SIGNIFICANT LETTER OF CREDIT DECISIONS IN SINGAPORE

By

TOH KIAN SING

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Rajah & Tann, Singapore

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I. INTRODUCTION

1. Singapore is probably the most important centre of trade finance in Asia. These notes cover a number of significant decisions on trade finance handed down by the Singapore courts in recent years.

2. These cases touch on issues that are encountered frequently in trade finance practice:-

(a) importance of proper endorsement of bills of lading;
(b) credit tolerance and price fluctuation clauses in oil letters of credit;
(c) giving notice of rejection when documents are re-presented under a letter of credit;
(d) handling of forged documents by negotiating / confirming banks;
(e) foreign injunctions and proceedings.

II. IMPORTANCE OF PROPER ENDORSEMENT OF BILLS OF LADING IN TRADE FINANCE: ***KEPPEL TATLEE BANK LTD V. BANDUNG SHIPPING PTE LTD*** **[2003] 1 LLOYD'S REP 619.**

3**.** This decision of the Singapore Court of Appeal deals with the striking out of a bank's claim against a ship owner for mis-delivery of cargo because the bill of lading was not re-endorsed to the bank by its foreign correspondent bank.

4. The bill of lading reached the hands of the plaintiff bank as part of a discounting arrangement. It was then blank endorsed. The plaintiff bank, as a matter of prudence, specially endorsed the bills in favour of the Indian collecting bank. When the bills of lading were not taken up by the Indian buyers, they were returned by the Indian bank without any re-endorsement.

5. Applying the Bills of Lading Act of Singapore (which is similar to the UK Carriage of Goods by Sea Act, 1992), the Singapore Court of Appeal concluded that rights to sue the carrier for the mis-delivery of the goods were transferred by the plaintiff bank to the Indian bank but not retransferred by the Indian bank to the plaintiff bank because of the absence of re-endorsement. The position might be different if there was only blank endorsement of the bills of lading since blank endorsed bills of lading function like bearer bills; no further endorsement is necessary.

III. FLUCTUATION CLAUSES IN OIL LETTERS OF CREDIT: ***STANDARD CHARTERED BANK V. KOREA EXCHANGE BANK*** **[2005] .SGHC 220.**

6. This Singapore High Court decision gives effect to a clause commonly found in oil letters of credit which provides that the letter of credit amount fluctuates freely with the price of oil over a defined period without need for amendment, despite the presence of a tolerance in the letter of credit value.

7. There is **a** basic inconsistency in the letter of credit provisions. One clause says that the letter of credit value of US$800,000 is subject to a margin of *+I-* 10%. Another clause says that the letter of credit value shall automatically fluctuate to cover any increase or decrease according to the price clause without further amendment to the letter of credit. The price clause tacks the price of the cargo to Platt's average over a period.

8. The court ruled that the automatic fluctuation clause should be upheld and that it prevails over the tolerance margin of +/- 10%. It specifically rejected the argument that if such a clause is upheld, the issuing bank's potential liability is unlimited. It also rejected the argument that the fluctuation clause creates a non-documentary condition, which may be ignored by the issuing bank under Article 13(c) of UCP 500. The issuing bank should not be allowed to renege on its obligations under Article 13(c) which is designed to protect the interests of intermediary banks and beneficiaries.

9. After the documents were rejected initially for a number of discrepancies, one alleged discrepancy was rectified. The whole set of documents was then re-presented but the issuing bank failed to give a second notice of rejection. The court reasoned, in the alternative, that even if the documents were discrepant because of the overdrawing, the issuing bank was precluded from rejecting them based on the second presentation because they did not reject these documents. The effect of Article 14(d) and (e) of UCP 500 is that the issuing bank cannot rely on the discrepancy of overdrawing, even if that were valid. Article 14 applies to the first and subsequent presentation of documents alike.

IV. TREATMENT OF FOREIGN INJUNCTION AND PROCEEDINGS

10. It is not uncommon for applicants to go to their local courts to get court injunctions to enjoin the issuing bank from making payment under letters of credit. There were several instances of injunctions being issued by Chinese courts a few years ago to prevent Chinese issuing banks from making payment.

11. When the issuing bank is sued for not paying under the letter of credit, it raises the injunction as a defence. Two Singapore decisions dealt with this point. In *Agritrade International Pte Ltd v. Industrial and Commercial Bank of China* [I998] 3 SLR 211, a court injunction from a provincial court in China was not given effect to by the Singapore courts because the letter of credit was governed was the law of Hong Kong, the place where negotiation occurred. In contrast, in *Sinotani Pacific Pte Ltd v. Agricu1tural Bank of China* [I999] 4 SLR 34, the Chinese court injunction was upheld because Chinese law was the governing law of the letter of credit (which was a straight letter of credit).

12. Thus, the test applied by the Singapore court is that the court injunction would only be recognised if it comes from a jurisdiction whose law is the governing law of the letter of credit. This in turn may depend on the presence of an express governing law clause in the letter of Credit (a preferred practice but not common) or the type of letter of credit (straight or negotiable). This approach has been followed in Hong Kong: see *Rabobank I/. Bank of China* (June, 2004).

13. Where there is a refusal to pay on a letter of credit, the issuing bank can be sued in a foreign jurisdiction where its branch is found and which the negotiating bank is comfortable with. The issuing bank may prefer to have the dispute resolved in its own jurisdiction instead. Such a situation arose in *Mizuho Corporate Bank Ltd v. Cho Hunq Bank* [2004] 4 SLR. 67. The Korean issuing bank was sued by the Japanese confirming bank in Singapore for wrongfully refusing payment under the letters of credit. It then commenced proceedings in Korea to get a court order declaring that it was not liable on the letters of credit. The Japanese negotiating bank started proceedings in Singapore, which the Korean issuing bank tried to stay so that all disputes could be adjudicated in one jurisdiction only i.e. Korea. If this had been allowed to happen, a defendant could steal a march from the plaintiff by starting non-liability declaratory proceedings in the court of its own choice. The Singapore court would have none of this. It refused to stay the Singapore

proceedings in favour of the Korean court even if that meant that two sets of proceedings would continue in two different jurisdictions.

V. A QUALIFIED FORGERY / NULLITY EXCEPTION EXISTS UNDER SINGAPORE LAW RELIEVING A CONFIRMING BANK FROM PAYING TO A BENEFICIARY IF A DOCUMENT PRESENTED IS A FORGERY, EVEN IF THE BENEFICIARY IS INNOCENT: ***STANDARD CHARTERED BANK V. BEAM TECHNOLOGY (MFG) PTE LTD*** **[2002] 2 SLR 155; [2OO3] 1 SLR 597**

14. English law only recognises one exception to the principle of autonomy i.e. beneficiary's fraud. It does not recognise any exception based on nullity of any of the documents presented: see *Montrod Ltd v. Grundkotter Fleischvertriebs-GmbH*. Singapore law, on the other hand, is somewhat different. In *Standard Chartered Bank v. Beam Technology (MFG) Pte Ltd* documents were presented by beneficiary to a confirming bank, one of which (an air waybill) turned out to be a forgery and therefore a nullity at law. The forgery was perpetrated by unknown persons who took the goods with them on a pretext of acting as a freight forwarder. The beneficiary was innocent of forgery. Somewhat exceptionally, the confirming bank was alerted to this forgery by other parties who were similarly defrauded in respect of other letters of credit confirmed by Standard Chartered Bank**.** In these circumstances, Standard Chartered Bank refused payment. The Singapore court held that a confirming bank in these circumstances is not obliged to make payment against documents which contain forgery even though the beneficiary may be completely innocent. The confirming bank should not be put in a position where it has to pay for documents which it is aware are worthless. The ***Montrod's*** decision was discussed by the court but not fully followed. The court ruled that the issuing bank must give notice that it is refusing the documents on this basis within 7 days as prescribed under Article 14. The Singapore court made it clear that the decision does not require the bank to investigate against any documents presented but if it happens to know, it is not required to pay.

The Author: Kian Sing TOH, LLB (Hons) BCL (Oxon)

Toh Kian Sing acts for most of the local and overseas banks in Singapore on trade finance matters. He has acted as counsel in many trade finance and letter of credit cases, which resulted in reported decisions given by the Singapore courts.

Kian Sing brings to his law practice a background of academic excellence and experience as a lecturer and later, senior adjunct fellow with the Faculty of Law of the National University of Singapore.

He has been responsible for coordinating and teaching the Admiralty and Shipping Law courses in the University for several years.

Kian Sing also authored the only book on Admiralty Law and Practice in Singapore which is relied on by both practitioners and academics alike locally and in other jurisdictions.

His scope of expertise includes bills of lading, charter-party and marine insurance litigation and arbitration, international trade disputes. He is well regarded for his expertise in trade finance litigation and documentation.

Kian Sing's fluency in both written and spoken Chinese also makes him the preferred counsel for a great number of shipping, trading and banking institutions from the People's Republic of China.

Job Title: Partner

Company: Rajah & Tann - Advocates & Solicitors
Business Address:
4 Battery Road
26 - 01
Bank of China Building
Singapore 049908
Singapore

Business: +65 (6) 2320614
Business Fax: +65 (6) 5361335
Switchboard: +65 6 6535 3600
E-mail: kian.sing.toh@rajahtann.com
Web Page: http://www.rajahtann.com