

China New Era International Ltd. v. Bank of China (H.K.) Ltd.

[2010] 5 HKC 82 (2010) [Hong Kong]

(The following supplements the China New Era case abstract featured in the Sept 2014 issue of Documentary Credit World.)

The excellent concurring opinion by Stone, J., is reproduced here in its entirety, indicating the paragraph numbers from the opinion.

48. At bottom, the argument mounted by [Issuer], amounted to the bald proposition that a nominated bank is unable validly to make payment under a credit which it has accepted for negotiation until the stage at which all requisite documents compliant with the terms of that credit have been presented to it.

49. If correct, this would lead to the equally surprising proposition that although – as in the instant case – there is no issue but that the documents as forwarded to [Issuer] as issuing bank indeed were compliant, under the UCP 600 the issuing bank is under no obligation to reimburse the negotiating bank unless – to use the words of the learned judge at paragraph 33 of his extemporaneous judgment (quoted in full by Le Pichon JA at paragraph 13 above) – payment was “actually released” to the beneficiary against such complying set of documents.

50. With respect, I am unable to construe Article 7c. in this restrictive manner.

51. The short point, it seems to me, is that as a matter of interpretation there is within Article 7c. no stipulation to the effect that payment cannot be made to the beneficiary by the negotiating bank until there is a fully compliant presentation, and not before.

52. The precise manner of negotiation of the documents must be a matter for the negotiating bank; hence if it wishes to make payment under the credit in anticipation (as in the instant case) of submission of a compliant document in lieu of one that is not compliant (vide the two initially discrepant cargo receipts) it does so at its own commercial risk, such risk often being covered by a beneficiary’s indemnity that if ultimately a “complying presentation” cannot be achieved, then such payment as made will be returned to the paying bank.

53. However, such discrete commercial arrangement – to which of course the issuing bank is not privy – does not affect the cardinal principal that, under Article 7c., the issuing bank undertakes to reimburse the nominated bank that has honoured or negotiated a “complying presentation”, and thereafter has forwarded the documents constituting such compliant presentation to the issuing bank.

54. Thus, if the documents as forwarded are found not to be compliant, there will be no obligation so to reimburse; conversely, if such documents are accepted as compliant, the unequivocal obligation arises upon the issuing bank to make reimbursement to the negotiating bank of the payment as earlier made to the beneficiary (or assignee thereof) by that bank.

55. In my judgment there is, and can be, no remit for the argument - which is precisely that advanced in the present appeal by [Issuer] - that qua issuing bank its reimbursement obligation is therefore effectively dependent upon not one but two distinct factors: first, the fact of a “complying presentation”, with the documents comprising such presentation being forwarded by the bank which has taken up the documents and has effected payment under the credit, plus a second factor, namely that the issuing bank is entitled to decline reimbursement,

notwithstanding full documentary compliance with the terms of the credit, because at the time of payment by the nominated bank, such a “complying presentation” had not been effected.

56. If this interpretation of Article 7c.were correct, which clearly it is not, the surprising (and wholly unintended) result would enure that prior to effecting reimbursement, in addition to ensuring that the documents as forwarded to it indeed constituted a “complying presentation”, the obligation of the issuing bank so to reimburse will not crystallize until it also be established that such payment as was effected by the nominated bank did not antedate an ultimately compliant presentation.

57. In my view, the argument that the issuing bank therefore is entitled to ‘vet’ or oversee the manner of negotiation by the bank which has made payment under the credit, and thereafter to justify its refusal to reimburse in face of a compliant presentation, possesses neither merit nor commercial justification, and I suspect that this is the very reason that leading counsel on either side apparently have been unable to locate any authority on the point.