

Incorporating:  
Margaret Wort & Co  
WB Gurney & Sons

Ref. CL-2016-000648

[2017] EWHC 3380 (Comm)

IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
OF ENGLAND AND WALES  
QUEEN'S BENCH DIVISION  
COMMERCIAL COURT

Royal Courts of Justice  
Rolls Building, London

14 December 2017

Before

THE HONOURABLE MR JUSTICE ANDREW BAKER

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DEUTSCHE BANK AG,  
LONDON BRANCH (Claimant)

- v -

CIMB BANK BERHAD (Defendant)

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MR A FULTON (instructed by Sullivan & Worcester UK LLP) appeared on behalf of the  
Claimant  
MS V SELVARATNAM QC and MR T STEWARD (instructed by Holman Fenwick Willan  
LLP) appeared on behalf of the Defendant

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APPROVED JUDGMENT

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MR JUSTICE ANDREW BAKER:

Introduction

1. These proceedings have been between two well-known international banks operating, amongst other things, in the field of financing international commodity trading transactions by the use of documentary letters of credit. The claimant, Deutsche Bank, is headquartered in Germany but for present purposes operated from its London branch. The defendant, CIMB, is headquartered in Malaysia but for present purposes operated through its branch in Singapore. Deutsche Bank claims, as confirming bank, reimbursement from CIMB, as issuing bank, under certain documentary letters of credit used to finance international trading transactions in Indian cotton. This has been the final trial of the action.
2. Two short points only arise. Other defences, or possible defences, were previously pleaded, or in some cases merely threatened or hinted at, but in the event only two defences were pursued by CIMB: (i) that the documents tendered as required document 7 did not conform to the letter of credit requirements; and (ii) that the documents were tendered more than 21 days after the shipment date shown in the documents.
3. The total paid by Deutsche Bank and claimed is just under US\$10 million. The exact amount has been agreed. There were in total 10 letters of credit and 23 documentary tenders across those 10 letters of credit. Happily, it is agreed that I can determine all 23 claims by reference to just one of those tenders. It is all or nothing. If Deutsche Bank is correct as regards that one tender - that is to say, if neither discrepancy alleged in that case is a discrepancy in truth - then it will also be correct in all other cases and the total claimed is due. If, however, CIMB is correct for that one tender, in respect of either of the discrepancies alleged, then it will also be correct in all other cases and Deutsche Bank's claims will stand to be dismissed. In the detailed discussion that follows, therefore, I refer exclusively to the one documentary tender (and the letter of credit under which it was effected) agreed by the parties as the test case.

The Letter of Credit Terms

4. The letter of credit was issued by CIMB on 6 October 2015. It was communicated to Deutsche Bank, to be advised by Deutsche Bank to the beneficiary, with authority to

Deutsche Bank to add its confirmation as in due course it did, by a SWIFT message in the SWIFT FIN 700 format for the issuance of a documentary credit. Its material terms included the following:

“40A: Form of Documentary Credit  
IRREVOCABLE

20: Documentary Credit Number  
025000201944

31C: Date of Issue  
151006

40E: Applicable Rules  
UCP LATEST VERSION

31D: Date and Place of Expiry  
160115IN UNITED KINGDOM

41A: Available With...By... - FI BIC  
DEUTGB2L  
DEUTSCHE BANK AG  
LONDON GB  
BY NEGOTIATION

44E: Port of Loading/Airport of Dep.  
ANY PORT IN INDIA

44F: Port of Discharge/Airport of Dest  
SHANGHAI, CHINA

44C: Latest Date of Shipment  
151215

45A: Descriptn of Goods &/or Services

INDIAN RAW COTTON (2014/2015 CROP) ORIGIN:  
GUJARAT, INDIA

QUALITY: SHANKAR-06 STAPLE LENGTH: 1-5/32”,  
MICRONAIRE: 3.6-4.8NCL

STRENGTH: 29GPT. GRADE: SM

ACCORDING TO THE SAMPLES MOISTURE  
PERCENTAGE WITHIN 9.0PCT, TRASH  
PERCENTAGE WITHIN 3.5PCT

1000MT (2, 204, 620.00 LBS) PLUS ZERO MINUS  
2 PCT VARIATION IN WEIGHT ALLOWED.

USC72.00/LBS WITH REFERENCE GTL/2014-  
2015/6495-III

INCOTERMS 2010, CIF SHANGHAI, CHINA

46A: Documents Required

LIST OF DOCUMENTS TO BE PRESENTED IN  
TRIPPLICATE (UNLESS OTHERWISE STATED) -

1. BENEFICIARY'S SIGNED COMMERCIAL INVOICE  
FOR 100PT OF THE CFIF VALUE IN 1 ORIGINAL  
PLUS 2 COPIES.

2. FULL SET (3/3) OF ORIGINAL SHIPPED ON  
BOARD BILLS OF LADING CONSIGNED TO ORDER  
AND BLANK ENDORSED, MARKED "FREIGHT  
PREPAID".

3. CERTIFICATE OF QUALITY ISSUED BY  
INDEPENDENT SURVEYOR IN 1 ORIGINAL AND  
1 COPY.

4. CERTIFICATE OF QUANTITY ISSUED BY  
INDEPENDENT SURVEYOR IN 1 ORIGINAL AND  
1 COPY.

47A: Additional Conditions

...

2. ALL DOCUMENTS MUST BE PRESENTED IN  
ENGLISH LANGUAGE, DATED AND SIGNED.

...

6. L/C ADVISING BANK IS AUTHORISED TO ADD  
ITS CONFIRMATION TO THE L/C AT  
BENEFICIARY'S REQUEST AND COST. UPON  
CONFIRMATION THE CREDIT BECOMES  
AVAILABLE WITH ADVISING BANK BY PAYMENT  
AND DRAFT TO BE DRAWN ON ADVISING BANK.

48: Period for Presentation  
DOCUMENTS TO BE PRESENTED WITHIN LETTER  
OF CREDIT VALIDITY."

5. As I have said, the SWIFT message was in FIN 700 format. The numbered fields for that message format each have a definition and usage guidance in the SWIFT Message Reference Guide. In relation to the second alleged discrepancy - late presentation - both parties rely on what is said about Field 48 in the Guide.
  
6. By Field 40E (Applicable Rules), the letter of credit terms incorporated the latest version of the UCP. That, of course, is a reference to the ICC Uniform Customs and Practice for Documentary Credits. Its latest version at the date of the letter of credit was UCP 600, published in 2007. The material provisions of UCP 600 for present purposes are the following:

“Article 1: **Application of UCP**

“The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no 600 (‘UCP’) are rules that apply to any documentary credit (‘credit’) (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded by the credit.

“Article 2: **Definitions**

“For the purpose of these rules:

“... ”

“**Complying presentation** means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.

“... ”

“Article 3: **Interpretations**

“For the purpose of these rules:

“... ”

“A document may be signed by handwriting, facsimile signature, perforated signature, stamp, symbol or any other mechanical or electronic method of authentication.

“... ”

**“Article 6: Availability, Expiry Date and Place for Presentation**

“... ”

“(e) Except as provided in sub-article 29 (a), a presentation by or on behalf of the beneficiary must be made on or before the expiry date.

**“Article 7: Issuing Bank Undertaking**

“... ”

“(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.

“... ”

**“Article 14: Standard for Examination of Documents**

“... ”

“(c) A presentation including one or more original transport documents subject to articles 19, 20, 21, 22, 23, 24 or 25 must be made by or on behalf of the beneficiary not later than 21 calendar days after the date of shipment as described in these rules, but in any event not later than the expiry date of the credit.

“(d) Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.

“... ”

“(f) If a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, banks will accept the document as presented if its content appears to fulfil the function of the required document and otherwise complies with sub-article 14(d).

“... ”

**“Article 17: Original Documents and Copies**

“... ”

“(b) A bank shall treat as an original any document bearing an apparently original signature, mark, stamp, or label of the issuer of the document, unless the document itself indicates that it is not an original.

“(c) Unless a document indicates otherwise, a bank will also accept a document as original if it:

“(i) appears to be written, typed, perforated or stamped by the document issuer’s hand; or

“(ii) appears to be on the document issuer’s original stationery; or

“(iii) states that it is original, unless the statement appears not to apply to the document presented.

“(d) If a credit requires presentation of copies of documents, presentation of either originals or copies is permitted.

“... ”

“Article 20: **Bills of Lading**

“... ”

“c. (i) A bill of lading may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same bill of lading.

“(ii) A bill of lading indicating that transshipment will or may take place is acceptable, even if the credit prohibits transshipment, if the goods have been shipped in a container, trailer or LASH barge as evidenced by the bill of lading.

“... ”

“Article 29: **Extension of Expiry Date or Last Day for Presentation**

“(a) If the expiry date of a credit or the last day for presentation falls on a day when the bank to which presentation is to be made is closed for reasons other than those referred to in article 36, the expiry date or the last day for presentation, as the case may be, will be extended to the first following banking day.

“... ”

7. The letter of credit underwent amendment on two occasions. The first amendment was made on 17 December 2015. Its material terms were as follows, as appearing in a further SWIFT message in FIN 707 format, for the amendment of a documentary credit:

“30: Date of Amendment  
051217

26E: Number of Amendment  
01

31E: New Date of Expiry  
160317

44C: Latest Date of Shipment  
160229

79: Narrative

...

UNDER FIELD 46A, TO INCLUDE THE FOLLOWING DOCUMENTS:

5. PHYTOSANITARY CERTIFICATE IN 1 ORIGINAL AND 1 COPY ISSUED BY COMPETENT AUTHORITY

6. CERTIFICATE OF ORIGIN IN 1 ORIGINAL AND 1 COPY ISSUED BY COMPETENT AUTHORITY

7. COPY OF REGISTRATION CERTIFICATE OF OVERSEAS SUPPLIER ENTERPRISE FOR IMPORT COTTON ISSUED BY AQSIQ.

UNDER FIELD 47A, TO INCLUDE THE FOLLOWING CONDITIONS:-

17. DOCUMENTS DATED PRIOR TO 151207 ARE NOT ACCEPTABLE.

...”

8. The second amendment, again sent by SWIFT message in FIN 707 format, was issued on 28 December 2015. It was identified as amendment number 2. Otherwise, apart from the date I have just mentioned, the only provision that may be material is that in Field 79 amendment 2 provided as follows:



“UNDER FIELD 47A, PLEASE DELETE ITEM 17:  
‘DOCUMENTS DATED PRIOR TO 151207 ARE NOT  
ACCEPTABLE’.”

### The Available Evidence

9. The material requirements of the letter of credit for a complying presentation are, it is agreed, a matter of the proper construction of the letter of credit terms (including the incorporated UCP 600 provisions). The issues at trial were therefore argued primarily by reference to the language of the letter of credit terms and the language of those UCP 600 provisions.
  
10. However, I also heard expert evidence from Mr Gary Collyer, called by Deutsche Bank, and Mr Roger Jones, called by CIMB. Both gentlemen have had long and senior careers in banking. I intend them no disrespect, though, by saying that in my judgment only relatively limited parts of their evidence were properly admissible. This was a very short trial. It was not going to be efficient to have a separate argument as to how much of the ground covered by Messrs Collyer and Jones in their reports would properly be of assistance to the court and limit their evidence accordingly. I therefore allowed all the evidence they had prepared in writing to be given and to be cross-examined upon as the parties felt appropriate, but all *de bene esse* as to how much was truly admissible expert opinion that may assist.
  
11. To my mind, the experts could properly give expert evidence to inform and educate the court as to the following four matters: (i) how things worked at trade financing banks in practice at the material time; (ii) how usual, or unusual, certain letter of credit language may be and how in practice it may have been treated; (iii) the degree to which external materials relied on by the parties would be familiar to ordinarily competent trade finance bankers (by “external materials” of course I mean anything beyond the letter of credit SWIFT messages themselves and the incorporated UCP 600); and (iv) the ICC Banking Commission system for generating and disseminating guidance as to matters of standard banking practice in relation to the use or operation of the UCP. The degree to which, if at all, their evidence on those matters is ultimately capable of influencing the true construction of the letter of credit terms in this case, and, if so, how, is a different question, of course, and a question for the court rather than for Mr Collyer

or Mr Jones as experts. Likewise, the ultimate task of determining the true purport of the letter of credit terms at issue, correctly interpreted, is exclusively the task of the court.

12. To the limited extent that it may then matter - that is to say, on the limited matters of legitimate expert evidence where Mr Collyer and Mr Jones in fact differed - I preferred Mr Collyer's views. In my judgment, he has both greater expertise and broader experience than Mr Jones and also directly relevant experience that Mr Jones does not have. Mr Jones acknowledged Mr Collyer's breadth and depth of expertise as "unique", that is to say unrivalled. Mr Jones, though, suggested that lent, if anything, greater weight to his (Mr Jones') views because of the degree to which Mr Collyer's unique breadth and depth of expertise distanced him from the ordinary day-to-day financing banker. I agree that Mr Collyer's expertise is such that care may be required to ensure that I do not impute to the parties knowledge that Mr Collyer himself may have that may be beyond that of the ordinarily competent and prudent trade finance banker. But subject to that note of caution, in my judgment Mr Jones' suggestion was a false point and Mr Collyer was, in truth, simply better placed, through more extensive and relevant experience, to assist the court.

13. In my judgment, to illustrate, the starkest example was in relation to the Field 48 language that is the critical language for the purposes of the second alleged discrepancy. Mr Jones' evidence was that he had never come across either that or similar language used in Field 48. However, under cross-examination, the reason for that became clear. It was that Mr Jones did not have experience of the world of commodity trade letters of credit which, by contrast, Mr Collyer had. Mr Jones went on to say as part of his evidence on what the relevant language actually means - which in any event, as I have said, is a matter for the court - that when he did first see the Field 48 language in this case he found it puzzling, was not sure what it meant and was not sure that it was indeed meaningful at all. It seemed to me that this was a clear example where Mr Jones' lack of relevant familiarity and experience coloured his views and hampered his ability to assist the court. It seemed to me there was a hostility to the proposition that the Field 48 language may have had the effect contended for by Deutsche Bank borne of Mr Jones' lack of experience and familiarity in the relevant field. By contrast, Mr Collyer's evidence was that, whilst by no means a standard usage or very frequently encountered, the language used here in Field 48, or similar language, is encountered from time to time

in commodity trading letters of credit and, so far as he is aware, has not given rise to difficulty or contention. I shall come back in context to how far that evidence of Mr Collyer's really went, but, however far it did go, it seems to me that he was well placed to give that evidence and I prefer it to Mr Jones' apparent views that the court should treat the Field 48 language here as extremely unusual or unwelcome or strange.

14. On matters where there was no dispute between the experts, they introduced the court to:

(1) The ICC publication International Standard Banking Practice for the Examination of Documents under UCP 600 (ICC Banking Commission publication 745) which has been referred to for shorthand as "ISBP 745". It is a publication representing the collective and approved wisdom of the ICC Banking Commission as to matters of standard practice amongst international banks in the use and operation of letters of credit incorporating UCP 600. It is the third publication of that nature produced by the ICC Banking Commission, following ISBP 645 in 2002 and ISBP 681 in 2007. The evidence was that ISBP 681, as an update to ISBP 645, was published at or about the same time as UCP 600 came into use and it therefore did not have the benefit of any collective experience of the use of UCP 600. ISBP 745, published in April 2013, therefore replaced so far as concerns UCP 600 any earlier statement of standard banking practice with the benefit of nearly six years of experience.

(2) The system for production and promulgation of ICC Banking Commission opinions on points of interest or potential dispute in relation to the meaning or operation of UCP 600 or, for that matter, the ISBP. Individual commercial parties or national committees may refer to the technical advisers to the ICC Banking Commission a point of interest or potential dispute. The technical advisers will consider the issue raised and provide their view on it in the form of a draft opinion given a TA reference number to indicate that it is the draft opinion as provided by the technical advisers. On a half-yearly basis the TA opinions are disseminated for comment by the Banking Commission and then approved, either as originally drafted or it may be with revisions to take account of comments received, at meetings of the Commission. Those approved opinions are then disseminated as batches following each half-yearly meeting. They are also from time to time

collected together and published in ICC Banking Commission collected opinions publications, at which point the opinions as published gain an R reference number.

- (3) Finally, the SWIFT Message Reference Guide in relation to the SWIFT message formats used in the present case.

### Principles of construction

15. I was reminded by Mr Fulton of, firstly, and if reminder were needed, the recent summary or restatement of the normal rules for the construction of commercial instruments provided by Lord Neuberger in *Arnold v Britton & Ors* [2015] UKSC 36; [2015] AC 1619 at [17] to [23], Mr Fulton particularly emphasising the first and third of Lord Neuberger's propositions at [17] and [19], and, secondly, *Fortis Bank SA/NV & Anor v Indian Overseas Bank* [2011] EWCA Civ 58; [2011] 2 All ER (Comm) 288, in which Thomas LJ (as he was then) emphasised that as regards construing the UCP 600 provisions an over-literalistic or parochial approach to construction depending on the particularities or idiosyncrasies of a particular national system of law should be avoided.
16. For her part, Ms Selvaratnam QC referred me to and emphasised the lessons to be drawn from *Forestal Mimosa Ltd v Oriental Credit Ltd* [1986] 1 WLR 631. I shall come back to that case later. At this stage, suffice it to say that Ms Selvaratnam QC placed heavy reliance upon what it says as regards what is required to modify or displace by the express, bespoke terms of a letter of credit the provisions of UCP. In that regard she also referred me to Benjamin's Sale of Goods (10<sup>th</sup> edition), especially at paragraphs 23-008 and 23-092, the first, she said, providing a useful summary of particular propositions to bear in mind when confronted with an argument that some provision of UCP 600 has been qualified or ousted, and the second providing, she said, useful illustrations of the sort of language that might be needed to achieve a qualification of, or departure from, UCP 600, article 14(c) in particular, which again concerns the second alleged discrepancy of late presentation.
17. Finally as regards the applicable principles, I was reminded by Mr Fulton, and if necessary he relied upon, three canons or principles of construction under English law: (i) the presumption against surplusage; (ii) the *contra proferentem* rule, or the rule that exclusion or limitation provisions should be narrowly construed; and (iii) the rule that

preceding, concluded agreements may properly be used as an aid to interpret a subsequent agreement, in which respect he relied in particular on the discussion and summary of the principles in *Mopani Copper Mines plc v Millennium Underwriting Limited* [2008] EWHC 1331 (Comm); [2008] 1 CLC 992, *per* Christopher Clarke J (as he was then) at [65] to [66]. In that case Christopher Clarke J also engaged in a helpful and extensive discussion at [100] of the rule - if indeed there be a clear rule - as to the use of deletions as a tool to assist in the construction of the language left in a document.

18. With all of those principles of construction well in mind, but, as will be seen, on the basis that the views I have come to do not involve any need to develop or resolve any difference between the parties as to their meaning or effect, I turn now to the two alleged discrepancies.

#### Document 7

19. A copy of the document tendered in this case is appended to this judgment. In the document as tendered, the border lines around the edge were blue, the circular stamp at the bottom centre was red, but otherwise the content appeared to be in a black typeface. There is no doubt upon its content that it appears to be the kind of document specified by the letter of credit term defining document 7. That is to say it appears to be a copy of a document and on its face the document of which it appears to be a copy appears to be a form of registration certificate issued by AQSIQ, a Chinese body, in respect of an overseas supplier, namely Bhadresh Trading Corporation Limited, which supplier was the identified shipper and supplier of the cotton shipments purportedly evidenced by the documents tendered.
20. However, CIMB says that by additional condition 2 of the letter of credit, inserted by Field 47A, item 2, of the SWIFT message, document 7 as tendered had to be a copy of a signed original and that the document in fact tendered appears on its face to be a copy of an unsigned document. To my mind, that is plainly wrong. By UCP 600 article 3, a document may be signed, amongst other things, by stamp, symbol or any other mechanical method of authentication. There is here a large and clear company stamp. It is agreed that the Chinese characters incorporated within the circular stamp and running around the circumference of the outer circle line of the stamp are the Chinese characters of AQSIQ's name, as also printed horizontally across the page underneath the stamp

above the name of AQSIQ written out in full in English words. As used in this instance, on that document, examining the tendered document simply on its face - as always - that company stamp appears to have been applied in the way that a manual signature would be used as an issuing authentication, over, as I have described, the name of AQSIQ printed in full in Chinese and in English across the bottom centre of the document, and obviously associated with the statement at the bottom right that the date of issue of the certificate was 29 December 2015. On the plain language of article 3 of UCP 600, that is to my mind a sufficient signature.

21. CIMB alleges, though, that as an international standard banking practice, “a chop can constitute a signature but in order to do so must contain some form of signature or initials whether ‘wet ink’ or embossed within the chop”. It was common ground between the experts that “chop” and “stamp” are in this context interchangeable terms. There is, in my judgment, no support for CIMB’s allegation in ISBP 745. In fact, and to the contrary and reflecting the language of UCP 600 article 3, ISBP 745 includes the following provisions, all in Part A, “General Principles”:

(1) A31(a), providing that “original documents are to be signed when required by the credit, the document itself (except as stated in paragraph A37) or UCP 600” and A31(b), which provides that “copies of documents need not be signed nor dated”.

(2) A35(a) providing, “A signature, as referred to in paragraph A31(a), need not be handwritten. Documents may also be signed with a facsimile signature (for example, a pre-printed or scanned signature), perforated signature, stamp, symbol (for example, a chop) or any mechanical or electronic method of authentication”, and A35(b) providing that a “requirement for a document to be ‘signed and stamped’ or a similar requirement is satisfied by a signature in the form described in paragraph A35(a) and the name of the signing entity typed, stamped, handwritten, pre-printed or scanned on the document, etc”.

22. On the face of those provisions, the document tendered as document 7 appears to be a copy of a document both signed and, for that matter, “signed and stamped” as described in paragraph A35(b).

23. Whilst referring to the provisions of ISBP 745 in this regard I should mention also ISBP A7(b)(i) which provides as follows:

“Any correction of data in a document, other than in a document issued by the beneficiary, is to appear to have been authenticated by the issuer or an entity acting as agent, proxy or for (or on behalf of) the issuer. Such authentication is to indicate the name of the entity authenticating the correction either by use of a stamp incorporating its name, or by the addition of the name of the authenticating entity accompanied by its signature or initials. In the case of authentication by an agent or proxy, the capacity of acting as agent or proxy for (or on behalf of) the issuer is to be stated.”

24. As regards, then, the ICC Banking Commission opinions, R718, ultimately published in publication 732E (the collected Banking Commission opinions of 2009 to 2011), is precisely in point. For that opinion the Banking Commission had been asked to opine as to whether commercial invoices, which were by the letter of credit in question required to be signed, and the bill of lading, which was required by the credit to be blank endorsed, were compliant given that they only contained by way of signature, or possible signature, the company stamp of the beneficiary, which was also the named shipper on the bill of lading which was consigned to order. The conclusion of the opinion is perfectly plain, namely that those documents were compliant because, by UCP 600 article 3, a stamp used by way of authenticating mark - that is to say, used *qua* signature - is a sufficient signature. Unsurprisingly in the circumstances, Mr Collyer, as expert, and Mr Fulton, as counsel, placed reliance on opinion R718.

25. By contrast, in Benjamin at paragraph 23-145, dealing with the question of signature of documents required to be signed under letters of credit governed by UCP 600, the learned editors quote the language of UCP article 3 but add this footnote partway through their quotation, namely footnote 593:

“This includes a chop provided it contains some form of signature or initials. A chop that contains only a company name is not sufficient: *Unpublished Opinions 1995-2004 R599* (Ref.403).

26. As Mr Fulton points out, there is immediately an oddity in Benjamin, in that a few paragraphs later at paragraph 23-150, dealing specifically with corrections and alterations - which was in fact the subject matter of opinion R599 - the learned editors

neither refer to opinion R599 nor refer back to their footnote 593 but on the face of things, referencing ISBP 745 at paragraph A7(b)(i), to which I have referred, give the opinion that in relation to corrections and alterations signature by use of a stamp alone is sufficient. Be that as it may, for his part Mr Jones, as expert, and for her part Ms Selvaratnam QC as counsel, relied on opinion R599, and, in Ms Selvaratnam's case, also Benjamin footnote 593.

27. Opinion R599, I was told, was finalised in May 2004. It has not been withdrawn, but, on the other hand, R718 is more recent and is precisely on point, as I have said. In opinion R599 there is, in response to what was query 2 for that opinion, the following statement:

“A chop alone - that only contains a company name - is not sufficient. A chop that also contains some form of signature, initials, whether ‘wet ink’ or embossed within the chop [et cetera]... is acceptable”.

28. That query 2 concerned paragraphs 9 and 10 of the then still relatively recent ISBP 645. ISBP 645 has not been placed in evidence before me. The query raised, according to Mr Collyer's evidence originating in Japan and concerning paragraphs 9 and 10 of ISBP 645, was as to whether a certain use of a round chop bearing a company name was “absolutely impermissible for making corrections and alterations”. The concern raised was that if the use of a round chop bearing a company name without any addition such as wet ink initials, for example, were absolutely impermissible, the provisions requiring signature to authenticate corrections or alterations would be difficult to implement in practice in Japan.

29. Notwithstanding the apparently unqualified width of the statement I have quoted from the opinion answering that query, it seems to me that it cannot fairly be read as providing some universal and general rule that the use of a chop or stamp without addition as part of the application of the stamp or chop to a document is insufficient to constitute a signature. Any such absolute or general rule would, it seems to me, simply fly in the face of, not explain or add to, the plain language of UCP 600 article 3. It seems to me that opinion R599 must have in mind that in the particular context of corrections and alterations it may or may not be clear in any given case where a stamp or chop is used that the stamp or chop has been used by way of authentication of the particular correction



or alteration rather than in some other way having been on the document before the correction or alteration was applied. In particular, it is impossible to say that opinion R599 goes any further than that problem without knowing by sight the type of documentation being considered by the technical advisers and the Banking Commission in that case.

30. In contrast, the later opinion, R718, albeit in a slightly stylised form rather than by appending full copies of the original documents, shows the reader exactly what was in front of the technical advisers and the Banking Commission in respect of which they gave their opinion.
31. Using the language of legal argument, at my suggestion, as a way of encapsulating her submission, Ms Selvaratnam QC says I should treat opinion R718 as wrong and decided *per incuriam*, for failure to have regard to opinion R599. But there is no evidence before me that those responsible for R718, or any of them, were unaware of or had forgotten about R599. In my judgment, far more likely, R718 when issued was not seen to be inconsistent with R599 and, as a result, R599 cannot have been thought to record or evidence the universal and general banking practice now asserted by CIMB.
32. With the greatest of respect to the learned editors, indeed, in my judgment, therefore, that which is wrong and *per incuriam* is Benjamin footnote 593. It is wrong for treating opinion R599 as evidencing some universal and general rule of practice. It is *per incuriam* for making no reference to opinion R718. It seems to me inconceivable, if the learned editors had R718 before them but for some reason still adhered to the view expressed at footnote 593, that R718 would not be mentioned. In the circumstances it seems to me that I can properly conclude that R718 has been overlooked by those editors.
33. It was a slight curiosity of the expert evidence before me that neither expert purported to speak to banking practice in respect of the use of stamps as signatures other than by reference to the ICC opinions. For my purposes, however, the importance of that is this. If there were a serious basis for thinking, despite the language of UCP 600 article 3 and ISBP 745 paragraph A35, and notwithstanding ICC Banking Commission opinion R718, that a stamp used on a document as the signature of the company issuing the document was, in the practice of bankers, regarded as always insufficient on its own, as CIMB

alleges, that would surely be supported by expert evidence from experience of real examples; but there is no such evidence. As it is, therefore, CIMB in my judgment has not established any practice qualifying UCP 600 article 3 and ISBP 745 article 35. For completeness, as I have indicated, ICC Banking Commission opinion R718 is also precisely in point and favours the contention of Deutsche Bank in this case that the stamp of AQSIO, as on the face of things used in this case, is sufficient by way of signature.

34. Thus, I conclude that document 7 as tendered, examined on its face and applying UCP article 3, appears to be a copy of a signed AQSIO registration certificate as called for by the letter of credit terms, if CIMB is correct that what was required was a copy of a signed original.
35. It is not necessary to determine, therefore, whether CIMB is right to say that that was the effect of additional condition 2. On balance though, and for completeness, I think it probably was. All documents called for by the letter of credit were documents required in their respective originals to be signed. See Field 46A item 1 in respect of the commercial invoice (overriding UCB 600 article 18(a)(iv)); UCP article 20(a)(i) for the bills of lading; and ISBP 745 paragraphs A3, L1 and Q1 for the other documents called for by the credit, all of which were certificates. It seems to me, on balance, that the function and clear effect of adding by Field 47A item 2 that “all documents must be ... dated and signed” is that where a copy document was called for, it had to (appear to) be a copy of that signed original. I emphasise in closing this aspect of this judgment that CIMB did not contend that that language required that the copy document tendered bear itself an original signature, that is to say applied to the copy document.

#### Late Presentation

36. The effect of the expiry date in the letter of credit is that conforming documents had to be tendered, if the letter of credit was to pay out, on or before that date. That is provided for expressly, if required, by UCP 600 article 6(e). Given the nature of the letter of credit, a conforming tender would be of documents that on their face evidenced a shipment of Indian raw cotton. Conforming tender, therefore, could not occur before the date of shipment thus evidenced. Unless modified or excluded by the bespoke letter of credit terms, UCP article 14(c) provided that documents had to be tendered not later than 21

days after that date. Article 14(c) itself adds: "..., but in any event not later than the expiry date of the credit".

37. As part of article 14(c) that closing wording is strictly unnecessary but serves to avoid doubt. The primary provision defining the purport of the letter of credit's expiry date is article 6(e) as I have already mentioned. The closing words of article 14(c) therefore, for the avoidance of any doubt, shut out any possible argument that by providing that documents must be tendered not later than 21 days after the shipment date, somehow a tender after expiry might be valid for a shipment less than 21 days before expiry. 21 days from shipment is thus the period for presentation under a letter of credit governed by UCP 600 unless something different is provided for by the particular letter of credit terms.
38. In that regard, article 1 of UCP 600 provides that the 21 day period for presentation rule is binding "unless expressly modified or excluded by the credit". That, however, does not mean, firstly, that there must be express reference to the particular UCP article being modified or excluded or, secondly, that any particular form of words is required. In particular, article 1 does not require that language of modification, exclusion or the like be used. Rather, it is sufficient for a different effect to be provided for by an express letter of credit term than is provided for by the provision of UCP 600 in question. For such a case, as Ms Selvaratnam QC submits, there needs to be irreconcilable inconsistency: see *Forestal Mimosa, supra*. Absent such an inconsistency it cannot be said that the express letter of credit term is distinctly different in its effect. It can, rather, sensibly sit with the UCP rule in question and there is insufficient basis, therefore, to say that the UCP rule has been ousted or qualified.
39. In the *Fortis Bank* case, *supra*, a 'different effect' was said to be the touchstone for ouster or modification pursuant to UCP article 1 and I see no inconsistency with that and the rule stated in *Forestal Mimosa*. Nor, therefore, do I agree with a submission by Mr Fulton that *Forestal Mimosa* is irrelevant to the present case.
40. On the other hand, I do not agree with a submission by Ms Selvaratnam QC that a modification to allow presentation later than 21 calendar days after shipment is so unusual as to put a bank on inquiry and to render applicable the third of the propositions advanced by Benjamin at paragraph 23-008. That third principle is that: "the more that a

suggested interpretation of an express term of the credit departs from the commercial essence of a documentary credit, the less likely it is that such an interpretation will reflect the intentions of the parties and the less likely it is, therefore, that a court will accept it.” That submission on Ms Selvaratnam QC’s part derived from Mr Jones’ evidence that language of the sort found here is very unusual, which I have already rejected. In fact, as the submission accepted, the proposition (had I accepted it) that the language is unusual would be insufficient in any event to trigger Benjamin’s third proposition. In that regard, the pleaded case was that requiring presentation within a specified period following shipment reflected such a fundamentally important matter of standard banking practice that “there is no commercial justification for delay in presentation in relation to an honest transaction”, and, therefore, it could be said that to depart from the 21-day presentation rule undermined the commercial essence of the use of a documentary letter of credit. Mr Jones, to be fair to him, expressly dissociated himself from those more far-reaching suggestions.

41. Mr Fulton emphasised particularly in his brief reply in closing argument that, first and foremost, the letter of credit as issued is a payment instrument for the benefit of and to be operated by the beneficiary. Mr Collyer’s evidence was that even the bankers involved would not have regard to the SWIFT Message Reference Guide when trying to understand the meaning of the letter of credit text as received, although he said that they would or certainly should know, without needing to consult the Guide, that Field 48 was where to go in a FIN 700 message to look for any express period for presentation provision. There is, though, no evidence before me as to whether cotton traders would have even that level of standing knowledge, although it would not necessarily be a surprise to be told that they did.
42. In the circumstances, therefore, I do not think that the use of Field 48 as such carries any material weight in construing the critical language. The logic of the suggestion that it should carry weight, advanced by Mr Fulton for Deutsche Bank, I understand. For example, the usage rules in the SWIFT Message Reference Guide say that the absence of any entry in Field 48 means the presentation period is 21 days, where applicable, and by way of definition the Guide says that Field 48 is there to specify the period within which the documents must be presented for payment, acceptance or negotiation following shipment. The logic of the suggestion, therefore, with that definition and that usage

guidance in mind, is that the very fact of choosing to enter in Field 48, an optional Field, something other than 21 days from shipment must be intended to oust the 21-day rule. To my mind, in the light of the evidence particularly of Mr Collyer, that is to place an unrealistic weight upon the detailed language of the SWIFT Message Reference Guide. To my mind, the result in this case should not be different than if the critical language had appeared, say, as an additional condition under Field 47A, as, for example, was the case for the language used in *Euro-Asian Oil SA v Abilo (UK) Ltd & Anor* [2016] EWHC 3340 (Comm); [2017] 1 Lloyd's Rep 287.

43. By contrast, Ms Selvaratnam QC for her part relied upon another part of the usage rules in the SWIFT Message Reference Guide which states that the period for presentation is to be expressed in a number of days. Relying upon the fact that in this case the Field 48 language used is not expressed in terms of some number of days different from the 21 days referred to in article 14(c), Ms Selvaratnam QC submits that the language cannot or should not be taken as intending a departure from the 21-day rule. For similar reasons, it seems to me that places a greater weight upon one particular part of the usage guidance than it realistically bears. Those responsible for the SWIFT message format may well prefer that bankers adhere to standardised methods of completing the message Fields. When that does not occur, however, the question is what the language actually used conveys rather than why (if capable of being ascertained) the preferred method has not been used.
44. The question, therefore, is what is the effect of the critical language as used here, that is to say used in a letter of credit subject to UCP 600 such that, unless some different effect is expressly provided for, documents must be tendered within 21 days of shipment.
45. In my judgment, there was no relevant evidence of standard banking practice bearing on that question. I have described already in summary the evidence Mr Collyer gave of encountering language as used here, or materially similar to it, from time to time, if not routinely, and that he was unaware that it had given rise to any difficulty or contention in the past. However, it was far from clear to me that he had any genuine recollection that on any of the occasions when he had encountered the language there had in fact been a presentation more than 21 days after the shipment date, let alone, if there had been, that the successful outcome of the transaction in question was explicable only by a general

acceptance that the effect of the language used was that contended for by Deutsche Bank here.

46. I have already indicated that to my mind Mr Jones, other than by reference, if there had been any, to ICC Banking Commission opinions, was not in a position to assist as to any general practice or understanding in relation to the use of such language.
47. The experts were agreed that no ICC Banking Commission opinion has ever been sought on the question and in my judgment there is nothing in ISPP 745 touching the point. As regards that last observation, I should say for completeness that I reject a submission appearing in Ms Selvaratnam QC's written closing, if it is not only an infelicity of expression, where she appeared to submit that the ISPB 745 commentary on the use of the term "stale documents" says that to oust the article 14(c) rule the credit must provide a condition that stale documents are acceptable using that language, in other words that the modification of the usual rule of article 14(c) must be specifically stated.
48. The critical language, as I have labelled it, by way of recap, is "Period for presentation - DOCUMENTS TO BE PRESENTED WITHIN LETTER OF CREDIT VALIDITY". To my mind, that critical language conveys entirely clearly that the period for presenting documents is the period from the date of shipment (necessarily the start of that period if nothing else is said) until the expiry date of the credit. That is a period for presentation rule distinctly different from a rule requiring documents to be tendered within 21 days from shipment (whatever the expiry date).
49. Ms Selvaratnam QC submits that the critical language merely restates the closing words of article 14(c), that is the provision for the avoidance of doubt that the 21-day period for presentation rule does not modify or override letter of credit expiry. In my judgment, that ignores the fact that, expressly, what is being defined is the period for presentation under this particular letter of credit. That is not, in my judgment, an application of the presumption against surplusage, which has sometimes been said to be a weak canon of construction in any event and which Ms Selvaratnam QC says ought not to be used anyway for deciding what suffices to satisfy UCP 600 article 1 given the injunction from the Court of Appeal in the *Fortis Bank* case not to be parochial. It is, rather, an expression of the view that stipulating expressly that a stated rule is to be the period for

presentation rule conveys something and does so unequivocally. It conveys that the rule thus stated is, for the letter of credit in question, the rule as to how long after shipment the beneficiary has to tender documents, if he wants to get paid. That rule, thus stated, *viz.* that he has until the expiry date, is distinctly different from the 21-day rule in article 14(c). It is irreconcilably inconsistent to say both that the beneficiary must act within 21 days and that he may act at any time until expiry, unless, I suppose, expiry were less than 21 days after the earliest possible shipment date, which is not this case.

50. Ms Selvaratnam QC submits, in my judgment correctly, that the proper starting point is to be aware of the article 14(c) rule when considering the effect of the language inserted by Field 48. She submits that, with that correct starting point, the reasonable recipient of this Field 48 language would, or might well, understand it merely to be restating the later part of article 14(c), confirming, for the avoidance of doubt, that it does not override expiry. To my mind, that is a *non sequitur* and is unrealistic. Ms Selvaratnam's correct starting point means, as it seems to me, that the reasonable banker or beneficiary in receipt of this language knows that there is a 21-day rule for presenting his documents, if the letter of credit terms do not say otherwise, and, as Mr Collyer vividly described it, when such reasonable banker or beneficiary looks through the message and finds, as a stated period for presentation, something different from that 21-day rule, he properly will conclude, in my judgment, that the rule there stated is the applicable rule, and not what would otherwise have been the rule under article 14(c).

51. Of course, as is often true of cases involving disputed issues of construction, yet other words might have been used, rendering it impossible, even for the talents of Ms Selvaratnam QC or other leading counsel, to construct any argument for a different conclusion. That does not mean that the words in fact used were not clear enough. In my judgment, they were clear enough. For that reason, the documentary tender here was within time. It could not properly have been rejected by Deutsche Bank as late. It should not have been objected to as late by CIMB or its customer.

52. In those circumstances, it is not necessary for me to deal with a number of further, perhaps subsidiary, arguments; I shall mention and deal with each of them briefly for completeness.

53. Firstly, I would have been most reluctant, for the reasons given by Ms Selvaratnam QC, to find in Deutsche Bank's favour if to do so required the application of either the *contra proferentem* principle or an English law notion that the time requirement for presentation of documents in order to be paid was to be compared to a limitation or exclusion provision so as to require it to be narrowly construed. In both respects, I would have been concerned that adopting such an approach ran contrary to the guidance of the Court of Appeal in the *Fortis Bank* case and as for the narrow construction argument in any event it seems to me doubtful that the provision of a rule as to the time by which documents must be presented in order to bring into existence a right to payment can properly be regarded as a provision cutting down, excluding or limiting a right so as arguably to be required under English law to be construed narrowly. Moreover, there is surely no room for such a principle where UCP article 1 provides expressly for the rule of construction to be applied.

54. Secondly, I have not had to have regard to Field 47A, item 17, under which a provision appeared briefly by way of amendment number 1 before being removed by amendment number 2, that documents dated prior to 7th December 2015 were not acceptable. In short, the presence of that rule, for the period during which it was present, and a decision to remove it on 28 December 2015, was consistent with either party's position as to the effect of the Field 48 language and, therefore, did not assist. So it does not matter whether Mr Fulton was right, although I think he probably was, to say that reference to the presence of Field 47A, item 17, in amendment number 1 and to its removal by amendment number 2, is a permissible use of an antecedent series of concluded contracts rather than a potentially impermissible use of the deletion of words from a contract document.

55. Thirdly, Mr Fulton pointed out that, even when first issued, the expiry date was something more than 21 days after the latest date for shipment. It seems to me, however, that that is an example of a provision of which it cannot be said that its only explanation is that there is acceptance of, and agreement to, presentation of documents more than 21 days from shipment. It would not, in my judgment, have amounted to an express provision clearly enough providing for a different effect than that provided for by article 14(c).



56. Fourthly, Ms Selvaratnam QC raised a somewhat complex argument concerning paragraph (vi) of the preliminary considerations in ISBP 745. In that paragraph, ISBP 745 cautions parties to be aware that some articles of UCP 600 define terms in a manner that could produce unexpected results. The list of articles includes article 14. It also includes article 20. In respect of article 20, it goes on to provide:

“For example, a credit requiring presentation of a bill of lading and containing a prohibition against transshipment will, in most cases, have to exclude UCP 600 sub-article 20(c) to make the prohibition against transshipment effective.”

57. That particular effect is a consequence of the particular provision in UCP 600, article 20(c)(ii), that certain documents indicating that transshipment will or may take place are to be regarded as acceptable “even if the credit prohibits transshipment”. It thus represents an explicit and very specific provision rendering insufficient (to oust the UCP 600 rule) what might otherwise be regarded a provision of different effect. It seems to me that that offers no guidance as to what, or what type of, language is required to oust a UCP 600 rule that has not itself incorporated a prohibition on the effectiveness of some particular use of language.

58. Fifthly and finally, both sides referred me to, and relied upon, the principle summarised in Benjamin at paragraph 23-040, that acting upon a reasonable understanding or interpretation of the meaning of ambiguous instructions is sufficient to generate a right to reimbursement on the part of the confirming bank. Mr Fulton, for his part, relied heavily on the principle. Ms Selvaratnam QC, for her part, relied heavily on the significant limitation to the principle, as it is described in that paragraph of Benjamin, namely that: “Where the ambiguity or lack of clarity is, or reasonably ought to be, apparent to the recipient of the instructions, the recipient should refer back to the instructing party for clarification, if it is realistically possible to do so.” In this case, I found somewhat elusive the concept of Field 48 being, in the judgment of the court, objectively insufficient to modify or oust the 21-day rule of article 14(c), pursuant to UCP article 1, and yet reasonably thought by Deutsche Bank to do precisely that. As it is, however, I have not needed to rely upon the principle of acting on a reasonable interpretation of ambiguous instructions in order to find in Deutsche Bank’s favour. On the other hand, it seems to me that, if this really was her submission, and at times it was not clear whether it was, Ms

Selvaratnam QC was wrong to suggest that if there were some true ambiguity but the court had now resolved it in Deutsche Bank's favour, not referring the ambiguity back to CIMB for instructions and acting at its own risk, as it is put in Benjamin, meant that Deutsche Bank now failed in its claims, even though *ex hypothesi* it had acted upon what the court regarded as the correct interpretation of the letter of credit. Again, however, it does not seem to me that there is any real ambiguity about Field 48, so that point does not arise in any event.

### Conclusion

59. In all the circumstances, Deutsche Bank's claims succeed. There will be judgment for \$9,959,452.57, which is the agreed figure before interest. I shall hear counsel as to interest, costs and anything else arising.

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Appendix 1 - "Document 7"

进口棉花境外供货企业

## 登 记 证 书

Registration Certificate of Overseas Supplier Enterprise for Import Cotton

证书号 (Certificate No.): C111090030

企业名称 (Company Name): Bhagresh Trading Corporation Limited

国别/地区 (Country/Region): 印度

经审核, 符合国家质检总局《进口棉花监督管理办法》规定,  
准予登记。

有效期自 2015 年 1 月 9 日至 2018 年 1 月 8 日

This is to certify that the above enterprise is in conformance with the *Administrative Measures on Inspection and Supervision of Imported Cotton* of General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China and granted the permission for registration.

Date of expiry is from 09/01/2015 to 08/01/2018.



中华人民共和国国家质量监督检验检疫总局  
General Administration of Quality Supervision,  
Inspection and Quarantine of the People's Republic of China

签发日期: 2015年12月29日  
Date Of Issue: 29th December 2015