

# Documentary Credit

# WORLD

## In This Issue...

■ **3 UPDATES:** ISO 2022 Demand Guarantee & Standby LC Messages Approved; Bank Denies Responsibility for Guarantee Issued via SWIFT; IMB Warns of Pre-Financing Scam in West Africa; Trade Finance Surges for Saudi Banks; Consequences of Algeria's LC Policy Continue to Emerge; JPMorgan Provides Trade Finance Support to Apicorp; Pakistan and Turkey Set Up Currency Swap; Bangladeshi Oil Company Seeks Relief from LC Commissions; International Updates



■ **7 THE READERS SPEAK:**

- Negotiation, Acceptance, and Payment
- Is Clause Cause for Concern?

■ **11 LITIGATION DIGEST:**

- *Fortis Bank (Nederland) N.V. v. Abu Dhabi Islamic Bank*
- Newly Decided LC & Guarantee Cases
- *Aurohill Global Commodities Ltd. v. M.S.T.C. Ltd.*

■ **28 REPORT:**

- Summary of the November 2012 ICC Banking Commission Meeting



- ISP98 Model Forms Presentation to the ICC Banking Commission
- Is Hong Kong a Chinese Port under a UCP600 Credit?
- Revisiting ICC Opinion TA772 and the Function of a Certificate of Origin
- Further Background to ICC Opinion TA772 Explained

■ **43 LC STATISTICS:**

- US Banks (1Q12)
- US Branches of Non-US Banks (1Q12)

■ **58 SCAM SURVEY**

■ **61 LC TRADE NEWS**

## 14 FEATURE



### ■ ISP98 FORM 7 – MODEL STANDBY REQUIRING CONFIRMATION

Although many LC specialists think that confirmations are simple and straightforward, confirmations of standbys are different. They raise many issues that are often overlooked or obscured. ISP98 Model Form 7 takes on these issues directly. For example, what if the bank requested to confirm declines to do so? Has the standby been issued or not? What must be done to obtain another confirmer? Should the beneficiary be able to make presentation to the issuer? In this issue, Jeremy SMITH and Khalil MATAR review ISP98 Form 7 and provide useful insights and commentary.

#### Next Issue of DCW ...

- ISP98 Model Form 8 and Analysis
- Transport in the Caspian Sea Region
- Yacht Hull Numbers: Why They Matter
- Local Bill Discounting

# LITIGATION DIGEST



## **Fortis Bank (Nederland) N.V. v. Abu Dhabi Islamic Bank No. 601948/09 (N.Y. Sup. Ct. Aug. 26, 2010) [USA]**

**Topics:** Independence Principle; Fraud; Structured Transactions

**Note:** Bank Awal (Issuing Bank) issued a US\$40 million commercial LC at the request of its parent company, Al Gosaibi Trading and Services Co. (Applicant), payable to Bunge, S.A. (Beneficiary) for the shipment of maize and soybeans from Brazil to Spain. ADIB (Confirming Bank) added its confirmation to the LC for a fee of US\$500,000. Fortis Bank (Negotiating Bank) negotiated drafts and paid Beneficiary upon the presentation of documents, which were “acceptable” “as presented” notwithstanding “any and all discrepancies” including typing mistakes and late presentation.

The LC stated that Confirming Bank would reimburse Negotiating Bank 360 days after negotiation of the drafts of “credit complying documents,” which Negotiating Bank was to forward directly to Issuing Bank. When Confirming Bank refused to reimburse Negotiating Bank as agreed, Negotiating Bank sued Confirming Bank in New York state court, requesting the attachment of Confirming

Bank’s funds located in New York Banks.

Negotiating Bank moved for summary judgment, but the court stayed its decision pending discovery. After arduous discovery proceedings, Negotiating Bank renewed its motion for summary judgment, which the New York Supreme Court, Schweitzer, J., granted, ordering Confirming Bank to reimburse Negotiating Bank US\$40 million plus 9% statutory interest dated from the day of default.

Confirming Bank had raised the defense of LC fraud, alleging that Negotiating Bank knew or should have known that the entire LC arrangement was a structured transaction designed to provide financing to Applicant, and that no underlying sale of goods existed. Confirming Bank had also moved to compel negotiating bank to release the purported “credit-complying” documents it had examined and forwarded to Issuing Bank. The judge denied this motion.

The Judge stated that the independence principle protects Negotiating Bank absent a clear showing of fraud in the transaction. Not only was the evidence of fraud

weak, other evidence indicated that Confirming Bank was fully aware that the transaction was structured

before it added its confirmation. In any case, the use of a Letter of Credit that is structured as a trade financing

may be unusual or novel, but is not fraudulent particularly when the parties are aware of the fact. ■

[JEB/jpf]

## **A Wonderfully Appreciated Decision**

In *Fortis Bank v. ADIB*, the New York Supreme Court appropriately determined that the Confirming Bank's allegations of fraud in the underlying transaction were without merit.

A Negotiating Bank is not concerned with the underlying contract. UCP600 Art. 4(a) states, in part: "A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit." This independence principle is fundamental to LC transactions.

UCP600 Art. 5 (Documents v. Goods, Services or Performance) states: "Banks deal with documents and not with goods, services or performance to which the documents may relate." Some refer to this as the abstraction principle, which also is fundamental to LC transactions and which has been upheld by courts all over the world.

As ordered by this court, the Confirming Bank must reimburse the Negotiating Bank. UCP600 Art. 8(a) states, in part: "Provided that the stipulated documents are presented to the confirming bank or to any other nominated bank and that they constitute a complying presentation, the confirming bank must ... honour, if the credit is available by ... deferred payment with another nominated bank ... ." UCP600 Art. 8(c) further provides, in part, that: "A confirming bank undertakes to reimburse another nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the confirming bank. Reimbursement for the amount of a complying presentation under a credit available by ... deferred payment is due at maturity ... . A confirming bank's undertaking to reimburse another nominated bank is independent of the confirming bank's undertaking to the beneficiary."

– Yorng-Won PAE,  
Professor Emeritus, University of Seoul (Seoul, Korea)



## **NEWLY DECIDED LC & GUARANTEE CASES**

*Greater Midwest Builders, Ltd. v. FDIC*  
11-CV-4225-FJG, 2012 U.S. Dist. LEXIS 175114  
(Western District Missouri Dec. 11, 2012) [USA]

*U.S. Bank N.A. v. Bank of America*  
12 Civ. 4873 (CM), 2012 U.S. Dist. LEXIS 176157  
(Southern District N.Y. Dec. 11, 2012) [USA]