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Ref : Chans advice/114

To: Transport Industry Operators

UCP 600

On 14/12/2009, the Hong Kong High Court held an issuing bank not obliged to reimburse US\$1,547,840 to an advising bank under a letter of credit pursuant to UCP 600. (HCA 1290/2008 & HCCL 24/2008) These proceedings concerned a Letter of Credit (L/C). They raised 2 issues on the application of UCP 600. The L/C was subject to UCP 600.

New Era requested Bank of China (BOC) to issue an L/C for US\$1,547,840 in favour of Flexus. The L/C was made available at First Commercial Bank (FCB) as advising, nominated and negotiating bank. FCB negotiated the L/C by accepting a draft drawn by Flexus on BOC. The negotiation was "with recourse" (i.e., subject to an indemnity from Flexus) because FCB paid out the L/C amount to Flexus against an admittedly non-compliant document. The non-compliant document was referred to at trial as the 1st Cargo Receipt. Within the validity period of the L/C, Flexus obtained 2 further versions of the 1st Cargo Receipt. The 2nd Cargo Receipt was equally non-compliant. But finally FCB presented a set of documents to BOC with a 3rd Cargo Receipt. At about the time when FCB presented documents to BOC, New Era informed BOC that the 3rd Cargo Receipt was a forgery. New Era further alleged that, even if genuine, the 3rd Cargo Receipt was non-compliant. New Era asked BOC not to pay out under the L/C. New Era claimed that the 3rd Cargo Receipt was non-compliant for the following reasons:-

- (1) The 3rd Cargo Receipt purported to be on New Era's letterhead. But the 3rd Cargo Receipt's letterhead wrongly identified New Era's address as "Unit 05B" instead of "Unit 058".
- (2) When opening the L/C, New Era had provided BOC with a specimen copy of its authorised signature and chop. New Era instructed BOC that the signature and chop on any Cargo Receipt used to operate the L/C had to be verified against the specimen. The advising bank was to be (and FCB was so) advised by BOC. The specimen gave New Era's Chinese name in traditional Chinese characters. The chop imprint on the 3rd Cargo Receipt, in contrast, gave New Era's name in simplified Chinese characters.

New Era contended to BOC that Flexus was acting fraudulently. In particular, contrary to the 3rd Cargo Receipt's tenor, Flexus (New Era told BOC) had never shipped any goods (TFT Panels) to New Era. On the strength of that fraud allegation and upon BOC indicating that it was nevertheless intending to honour the L/C by reimbursing FCB, New Era obtained an interlocutory Court order enjoining BOC from paying FCB. By a Letter of Undertaking dated 14/7/2008 Flexus admitted fraud. The Letter stated that the 3rd Cargo Receipt was false.

On the authorities (for example, *Credit Agricole Indosuez v. Generale Bank* [1999] 2 All ER (Comm) 1009 (at 1015c-h per Rix J)) New Era accepted that, if the 3rd Cargo Receipt was compliant and FCB was entitled to present the same, it was irrelevant that the document was a forgery. This was because FCB had no knowledge of a possible fraud by Flexus until long after FCB had paid monies to Flexus or made its presentation to BOC.

At all times, New Era was acting as the import agent for Ching Tai. As such agent, New Era entered into a contract dated 30/5/2008 with Flexus for the purchase of 55,280 sets of 7" TFT Panels. This was the transaction underlying the L/C. The contract envisaged that, upon receipt of the goods in Hong Kong, New Era would provide Flexus with a Cargo Receipt. Flexus could then present this Cargo Receipt to its bank (FCB) to obtain payment. On 24/6/2008 Ching Tai requested New Era to send the 1st Cargo Receipt to FCB. Ching Tai asked New Era to describe the relevant goods in the 1st Cargo Receipt as "STN" (not "TFT"). New Era complied with the request, sending the 1st Cargo Receipt to FCB by DHL. Although New Era did not know then whether Ching Tai had actually received any goods from Flexus, New Era realised that the

1st Cargo Receipt was non-compliant (since the goods were there wrongly described as “STN” rather than “TFT”). New Era rightly believed that Flexus would not be able to obtain payment under the L/C through presentation of the 1st Cargo Receipt. All parties accepted that the 1st Cargo Receipt was non-compliant precisely for the reason which New Era identified. FCB received the 1st Cargo Receipt on 25/6/2008. On the same date, Ching Tai requested New Era to send the 2nd Cargo Receipt. This time Ching Tai asked that the goods be described as “7” STN”. New Era complied, again fully appreciating that Flexus could not obtain payment under the L/C using the 2nd Cargo Receipt. New Era sent the 2nd Cargo Receipt to FCB by DHL. All parties also accepted that the 2nd Cargo Receipt was non-compliant. FCB received the 2nd Cargo Receipt on 26/6/2008. But by the time of receipt FCB had already paid Flexus, albeit subject to an indemnity. New Era never sent (and was never requested by Ching Tai to send) the 3rd Cargo Receipt. Instead, FCB mysteriously received the 3rd Cargo Receipt by DHL on 1/7/2008. The DHL documents evidencing the delivery of the 1st and 2nd Cargo Receipts to FCB all bore New Era’s DHL account number. The DHL documentation for the 3rd Cargo Receipt did not have New Era’s DHL account number. FCB sought reimbursement from BOC by presenting documents (including the 3rd Cargo Receipt) on 2/7/2008.

1st Issue: Was FCB’s presentation of the 3rd Cargo Receipt valid?

The Judge did not think that FCB’s presentation was valid.

UCP Art. 7(c) provides that:-

“An issuing bank [here, BOC] undertakes to reimburse a nominated bank [here, FCB] that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank”

Among other things, UCP Art. 2 defines “honour” of an L/C as “to pay at sight if the credit is available by sight payment”. The same article defines “negotiation” as “the purchase by the nominated bank of ... documents under a complying presentation”. By “presentation” is meant “either the delivery of documents under a credit to the issuing bank or nominated bank or the documents so delivered”.

It followed from the foregoing that under Art. 7(c) BOC (as issuing bank) was bound to reimburse FCB (as nominated bank) where:-

- (1) FCB honoured or negotiated a complying presentation by Flexus (as beneficiary); and,
- (2) FCB has forwarded the documents thereby purchased or obtained from Flexus’ complying presentation to BOC.

That was not what FCB did. Instead, FCB paid Flexus on the basis of a non-complying presentation (since the 1st Cargo Receipt was discrepant). Thus, FCB purchased (negotiated) documents under a non-complying presentation. Had FCB presented the documents so obtained (including the 1st Cargo Receipt), the documents would rightly have been rejected as non-complying.

FCB argued that it could, despite the discrepancy in the 1st Cargo Receipt, pay Flexus under the L/C with recourse. FCB said that it could then wait until it somehow obtained a full set of compliant documents. Once it had such a compliant set of documents and provided that the L/C had not yet expired, it could present the now complying set to BOC and claim reimbursement under Art. 7(c).

But that is not what Art. 7(c) says. To obtain reimbursement under Art. 7(c), the documents presented by a nominated bank have to be the complying set of documents which the beneficiary actually presented to the nominated bank and against which the nominated bank actually released payment to the beneficiary. The Judge did not accept the submission of FCB that Art. 7(c) did not link the beneficiary’s presentation to the nominated bank with the presentation of the nominated bank to the issuing bank. According to FCB, so long as the presentation by the nominated bank to the issuing bank was compliant, it did not matter that the nominated bank released payment to a beneficiary against non-compliant documents. In the Judge’s view, that reading was untenable in light of the actual wording of Art. 7(c). When Art. 7(c) refers to the nominated bank having “forwarded the documents” to the issuing bank, it plainly means having “forwarded the documents which the nominated bank purchased upon a beneficiary’s complying presentation”. It followed that FCB’s presentation was invalid. BOC had no obligation to reimburse FCB under Art. 7(c).

2nd Issue: Was the 3rd Cargo Receipt a compliant document?

In light of the Judge's conclusion on the 1st Issue, it was unnecessary for the Judge to decide this 2nd Issue. But in deference to counsel's submissions, the Judge briefly set out his views. The Judge did not think that the 3rd Cargo Receipt was compliant.

As to the error in New Era's letterhead, the Judge was not persuaded that the reference to "Unit 05B" was a material irregularity.

UCP Art. 14(j) states:-

"When the addresses of the ... applicant [here, New Era] appear in any stipulated document [here, a Cargo Receipt], they need not be the same as those stated in the credit or in any other stipulated document, but must be within the same country as the respective addresses mentioned in the credit. Contact details (telefax, telephone, email and the like) stated as part of the ... applicant's address will be disregarded"

UCP Art. 14(j) suggested that the minor discrepancy in New Era's Unit was a detail which might be disregarded.

In contrast, the Judge thought that the discrepancy in the chop was a material one. UCP Art. 1 stipulates that the UCP is binding "unless expressly modified or excluded by the credit". Here the L/C was subject to New Era's express instruction that the signature and chop on any Cargo Receipt presented were to be verified against the specimen provided. The chop in the 3rd Cargo Receipt did not conform to the specimen provided to BOC and FCB. Self-evidently, since the former was in simplified characters, the imprint was that of a different chop from the specimen. It followed that the 3rd Cargo Receipt was non-conforming. Therefore, even if FCB was entitled to present the 3rd Cargo Receipt, that Receipt was a non-compliant document. Under the L/C, FCB was not entitled to payment by BOC on such a presentation.

CONCLUSION

FCB's presentation of the 3rd Cargo Receipt was invalid. In any event, the 3rd Cargo Receipt was not a compliant document under the terms of the L/C. BOC was not obliged to reimburse FCB.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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Thanks to the colossal injections by worldwide governments, the fourth quarter of 2009 imparted some hope as we saw both seafreight and airfreight cargo rush in the last quarter created temporary space shortage. Whether the robust trend will continue is uncertain as worldwide governments are not in unison in their fiscal policies. The "visible" hand will still haunt the economy in 2010.

During time of uncertainty, we believe the number of E&O, uncollected cargo and completion of carriage claims will be unabated. If you need a cost effective professional service to defend claims against you, our claim team of five are ready to assist. Feel free to call Carrie Chung / George Cheung at 2299 5539 / 2299 5533.