoured* ... a complying presentation … ".

Rewriting UCP

It is instructive to relate how the judge addressed the contention by Deutsche Bank (its third argument) that UCP600 Article 7(c) must be read as saying that reimbursement to a nominated bank will be made upon its stating that it has honoured or negotiated a complying presentation. Following what was said in the *Fortis Bank* case that a court must recognise the international nature of the UCP and approach its construction in that spirit, he agreed with Thomas LJ that "there would be real difficulties in using a rule of national law [*eg* of English law] as to the implication of terms (if distinct from a method of construction) to write an obligation into the UCP".[8] Accordingly, he did not think it would be right in principle to construe UCP600 Article 7(c) by writing in words that materially changed its sense. He also noted that the UCP is revised periodically and that is the occasion for introducing changes if thought desirable. His conclusion, therefore, was that by UCP600 Article 7(c), read with the definition of "honour" in UCP600 Article 2 ["pay at sight"], an issuing bank's undertaking to reimburse the confirming bank arises where the confirming bank has honoured a complying presentation by making payment under the credit.

In essence, this was merely another way of making the argument of there being an analogy with the first demand bond which I have already mentioned. The judge saw no basis for doing so.

4. [2013] EWCA Civ 1679, at [22].

5. [1983] 1 AC 168.

6. 1999] 2 All Eng (Comm) 1009.

7. [2009] EWHC 2303 (Comm). In the commercial court; this point did not arise on the appeal.

8. In the court of appeal [2011] EWCA Civ 58 at [29]. Discussed in *DCW* September 2011 at page 16.

FEATURE

The decision in the context of the pleadings in this case

I mentioned at the beginning of this article that this was a decision in principle made in the course of the pleadings in this particular case. It is important, therefore, that readers not acquainted with English procedure or those in different jurisdictions understand the context in which this decision was made.

In summary, CIMB had agreed to provide banking facilities to its customer in Singapore to finance the purchase of cotton. CIMB did this by issuing 10 letters of credit in favour of the sellers which were confirmed by Deutsche Bank at whose premises in London the requisite documents were to be presented. As a result of court proceedings in Singapore in which CIMB allege fraud against the buyers, CIMB has refused to reimburse Deutsche Bank in respect of these LCs.[9] Deutsche Bank in turn has commenced the present proceedings in the commercial court in England seeking reimbursement. A statement of claim has been served on CIMB and in its defence CIMB has not admitted payment by Deutsche Bank, who in consequence has been put to strict proof that it has honoured the presentations made by the beneficiary under the LCs. Deutsche Bank has sought to meet this by pleading in its reply a detailed case as regards payment. It is this pleading that is the subject of the Request for Further Information now made by CIMB asking for details of how Deutsche Bank made payment to the beneficiary. And it is this Request that the judge has now ordered to be made. In his view, since the claimant Deutsche Bank has made assertions as to payment, the defendant CIMB is entitled to ask for further information in the usual way.

It will be interesting to see if readers, especially those in other jurisdictions, can fill the gap that apparently exists as respects direct case law or textbook authority on this question of principle.

The qualification

The judge did, however, add a significant qualification. The width of the request served by CIMB, he thought, did in some respects have the air of a 'fishing expedition'. He said it was important that the modern procedural vehicle of the Request for Further Information was not used to replicate the old "Requests for Further and better Particulars" which in former times all too often were an excuse for tactical time wasting. In the context of letters of credit, he said the court should not entertain Requests for Further Information seeking unduly to investigate a confirming bank's payment arrangements in the hope that something by way of a defence will turn up. In this regard, he cited with approval paragraph D15.1 of the Admiralty & Commercial Court Guide explaining that "The court will only order further information to be provided if satisfied that the information request is *strictly necessary* to understand another party's case" (emphasis added).

An Afterthought

It will be interesting to see if readers, especially those in other jurisdictions, can fill the gap that apparently exists as respects direct case law or textbook authority on this question of principle. It will be interesting, too, if in a forthcoming revision of the UCP they think that the opportunity should be taken either to confirm Justice Blair's decision in this case or to reverse it. ■

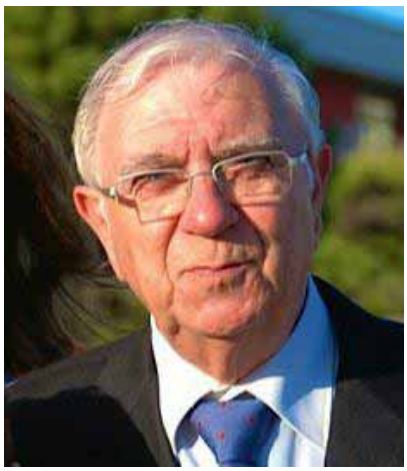
9. No allegation of fraud is made against Deutsche Bank. The fraud relied upon is the use by the buyers and the sellers of doctored or forged documents and the creation of sham transactions.

Cover

ARTICLES

DOCUMENTARY CREDITS AND THE COMPLEXITIES OF COMPLIANCE

by Xavier FORNT*



Documentary credits are often complex instruments. In this article, I analyze some of the major reasons for this complexity.

The first factor lies in the fact that banks do not examine goods or services, but documents. The provision contained in UCP600 Article 5 (Documents v. Goods, Services or Performance) is something that certain customers (applicants or beneficiaries) do not always want to come to understand and accept, depending on their role. It is clear that they are concerned about the underlying goods or services that they are producing or receiving.

The second factor lies in the interpretation of the UCP rules. Document checkers may opt for a strict compliance interpretation or they may be somewhat more lax in their compliance standard. Many times we see that, under the same UCP rules and under the same LC conditions, some examiners consider presented documents to be acceptable and other examiners contend they are discrepant.

The third factor usually occurs within financial institutions when some bankers place emphasis on documentary compliance while other bankers prioritise commercial reasons. At the time of requesting issuance of an LC, for example, the applicant might ask that a copy of the proforma invoice be included among the required documents. Upon this request, the issuing bank's credit department will normally say that this is unacceptable since UCP600 Article 4(b) discourages this practice. However, it is

* Xavier Fornt is Professor at ESCI High School of International Trade in Barcelona.

possible that the relationship manager in charge of the applicant's account cites commercial reasons for satisfying the client's request.

Similar situations can also be found when a beneficiary presents documents to his bank and, while the document checker identifies certain minor discrepancies that would cause subsequent problems with the issuing bank, the officer in charge of the beneficiary's account would urge for commercial reasons that these documents be considered acceptable and sent on to the issuing bank. These battles pitting strict compliance versus commercial considerations are situations that each bank must decide on their own and can make operations complex.

As if these factors were not enough, there is a fourth factor: a different type of compliance. That is, regulatory compliance matters such as anti-money laudering requirements. For instance, a documentary credit is opened and provides that transhipments are accepted. On receiving presented documents, the issuing bank observes that transhipment has taken place in the port of a blocked country. From a document checker's perspective, payment of this credit should be considered acceptable, but a compliance officer decides that it is not possible given the appearance of a blocked country in the operation. In this case, three considerations are involved: Strict compliance; commercial matters; and compliance measures. Which do you believe will win out?

As we said at the beginning, documentary credits can be very complex operations and it seems things are not getting any easier for banks. ■

ARTICLES

ALEXA, HOW DO I CANCEL THIS AUTO-EXTENSION LC?

by Arshad H. SIDDIQUI*

Setting aside the question of whether or not you would issue such a standby LC providing for automatic extension, consider the following wording contained in the standby:

> IT IS A CONDITION OF THIS LETTER OF CREDIT THAT IT SHALL BE DEEMED AUTOMATICALLY EXTENDED WITHOUT AMENDMENT FOR ONE YEAR FROM THE PRESENT EXPIRY DATE AND FROM EACH FUTURE EXPIRY DATE, UNLESS AT LEAST SIXTY (60) DAYS PRIOR TO THE THEN EXPIRY DATE, WE NOTIFY BENEFICIARY THAT WE ELECT NOT TO EXTEND THIS LETTER OF CREDIT FOR ANY SUCH ADDITIONAL PERIODS. TO BE EFFECTIVE, SUCH NOTICE MUST BE IN WRITING AND MUST BE SENT BY RECEIPTED OVERNIGHT COURIER (NEXT BUSINESS DAY DELIVERY) OR BY CERTIFIED OR REGISTERED MAIL, RETURN RECEIPT REQUIRED, TO BENEFICIARY. UNTIL FURTHER NOTICE BY BENEFICIARY TO US, BENEFICIARY'S ADDRESS FOR SUCH NOTICES IS THE ADDRESS SET FORTH ABOVE. AT ANY TIME OR FROM TIME TO TIME BENEFICIARY MAY CHANGE ITS ADDRESS FOR SUCH NOTICES, BY NOTICE TO US WHICH, TO BE EFFECTIVE, MUST BE IN WRITING AND MUST BE SENT BY RECEIPTED OVERNIGHT COURIER (NEXT BUSINESS DAY DELIVERY) OR BY CERTIFIED OR REGISTERED MAIL, RETURN RECEIPT REQUIRED) CLEARLY STATING THIS LETTER OF CREDIT NO. XXXXXX AND ENCLOSING A PHOTOCOPY OF THIS LETTER OF CREDIT.
>
> DRAWINGS HEREUNDER MAY BE MADE BY PRESENTATION OF BENEFICIARY'S SIGHT DRAFT(S) ALONG WITH THE ORIGINAL OF THIS LETTER OF CREDIT TO OUR OFFICES LOCATED …

As Issuing Bank, consider also the following background and circumstances:

- Applicant is your customer seeking release of the LC
- Beneficiary is bankrupt and not traceable
- The LC contains no final expiration date
- The LC cannot be located
- Applicant has come to you, the Issuing Bank, asking your advice how to cancel the LC

* Arshad H. Siddiqui is Head of Trade Finance Dept at Handelsbanken, New York Branch. The son of the late Khadim H. Siddiqui, once President of Allied Bank of Pakistan who was a well renowned banking icon from the Middle East and decorated with the highest banking award in the country for his contributions. Banking runs in Arshad's blood, His banking experience spans over 40 years of association with Middle Eastern, American, and European banks. Arshad has served the New York banking market since the early 1980s. Customers and friends value his opinions and views on sticky technical issues in the trade finance world.

Positioned as the Issuing Bank, here is what one specialist would say in response to the Applicant:

> Dear Customer,
>
> Unless and until our liability under the LC is conclusively, explicitly, and entirely extinguished in writing beyond any reasonable doubt, I would assume that my bank is obligated to someone. That entity may be the Beneficiary or any successor by operation of law of the Beneficiary named in the LC including, without limitation, any liquidator, rehabilitator, receiver or conservator.
>
> Merely the fact that we as the issuer cannot clearly identify as to who we are obligated to, would not relieve us of our obligation under the undertaking. Take the example of a dormant account. If a bank cannot catch hold of the true owner, after a certain amount of time the deposits are transferred to the State under unclaimed property provisions. It becomes more of a legal question that I do not have answer for. Can a State play the role of successor by operation of law? In that capacity sign off on our indemnity form, thereby releasing us of our obligations.
>
> It might sound like hiding our head in the sand or willful blindness, but after reading the evergreen paragraph a couple of times, I think if we attempt to send our notice of non extension to the beneficiary's address on file (even if the notice is returned back undelivered) then we should be able to remove the LC from our books, but not before the then current expiry date, as long as we can produce evidence that despite repeated attempts, the notice could not be delivered.
>
> Kind Regards,
> Issuing Bank

Questions to *DCW* Readers:

Can the LC be cancelled?

If so, how? If not, why not?

Does it matter whether the named beneficiary was a human being, a corporate entity, or some other form of organization or association?

Would you answer differently if you had a financially strong or a financially weak applicant (indemnitor)?

Let us know: info@doccreditworld.com

Cover

TEXT

IIBLP COMMENT ON EPA PROPOSED REGULATION UNDER CERCLA SECTION 108(B)

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13 March 2017

VIA REGULATION.GOV

The Environmental Protection Agency
Washington DC

Re. Proposed Rulemaking for Hardrock Mining under CERCLA Section 108(b)

Introductory Remarks

1. This comment letter addresses the proposed wording for financial assurance in the form of a standby letter of credit ("SLC") contained in 40 CFR 320.50(b) ("the proposed regulation"). The comment consists of three parts: Part A states what a bank is required to consider under U.S. law, banking regulations, and standard international standby practice in issuing an SLC. Part B proposes an alternative SLC form. Part C critiques the technical provisions and workability of the wording of the SLC in the proposed regulation regarding automatic extension.

2. These comments are submitted by the Institute of International Banking Law & Practice (IIBLP), a non-profit educational organization, after extensive consultation with members of the international banking operations community in the U.S., including active and retired bankers, attorneys, and academics. The IIBLP has participated in the public comment exercises during the process of this rulemaking exercise.

Part A: Policy Issues regarding letter of credit law and practice raised by the proposed regulation

3. The comments in Part A focus on what banks must consider when requested to issue an SLC in light of law (the applicable state version of UCC Article 5), bank regulation (in particular 12 CFR 7.1016), standard SLC practices and forms, and the ways that SLC departments operate

practically and function. (There is a possibility that non-bank financial institutions or even banks, invoking 12 CFR 7.1017, might consider undertaking suretyship obligations or might issue SLCs outside the EPA's regulation to sureties that would provide financial assurance under the EPA's regulation which is beyond the scope of this Comment.)

4. The comment also takes into consideration the practice in the U.S. of banks when they issue SLCs to bank trust departments as beneficiaries. It does not, however, address the acceptability of the EPA's proposed wording of the SLC or of the trust agreement (40 CFR 320.50(a)) to trustee-beneficiaries. In this regard, some banks, including some major U.S. bank SLC issuers, do not act as trustees, and those that do treat their LC and trust operations as independent departments.

5. The EPA's decision to permit two different forms of SLCs to be issued, one in favor of a named trust fund trustee and the other in favor of unnamed third party claimants, is critical to the willingness of U.S. banks to issue any SLCs under 40 CFR 320.50(b). If the EPA will not act as beneficiary in the place of CERCLA claimants, then knowledgeable SLC bankers will decline to issue an SLC under 40 CFR 320.50(b) unless it is to a known trustee beneficiary. (The required wording provides for direct action by claimants, which is outside letter of credit law and practice. Also, any such unnamed third party claimant could require proof that each reduction in the amount available under the SLC resulted from rightful honor of each prior demand for honor. With a single named beneficiary, particularly a bank trustee as beneficiary, this kind of risk is predictably negligible.) This comment, therefore, focuses on provisions of the proposed regulation for an SLC to be issued to a trust fund trustee.

6. The proposed regulation combines the wording of the two different types of SLCs into one form. This approach is highly confusing and invites misunderstanding and error on the part of any owner/operator or other applicant, the trust fund trustee, the issuer, and the relevant EPA personnel. The IIBLP strongly recommends that the wording for the two types of SLCs be set forth in separate forms in the regulation as issued.

7. The proposed regulation provides that a trustee-beneficiary may draw by presenting a simple demand without any statement identifying the obligation to be paid or secured by the SLC proceeds. Instead, it relies on bracketed inserts and recitals that the SLC "covers" mentioned CERCLA obligations that may mislead, in that issuers are not responsible for them and must disregard them as non-documentary conditions. The alternative SLC wording contained in Part B provides for a single recital regarding the intended use of proceeds from a drawing by a trustee-beneficiary. It is clearly a recital of applicant intent that is not binding on the issuer. While Issuing banks would disregard this recital as a non-documentary condition when deciding whether to honor a demand, this recital would more accurately indicate that the SLC supports an underlying obligation to fund a trustee-beneficiary's trust fund. And it would be more useful to all parties, including the EPA, in any post-honor dispute regarding the retention and use of SLC proceeds.

8. The IIBLP remains concerned about the retention in the proposed regulation of the requirement that the issuer certify that the wording of the standby is "identical" to that contained in the regulation. Issuers are not responsible to beneficiaries for including whatever SLC wording the applicant supplies to the issuer. Under standard international letter of credit practice, beneficiaries are expected to review and decide whether or not the wording is acceptable to them. The proposed regulation, including the "must be worded" provision in the opening line of 320.50(b), makes it the responsibility of the owner/operator to provide EPA required financial assurance.

   However, the "identical wording certification" shifts the beneficiary's responsibility to the issuer. That shift is unnecessary for SLCs issued to a trustee-beneficiary and, if retained, will reduce considerably bank willingness to issue or continue SLCs under this regulation. There are many foreseeable as well as unforeseeable reasons why the SLC wording should be varied from that in the regulation, e.g., where the bank's customer with the SLC credit line is a parent company or financer that is not the current owner or operator so that the owner/operator is not the "applicant" or where the issuer and trustee-beneficiary want to provide expressly for transfer of drawing rights to a successor trustee or for drawing or other communications by electronic messages. These changes are not only reasonable but sensible and should not be foreclosed by the rigidity of the regulation. The willingness of the trust fund trustee to accept any changes ensures the appropriateness of any changes and relieves the staff of the EPA from having to approve sensible practical adjustments in the wording of the SLC.

9. Requiring notification of non-extension to an applicant as a condition to effectiveness of the notified non-extension, especially if effectiveness requires proof of receipt, raises safety and soundness issues that will also weigh heavily against SLC issuance. Apart from these issues, it increases the risk to the issuer which will be reflected in the increased requirement of security by the owner/applicant, significantly increasing its costs and probably making the SLC option economically prohibitive. The problems with the notification requirement are more fully addressed in the attached alternative SLC form. A trustee-beneficiary is better positioned to notify/copy the applicant-grantor (and the EPA) of communications from or to the issuer (and to deal with notification where the applicant-grantor ceases to exist, a topic covered in 40 CFR § 320.50(a)(1), section 15).

PART B. Proposed Text of an SLC issued in favor of a Trust Fund Trustee

10. The IIBLP recommends the following as wording for an SLC to a trustee-beneficiary. In the opinion of the IIBLP, this SLC wording addresses and resolves many of the issues raised by the form in the proposed rule including the problems with the automatic extension clause that are discussed in Part C of this Comment. It is the IIBLP's opinion that the following proposed form facilitates the purposes of the regulation and that is consistent with safe and sound banking practice. This revision takes into consideration many of the drafting points made in the annotated ISP98 Forms, including ISP98 Form 11.1 [U.S.] Model Government Standby Form ("Form 11.1") and in SLC wording previously recommended by the IIBLP to the EPA.

[40 CFR § 320.50] (b) A letter of credit, as specified in 40 CFR § 320.40 of this chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

IRREVOCABLE STANDBY LETTER OF CREDIT

IRREVOCABLE STANDBY LETTER OF CREDIT NUMBER: [insert number] ("this Standby")

ISSUER: [insert name and address of issuing institution] ("Issuer")

ISSUANCE DATE: [insert date] ("Issuance Date")

MAXIMUM AMOUNT: USD [insert dollar amount] ("Maximum Amount")

APPLICANT: [insert name of Owner or Operator of Facility] [Insert contact person(s), title(s), and contact information (address, phone, email, etc.)] ("Applicant")

FACILITY: [insert EPA Identification number(s), name(s), address(es) and, if more than one facility is listed, the CERCLA 108(b) financial responsibility amount for each facility totaling the Maximum Amount)] ("Facility" or "Facilities")

TO: [insert the name and mailing address of trust fund trustee] ("Beneficiary")

Dear Sir or Madam:

At the request and for the account of Applicant, Issuer issues this Standby in favor of Beneficiary in the Maximum Amount.

This Standby is intended by Applicant to support payment to Beneficiary as trustee under a trust fund agreement established under 40 CFR § 320.50(a) as financial assurance for the current owners or operators' CERCLA response costs, health assessment costs, and/or natural resource damages associated with the Facility(ies) up to the CERCLA 108(b) financial responsibility amount(s) for each Facility and not to exceed in total the Maximum Amount.

Issuer undertakes to Beneficiary to pay Beneficiary's demand for payment for an amount available under this Standby, dated and signed by Beneficiary, and presented to Issuer at the following place for presentation: [insert address of place for presentation], at or before the close of business on the expiration date. Payment shall be effected by wire transfer to Beneficiary's duly requested account.

Expiration. The expiration date of this Standby is [insert specific calendar date at least one year after issuance date].

Automatic Extension. The expiration date of this Standby shall be automatically extended for successive one-year periods, unless 120 or more calendar days before the then current expiration date Issuer gives written notice to Beneficiary that Issuer elects not to extend the expiration date. Issuer's written notice must be sent by certified mail or nationally recognized overnight courier to Beneficiary's above indicated address and attention party or, alternatively, be received by Beneficiary's above indicated attention party 120 or more calendar days before the then current expiration date. The expiration date is not subject to automatic extension beyond [specific calendar date at least 2 years after issuance date], and any pending automatic one-year extension shall be ineffective beyond that date. Whenever this Standby is set to expire in fewer than 30 calendar days (whether by Issuer's failure to retract a notice of non-extension or to amend this Standby by sending an affirmative extension in form and substance satisfactory to Beneficiary), Beneficiary may present a demand in the above quoted form.

Terms used in this Standby shall have the meanings indicated whether used in the text of or in a demand made under this Standby.

This Standby is issued subject to the most recent edition of the [insert either "Uniform Customs and Practice for Documentary Credits" or "International Standby Practices" published by the International Chamber of Commerce).

Issuer certifies that the wording of this Standby is substantially in accordance with the wording specified in 40 CFR 320.50(b)§ as such regulations were constituted on the Issuance Date.

[Issuer's name]

__[signature]_____
Authorized Signature

Part C: Comments on the EPA's Proposed Auto-Extension Clause in Section 320.50(b)

11. This Part C focuses on the provisions contained in the proposed regulation for an automatic extension clause in the standby in favor of the trust fund beneficiary ("the EPA's proposed auto-extension clause) regarding automatic extension. Reported decisions regarding non extension clauses appear regularly every year, and properly drafting such clauses is among the most difficult technical challenges faced by SLC bankers and users. It is the opinion of the IIBLP that the EPA's proposed auto-extension clause has such significant technical problems as to call into serious question the EPA's proposed SLC's safety and soundness.

a. The EPA's proposed auto-extension clause refers to notifying the required parties "at least 120 days before the current expiration date". It is unclear from these terms whether the required notice may be given on the 120th day before the then current expiration date.

b. It is also unclear whether the requirement of notice is satisfied by sending the notice by certified mail or by its receipt by the required parties. It should be noted that the provision in the EPA's proposed auto-extension clause which addresses the demand for payment (and not the notice of non extension) refers to a drawing by the trustee-beneficiary "within 120 days after the date of receipt of such notification by both you and [owner's or operator's name], as shown on the signed return receipts." Whether this provision is to be also treated as modifying the earlier provisions on notification or simply with respect to calculating when the demand is made is likewise unclear.

c. If receipt of the notice of non extension is required, there is no provision if the intended recipient is no longer at the address in the standby and has not given the issuer notice of its new address or has ceased to do business. In the opinion of the IIBLP, the requirement should be omitted in the SLC. (While the SLC "Applicant" may also be the "Owner/ Operator, and the beneficiary-trustee's "Grantor", that will not always be the case. The trustee-beneficiary and the EPA are best positioned to determine what notices should go to whom after notice is given to the trustee-beneficiary.) In no event should the effectiveness of the notice be made uncertain by an owner/operator's going out of business, abandoning its address, or refusing to sign or accept the delivery of the certified letter. The proposed SLC should provide for receipt of delivery or attempted delivery, a service provided by the US Post Office in connection with certified mail.

d. The EPA's proposed auto-extension clause requires that notice of non extension be given by certified mail even though the accepted and recognized method for giving such notice in letter of credit practice is by courier. Is there a reason that this standby business practice is not permitted? It is the opinion of the IIBLP that the clause should allow for notice "by registered mail or other receipted means of delivery".

e. Although the EPA's proposed auto-extension clause requires use of certified mail, it is very difficult to find the difference between certified and registered mail even on the U.S. Post Office website and queries to postal employees have resulted in contradictory and confusing answers. After considerable research, It appears that registered mail is more secure with an unbroken chain of custody. While both forms permit request of a return receipt, the return receipt is not inherent in either. If the issuer sends the notice of non extension by registered mail (or registered mail with return receipt requested), is such notice effective? If the issuer sends it by certified mail with return receipt requested, is that mode of transmission effective? Lest these points appear overly technical, there is a strong incentive for beneficiaries who have failed to make a timely presentation under the non extension notice

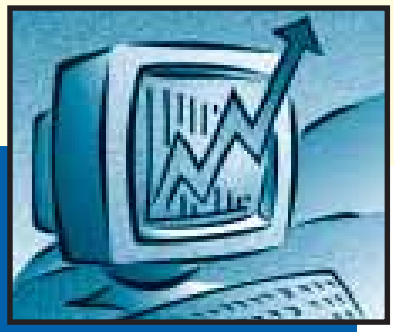
to raise such technical arguments which the reported cases reflect, forcing the courts to fathom imprecisely drafted SLC provisions, strictly construing them against the issuer.

f. Because it will be unclear to the issuer when the notice of non extension has been received by the issuer and the applicant/owner, an issuer is given a very strong incentive to give notice at the earliest possible date. However, under the regulation, the trustee-beneficiary can only draw "within 120 days after the date of receipt of such notification". Thus, if the then-current expiration date is 1 December and the issuer gives notice which is received on the prior 1 February, the trustee-beneficiary will be unable to make a complying drawing after the date in April which is 120 days after 1 February even though the standby will not expire until 1 December. Surely, the provision should refer to the then-current expiration date and not the 120 day period with respect to when a drawing must occur, that is "on or before the then current expiration date".

g. There are inconsistent provisions in the final sentence in the clause regarding the amount to be paid in the event of a drawing due to a notice of non extension.
    i. The beginning of the sentence states that "any unused portion of the credit shall be paid into the accompanying trust fund. Taken on its own, this clause appears to be a non documentary condition which would either be disregarded under UCC Section 5-108(g) (Issuer's Rights and Obligations) or render the undertaking a suretyship undertaking and not a letter of credit under UCC Section 5-102(a) (10) (Definitions: "Letter of Credit").
    ii. The end of the sentence, however, states that there must be a "demand for payment" made by the trustee-beneficiary. The issuer should pay the amount demanded by the trustee-beneficiary up to the available balance and not the available balance if the demand has any meaning. While in most cases the demand will be for payment of the available balance, there is no reason to insert a possible source of confusion and uncertainty in the event that the trustee-beneficiary does not demand payment of the available balance for whatever reason.

12. The EPA's proposed auto-extension clause refers to receipt of the notice of non extension by the trustee-beneficiary and the owner/operator. Assuming that this requirement is not a non documentary condition to be disregarded under the applicable state version of UCC Section 5-108(g) (Issuer's Rights and Obligations), it affords no safe harbor to the issuer who sends the notice to the address stated in the SLC where the owner/operator has moved without notifying the issuer or ceased business even though delivery is tendered to this address. Nor does it provide for a mechanism for changing address short of amending the SLC, an expensive, cumbersome, and inefficient process for changing the address for notification. Even worse, it raises serious questions about the effectiveness of a notice sent to a different address than that stated in the SLC unless it is amended to state a new address.

Cover



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 reflect net after subtracting respective amounts conveyed to others. Net LCs reflect totals for Net Standby LCs and Commercial & Similar LCs. Note: Numbers are in US$ 1,000s.

1ST QUARTER 2017

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.	BANK TOK-MIT UFJ NY BR	NEW YORK	NY	20,221,166	4,196,334	12,820,134	5,101,661	17,921,795
2.	SUMITOMO MITSUI BKG NY BR	NEW YORK	NY	15,867,424	1,276,871	17,020,506	46,033	17,066,539
3.	DEUTSCHE BK AG NY BR	NEW YORK	NY	15,855,276	1,345,537	16,350,589	138,883	16,489,472
4.	ROYAL BK CAN 3 WRLD FNCL BR	NEW YORK	NY	8,561,181	899,796	8,540,993	0	8,540,993
5.	BNP PARIBAS EQUITABLE TWR BR	NEW YORK	NY	9,191,005	1,564,589	8,270,552	209,826	8,480,378
6.	MIZUHO BK NEW YORK BR	NEW YORK	NY	12,496,480	3,711,514	7,855,218	63,902	7,919,120
7.	LANDESBANK HESSN-THRN NY BR	NEW YORK	NY	4,507,644	1,864,056	6,371,700	0	6,371,700
8.	STANDARD CHARTERED BK NY BR	NEW YORK	NY	3,794,313	1,628,122	5,422,435	384,065	5,806,500
9.	CREDIT SUISSE NY BR	NEW YORK	NY	759,195	4,208,223	4,866,838	924,416	5,791,254
10.	UBS AG STAMFORD BR	STAMFORD	CT	6,602,083	1,151,545	5,788,726	0	5,788,726
11.	CREDIT AGRICOLE CORP NY BR	NEW YORK	NY	5,775,067	3,926,102	5,372,109	174,761	5,546,870
12.	BANK OF NOVA SCOTIA NY AGY	NEW YORK	NY	3,123,520	1,817,831	4,910,920	65,259	4,976,179
13.	UNICREDIT BK NY BR	NEW YORK	NY	3,603,544	997,727	4,489,167	57,966	4,547,133
14.	RABOBANK NEDERLAND NY BR	NEW YORK	NY	4,730,666	151,118	4,314,827	194,122	4,508,949
15.	BANK OF CHINA NY BR	NEW YORK	NY	1,991,891	1,608,568	3,599,945	27,155	3,627,100
16.	SOCIETE GENERALE NY BR	NEW YORK	NY	1,679,909	1,650,796	3,302,846	158,058	3,460,904
17.	NATIXIS NY BR	NEW YORK	NY	2,668,992	639,229	3,164,190	44,809	3,208,999
18.	BANK OF MONTREAL CHICAGO BR	CHICAGO	IL	3,158,719	1,320,414	3,051,760	27,592	3,079,352
19.	BAYERISCHE LANDESBANK NY BR	NEW YORK	NY	459,894	2,510,962	2,970,856	0	2,970,856
20.	AUSTRALIA & NEW ZEALAND NY BR	NEW YORK	NY	2,191,229	571,563	2,622,445	193,551	2,815,996
21.	INTESA SANPAOLO SPA NY BR	NEW YORK	NY	2,271,501	170,646	2,271,433	542,911	2,814,344
22.	LLOYDS TSB BK PLC NY BR	NEW YORK	NY	1,617,596	968,582	2,586,178	196,953	2,783,131
23.	BANK OF NOVA SCOTIA HOU BR	HOUSTON	TX	3,153,506	104,088	2,684,308	4,680	2,688,988
24.	CANADIAN IMPERIAL BK NY BR	NEW YORK	NY	1,553,298	724,498	2,184,493	0	2,184,493
25.	DNB BK ASA NY BR	NEW YORK	NY	1,835,011	197,387	2,016,572	0	2,016,572
26.	COMMERZBANK AG NY BR	NEW YORK	NY	1,364,564	405,179	1,769,743	3,425	1,773,168
27.	CREDIT INDUS ET CMRL NY BR	NEW YORK	NY	1,389,850	278,732	1,668,582	0	1,668,582
28.	SVENSKA HANDELS AB PUBL NY BR	NEW YORK	NY	1,519,858	145,505	1,665,363	134	1,665,497
29.	NORDEA BANK AB PUBL NY BR	NEW YORK	NY	903,431	699,522	1,602,953	0	1,602,953
30.	LANDESBK BADEN WRTTMB NY BR	NEW YORK	NY	330,738	1,144,130	1,474,868	0	1,474,868
31.	NATIONAL AUSTRALIA BK NY BR	NEW YORK	NY	1,137,211	217,887	1,355,098	0	1,355,098
32.	BANCO BILBAO VIZCAYA NY BR	NEW YORK	NY	792,847	509,619	1,296,480	1,251	1,297,731
33.	INDUSTRIAL & CB OF CHINA NY BR	NEW YORK	NY	1,051,673	213,802	1,265,371	3,281	1,268,652
34.	ICICI BK NY BR	NEW YORK	NY	940,216	251,843	1,181,434	6,803	1,188,237
35.	BNP PARIBAS SF BR	SAN FRAN.	CA	3,115,419	44,588	969,183	0	969,183
36.	DEXIA CREDIT LOCAL NY BR	NEW YORK	NY	848,179	0	779,809	0	779,809
37.	TORONTO-DOMINION BK NY BR	NEW YORK	NY	346,765	1,846,072	707,167	0	707,167
38.	ARAB BKG CORP NY BR	NEW YORK	NY	207,465	52,260	259,725	381,144	640,869
39.	STATE BK OF INDIA NY BR	NEW YORK	NY	615,664	12,834	628,498	3,556	632,054
40.	NATIONAL BK KUWAIT SAK NY BR	NEW YORK	NY	737,884	37,906	519,153	0	519,153
41.	BANK TOK-MIT UFJ LA BR	L. ANGELES	CA	426,590	116,672	516,563	1,042	517,605
42.	KBC BANK NV NY BR	NEW YORK	NY	494,200	3,483	497,683	0	497,683
43.	RIYAD BK HOU AGY	HOUSTON	TX	464,571	0	464,571	0	464,571
44.	NATIONAL BK OF CANADA NY BR	NEW YORK	NY	62,358	399,767	460,263	0	460,263
45.	KOREA DEVELOPMENT BK NY BR	NEW YORK	NY	410,382	6,554	416,936	151	417,087

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.	CHINA MERCHANTS BK CO NY BR	NEW YORK	NY	608	120,400	121,008	290,610	411,618
47.	UBS AG NY 787 7TH AVE WMA BR	NEW YORK	NY	124,051	260,204	384,255	0	384,255
48.	SWEDBANK AB NY BR	NEW YORK	NY	312,079	55,715	367,794	0	367,794
49.	MEGA INTL CMRL BK CO NY BR	NEW YORK	NY	1,450	0	1,450	302,500	303,950
50.	MEGA INTL CMRL BK LA BR	L. ANGELES	CA	1,270	0	1,270	300,000	301,270
51.	BNP PARIBAS CHICAGO BR	CHICAGO	IL	299,502	272	267,351	0	267,351
52.	AGRICULTURAL BK CHINA NY BR	NEW YORK	NY	9,497	232,181	241,678	0	241,678
53.	BANCO SANTANDER SA NY BR	NEW YORK	NY	225,939	0	225,939	0	225,939
54.	KOOKMIN BK NY BR	NEW YORK	NY	203,628	10,000	213,628	4,124	217,752
55.	SUMITOMO MITSUI TR BK NY BR	NEW YORK	NY	154,911	57,498	212,409	0	212,409
56.	MASHREQBANK PSC NY BR	NEW YORK	NY	47,448	3,147	50,595	159,998	210,593
57.	COMMONWEALTH BK AUS NY BR	NEW YORK	NY	100,686	109,226	209,912	0	209,912
58.	NATIONAL BK EGYPT NY BR	NEW YORK	NY	186,323	110	186,433	22,348	208,781
59.	DZ BK AG DEUTSCHE ZNTRA NY BR	NEW YORK	NY	170,312	2,137	172,449	0	172,449
60.	BANK TOK-MIT UFJ CHICAGO BR	CHICAGO	IL	108,570	17,966	126,536	42,467	169,003
61.	MIZUHO BK LOS ANGELES BR	L. ANGELES	CA	140,330	0	140,330	18,932	159,262
62.	BANK HAPOALIM BM NY BR	NEW YORK	NY	123,092	1,052	124,144	30,299	154,443
63.	NORDDEUTSCHE LNDSBNK NY BR	NEW YORK	NY	133,619	13,999	147,618	0	147,618
64.	UNITED OVERSEAS BK NY AGY	NEW YORK	NY	137,844	1,520	139,364	0	139,364
65.	UNICREDIT NY BR	NEW YORK	NY	125,960	2,250	128,210	0	128,210
66.	BANCO DE CREDITO E INV MIA BR	MIAMI	FL	21,868	85,714	107,582	1,119	108,701
67.	ITAU UNIBANCO SA NY BR	NEW YORK	NY	0	102,828	102,828	0	102,828
68.	MALAYAN BKG BERHAD NY BR	NEW YORK	NY	102,587	0	102,587	0	102,587
69.	BANK OF CHINA CHICAGO BR	CHICAGO	IL	99,691	0	99,691	0	99,691
70.	BANCO DE SABADELL SA MIAMI BR	MIAMI	FL	54,775	41,142	95,917	2,887	98,804
71.	WOORI BK NY AGY	NEW YORK	NY	70,374	8,952	79,326	4,167	83,493
72.	MEGA INTL CMRL SILICON VAL BR	SAN JOSE	CA	82,429	0	82,429	2	82,431
73.	ALLIED IRISH BKS NY BR	NEW YORK	NY	76,094	0	76,094	0	76,094
74.	GULF INTL BK NY BR	NEW YORK	NY	29,170	0	29,170	43,400	72,570
75.	ITAU CORPBANCA NY BR	NEW YORK	NY	0	64,821	64,821	0	64,821
76.	BANK OF BARODA NY BR	NEW YORK	NY	1,687	25,772	27,459	36,210	63,669
77.	SHIZUOKA BK NY BR	NEW YORK	NY	63,170	0	63,170	0	63,170
78.	BANK OF CHINA LA BR	L. ANGELES	CA	57,221	0	57,221	26	57,247
79.	BANCO DO BRASIL SA NY BR	NEW YORK	NY	51,050	3,444	54,494	349	54,843
80.	NATIONAL BK OF PAKISTAN NY BR	NEW YORK	NY	2,159	20,815	22,974	28,949	51,923
81.	UNITED OVERSEAS BK LA AGY	L. ANGELES	CA	45,144	0	45,144	935	46,079
82.	TURKIYE VAKIFLAR BK NY BR	NEW YORK	NY	4,068	9,934	14,002	31,870	45,872
83.	UBS AG MIAMI BR	MIAMI	FL	0	40,337	40,337	0	40,337
84.	MITSUBISHI UFJ TR & BKG NY BR	NEW YORK	NY	38,864	0	38,864	0	38,864
85.	BNP PARIBAS HOUSTON AGY	HOUSTON	TX	31,282	2,475	33,757	0	33,757
86.	ROYAL BK OF CANADA NY BR	NEW YORK	NY	23,386	6,719	30,105	0	30,105
87.	LAND BK OF TAIWAN LA BR	L. ANGELES	CA	30,081	0	30,081	0	30,081
88.	SHINHAN BK NY BR	NEW YORK	NY	13,247	0	13,247	13,731	26,978
89.	BANCO DEL ESTADO CHILE NY BR	NEW YORK	NY	0	24,167	24,167	0	24,167
90.	CHINA CITIC BK INTL NY BR	NEW YORK	NY	15,719	4,050	19,769	2,599	22,368
91.	BANCO NACION ARG NY BR	NEW YORK	NY	0	17,474	17,474	3,619	21,093
92.	CHIBA BK NY BR	NEW YORK	NY	20,957	0	20,957	0	20,957
93.	CTBC BK CO NY BR	NEW YORK	NY	17,893	0	17,893	1,101	18,994
94.	OVERSEA-CHINESE BKG LA AGY	L. ANGELES	CA	18,881	0	18,881	0	18,881
95.	UNITED BK NY BR	NEW YORK	NY	0	0	0	16,598	16,598

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.	T C ZIRAAT BANKASI AS NY BR	NEW YORK	NY	6,402	8,715	15,117	80	15,197
97.	BANK OF INDIA NY BR	NEW YORK	NY	11,877	0	11,877	2,980	14,857
98.	SHANGHAI CMRL BK SF BR	SAN FRAN.	CA	5,650	0	5,650	8,249	13,899
99.	KEB HANA BK NY AGY	NEW YORK	NY	2,682	0	2,682	10,909	13,591
100.	BANK OF EAST ASIA NY BR	NEW YORK	NY	13,169	0	13,169	0	13,169
101.	BANCO DAVIVIENDA SA MIA BR	MIAMI	FL	0	12,829	12,829	0	12,829
102.	NBAD AMERS NV WA BR	WASH.	DC	0	0	0	12,574	12,574
103.	BANCO LATINOAMERICNO NY AGY	WHITE PLNS	NY	0	6,656	6,656	4,211	10,867
104.	SHANGHAI CMRL BK NY BR	NEW YORK	NY	681	5	686	8,522	9,208
105.	CHINA CONSTRUCTION BK NY BR	NEW YORK	NY	9,139	0	9,139	0	9,139
106.	WOORI BK LA BR	L. ANGELES	CA	6,378	1,762	8,140	681	8,821
107.	BANCO INTERNACIONAL MIA AGY	CRL GABLES	FL	0	1,938	1,938	6,478	8,416
108.	FEDERATION DES CAISSES FL BR	HALLANDLE	FL	8,393	0	8,393	0	8,393
109.	INDUSTRIAL BK OF KOREA NY BR	NEW YORK	NY	4,244	0	4,244	3,979	8,223
110.	BANCO DE CREDITO DEL MIA AGY	CRL GABLES	FL	0	1,887	1,887	5,578	7,465
111.	BANCO POPULAR DE PR NY BR	NEW YORK	NY	7,439	0	7,439	0	7,439
112.	TORONTO-DMINION BK HOU AGY	HOUSTON	TX	0	506,415	0	7,146	7,146
113.	HUA NAN CMRL BK LA BR	L. ANGELES	CA	6,629	5	6,634	0	6,634
114.	BANCA MONTE DEI PASCHI NY BR	NEW YORK	NY	3,219	3,423	6,624	0	6,624
115.	BANK OF E ASIA LA BR	ALHAMBRA	CA	5,732	0	5,732	0	5,732
116.	BANCO DE NACION ARG MIA AGY	MIAMI	FL	0	273	273	5,014	5,287
117.	WING LUNG BK LA BR	NEWPRT BH	CA	5,250	0	5,250	0	5,250
118.	E SUN CMRL BK LOS ANGELES BR	INDUSTRY	CA	4,568	0	4,568	0	4,568
119.	STATE BK OF INDIA LA AGY	L. ANGELES	CA	0	0	0	4,105	4,105
120.	BANK HAPOALIM BM MIAMI BR	AVENTURA	FL	0	3,950	3,950	0	3,950
121.	NORINCHUKIN BK NY BR	NEW YORK	NY	3,604	0	3,604	0	3,604
122.	BANK HAPOALIM BM PLAZA BR	NEW YORK	NY	0	3,485	3,485	0	3,485
123.	OVERSEA-CHINES BKG CRP NY AGY	NEW YORK	NY	5	100	105	2,990	3,095
124.	BANCO BRADESCO SA NY BR	NEW YORK	NY	0	2,754	2,754	0	2,754
125.	FIRST CMRL BK CO NY BR	NEW YORK	NY	2,705	0	2,705	28	2,733
126.	BANK OF TAIWAN LA BR	L. ANGELES	CA	2,724	0	2,724	0	2,724
127.	BANK OF CMNTNS NY BR	NEW YORK	NY	1,941	0	1,941	674	2,615
128.	ERSTE GROUP BK NY BR	NEW YORK	NY	2,336	0	2,336	0	2,336
129.	CHANG HWA CMRL BK NY BR	NEW YORK	NY	2,327	0	2,327	0	2,327
130.	TAIWAN CO-OP BK LA BR	L. ANGELES	CA	2,003	0	2,003	0	2,003
131.	BANCO PICHINCHA CA MIA AGY	MIAMI	FL	0	1,204	1,204	414	1,618
132.	BANGKOK BK PUBLIC CO NY BR	NEW YORK	NY	1,522	0	1,522	0	1,522
133.	BANCO DE BOGOTA SA MIA AGY	MIAMI	FL	0	1,400	1,400	0	1,400
134.	BANK OF GUAM SAN FRAN BR	SAN FRAN.	CA	1,313	0	1,313	0	1,313
135.	SHANGHAI CMRL BK LA BR	ALHAMBRA	CA	1,262	0	1,262	0	1,262
136.	TAIWAN CO-OP BK NY BR	NEW YORK	NY	1,031	0	1,031	0	1,031
137.	UNITED BK AFRICA NY BR	NEW YORK	NY	0	979	979	0	979
138.	NATIONAL BK PAKISTAN WA BR	WASH.	DC	0	0	0	926	926
139.	FIRST CMRL BK LA BR	L. ANGELES	CA	581	0	581	257	838
140.	LAND BK OF TAIWAN NY BR	NEW YORK	NY	694	0	694	0	694
141.	CAIXA GERAL DE DEPOSITOS NY BR	NEW YORK	NY	302	330	632	0	632
142.	CHANG HWA CMRL BK LA BR	L. ANGELES	CA	512	0	512	0	512
143.	BANK SINOPAC LA BR	L. ANGELES	CA	186	0	186	298	484
144.	BANK OF CMNTNS SF BR	SAN FRAN.	CA	0	481	481	0	481
145.	TAIWAN BUS BK LA BR	L. ANGELES	CA	360	0	360	0	360

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
146.	BANCO REPUBLICA ORIENTL NY BR	NEW YORK	NY	0	338	338	0	338
147.	STATE BANK INDIA CHICAGO BR	CHICAGO	IL	300	0	300	0	300
148.	CHINA CITIC BK INTL LA BR	ALHAMBRA	CA	200	0	200	0	200
149.	P T BK NEGARA INDO PER NY AGY	NEW YORK	NY	68	0	0	184	184
150.	PHILIPPINE NB LA BR	L. ANGELES	CA	150	0	150	0	150
151.	HUA NAN CMRL BK NY AGY	NEW YORK	NY	126	0	126	0	126
152.	BANCO DO BRASIL SA MIAMI BR	MIAMI	FL	0	120	120	0	120
153.	METROPOLITAN B&TC NY BR	NEW YORK	NY	0	0	0	89	89
154.	WESTPAC BKG CORP NY BR	NEW YORK	NY	0	79	79	0	79
155.	GUNMA BANK NY BR	NEW YORK	NY	73	0	73	0	73
156.	MEGA INTL CMRL BK CHICAGO BR	CHICAGO	IL	65	0	65	0	65
157.	HABIB BK NY BR	NEW YORK	NY	30	0	30	25	55
158.	BANK OF TAIWAN NY BR	NEW YORK	NY	4,518	0	0	0	0
	TOTALS			158,541,281	47,497,902	167,422,496	10,402,621	177,825,117

SCAM SURVEY

Two Sentenced for Fraud Involving USDA Program

Brett C. Lillemoe of Minneapolis, Minnesota, and Pablo Calderon of Darien, Connecticut, have been sentenced for their roles in a fraud, following a one-month trial that concluded in November 2016. As *DCW* reported in December 2016, the fraud related to a US Department of Agriculture (USDA) loan guarantee program. Through the program, the USDA encourages export of US agricultural products by offering credit guarantees to banks unwilling to finance sales without the guarantee. The guarantee might be necessary in transactions involving buyers in developing countries or transactions with increased risk of loss. The buyer applies for a letter of credit from a non-US bank, approved by the USDA, which issues the LC in favor of the US exporter. If the bank would default on its obligation to pay, the USDA guarantees up to 98% of the payment owed at the time of default.

The jury found that between September 2007 and January 2012, Lillemoe, Calderon, and others defrauded various US banks, including Deutsche Bank A.G. and Colorado-based CoBank ACB. The defendants presented false or altered shipping documents, including altered bills of lading, to secure funding on loans guaranteed by the USDA. To avoid suspicion, the defendants created multiple fictitious entities and used multiple bank accounts. The defendants were able to obtain payment on shipments of product that did not exist or in whose shipment the defendants played no role.

The jury also found that the defendants defrauded US banks through the involvement of certain non-US banks. Lillemoe entered into agreements with non-US banks, including International Industrial Bank in Russia, to help them obtain capital from the US banks. In exchange, the non-US banks issued LCs.

According to the US Attorney, the defendants and others "altered copies of certain shipping documents, including bills of lading marked "Copy non negotiable," by whiting out portions of the documents, stamping the word "original" on the documents, and adding shading on certain sections of the bills of lading. The defendants also prepared and executed documents termed "commercial invoices" purporting to represent sales of agricultural commodities between entities that they controlled, as well as between entities that they controlled and other entities."

The funds obtained were provided to the non-US banks after the defendants retained fees for their role. In some cases, the

SCAM SURVEY

non-US banks failed to reimburse the US banks. According to the US Attorney, the evidence at trial showed that non-US banks defaulted on loans totaling more than USD 25 million. Those amounts constituted losses to the US banks, which were ultimately covered by the USDA guarantees. The defendants were found guilty of conspiracy to commit wire fraud and bank fraud. Lillemoe was found guilty of five counts and Calderon was found guilty of one count of wire fraud.

At a sentencing held 14 June 2017, Lillemoe was sentenced to 15 months in federal prison and Calderon was sentenced to five months in prison and five months of house arrest. Chief Judge Hall also ordered both men to serve a three-year term of supervised release and to pay restitution in the amount of USD 18 million and forfeit more than USD 1.5 million of ill-gotten gains.

(Source: United States Attorney, District of Connecticut)

Father and Son Accused of Large LC Fraud in India

Several businessmen, including a father and son and a former official at Canara Bank have been arrested by India's Central Bureau of Investigation (CBI) on suspicion of letter of credit fraud. The accused remain behind bars as a court has granted the CBI's request for extended pretrial custody.

Manoj Jayaswal and his son Abhishek, along with two other directors of Jayaswal's company, and TS Pai, a former official with Canara Bank, were arrested in Kolkata in June 2017. The defendants are accused of an LC fraud involving losses of Rs 290 crore (approximately USD 43.6 million) to Canara Bank and Vijaya Bank cumulatively. According to the CBI, Jayaswal's company had obtained a contract to set up a coal-based power project and awarded a portion of the project to a related company pursuant to contracts of which the banks were awarded. Those contracts provided that the subcontractor was to be paid a mobilization advance. In exchange, it secured bank guarantees.

The banks did not know, however, that pursuant to an amendatory agreement, the subcontractor agreed to repay the mobilization advance on demand. When the repayment was demanded, the subcontractor discounted letters of credit issued in its favor and the proceeds were diverted to Jayaswal's company. It is alleged that the bank official aided in the fraud by recommending the bank enter into the transactions and by falsely promising that bank guarantees had been assigned to the bank as security.

The accused remain jailed pending the investigation and prosecution of the charges.

(Sources: Central Bureau of Investigation, *The Times of India*)

Court Upholds Dismissal of Claim of Wrongful Dishonor of Fraudulent LC

The United States Court of Appeals for the Ninth Circuit, in a decision entered 1 June 2017, upheld a District Court's decision to dismiss a claim for wrongful of a letter of credit that had been forged.

In the underlying case, Morris Cerullo World Evangelism ("the Ministry") alleged that Compass Bank, DBA BBVA Compass, had wrongfully dishonored an LC issued for the benefit of the Ministry. The District Court held, however, that no LC existed, and as a result, Compass could not have wrongfully dishonored. The Court found that a branch manager at one of Compass's branches had forged the LC and that he had no authority to issue LCs on behalf of Compass.

Moreover, the Court found that there were significant indicia that the LC was fraudulent. Indeed, the Court found that the transaction at issue had raised the suspicion of the Ministry's decision makers and they had initially declined the "confidential offering" made to them by the rogue employee. The supposed LC also had defects on its face, including inaccurate dates and names of parties, an outdated address for Compass, and an "incoherent reference to nonexistent bracketed text."

In short, the Court found that the LC did not exist, and as a result, there could have been no wrongful dishonor of it. Moreover, the Court found that the defects on the face of the LC were so obvious that the Ministry could not have reasonably relied upon it as a legitimately issued instrument. The Ninth Circuit affirmed the District Court's decision.

(Source: *Compass Bank, DBA BBVA Compass v. Morris Cerullo World Evangelism*, No. 15-56417 (9th Cir.))

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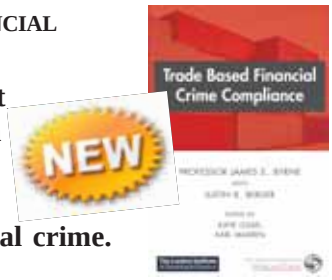

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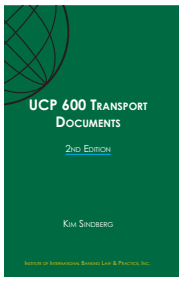

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Annual Survey of Letter of Credit Law & Practice

AMERICAS:	Atlanta – 16-17 March 2017
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EUROPE:	Stockholm – 4 May 2017
EUROPE:	Antwerp – 9 May 2017
HONG KONG:	15 July 2017
SE ASIA:	Singapore – 17-18 July 2017
CHINA:	Beijing – July 2017

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Guarantee & Standby Forum

EUROPE:	Stockholm – 5 May 2017
EUROPE:	Antwerp – 10 May 2017
HONG KONG:	14 July 2017
SE ASIA:	Singapore – 19 July 2017
CHINA:	Beijing – July 2017
AMERICAS:	New York – 26 October 2017

Full Day Focus on LC Practice, Forms, and Litigation Issues

Letter of Credit Law Summit

SE ASIA:	Singapore – 20 July 2017
AMERICAS:	New York – 27 October 2017

Other 2017 events, dates, and locations are pending and will be announced. For the most current information, visit:www.iiblp.org For a complete list of resources available, please contact the Institute.

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