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Claim No. CR-2022-000181
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 10th October 2022

Before:
Deputy Insolvency and Companies Court Judge Greenwood

- -

Between:

HEYTEX BRAMSCHE GMBH

Petitioner

- and –

UNITY TRADE CAPITAL LIMITED

Respondent

Mr William Day (instructed by Norton Rose Fulbright LLP) for the Petitioner
Mr Timothy Deal (instructed on a direct access basis) for the Respondent

Hearing date: 9 September 2022

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JUDGMENT

Remote hand-down: This Judgment was handed down remotely at 10.30am on Monday 10th October 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

Deputy Insolvency & Companies Court Judge Greenwood:

Introduction & the Issues

1. This is the final hearing of a winding up petition ("the Petition") presented by a German company, Heytex Bramsche GMBH ("Heytex") which makes and sells textiles and fabrics, against an English company, Unity Trade Capital Limited ("UTC") incorporated under the Companies Act 1985 with registered number 04784580 and a registered office at Ashley House, 235-239 High Road, Wood Green, London N22 8HF. Heytex was represented before me by Mr William Day of Counsel, and UTC by Mr Timothy Deal of Counsel. I am grateful to them both for their assistance.

2. According to its own evidence, UTC, incorporated in 2003, is a trade finance company specialising in the provision of capital and credit for international business, trade and other financial transactions, including by means of "*supporting credit facilities, issuing financial guarantees and letters of credit to back up payment commitments and obligations*". As such, on 26 August 2020, on the instructions of a company in the UAE called Jibran Technical Services LLC ("Jibran") UTC is said by Heytex to have issued, by an MT700 SWIFT message, an expressly irrevocable letter of credit in the sum of €200,707.50 in favour of Heytex, as beneficiary, in order to facilitate the purchase of certain PVC coated fabrics by Jibran from Heytex pursuant to a contract of sale made on or about 5 June 2020. The sale contract itself had provided expressly for payment by "*letter of credit 90 days after date of B/L*" (a reference to the anticipated bill of lading).

3. Whilst it was common ground that the letter of credit incorporated the standard terms contained in the "UCP 600", being (since 1 July 2007) the current version of the "Uniform Customs and Practice for Documentary Credits" promulgated by the International Chamber of Commerce, there was, as I will explain, an issue regarding the extent to which those terms, which do not have force of law in the UK, were modified.

4. On 9 November 2020, by means of a SWIFT message sent by its own bank, Sparkasse Osnabruck ("Sparkasse"), acting as the "advising bank" in the context of the letter of credit, Heytex presented the various documents which it says were stipulated by the terms of the letter of credit and which it therefore says entitled it to immediate payment by UTC under Articles 7 and 15 of the UCP 600.

5. In the event however, on 12 November 2020, Sparkasse was told by UTC that it considered those documents, signed on behalf of Heytex and Jibran, to be discrepant, not having been signed by "*all sides of LC*", as expressly required by the letter of credit, and that the presentation was therefore non-compliant, meaning that no payment was due.

6. UTC has continued to deny its liability under the letter of credit notwithstanding that on the following day, 13 November 2020, it told Sparkasse by means of a further SWIFT message, that Jibran had since "*accepted all documents with discrepancies and advsied* (sic) *us to release all original shipping documents against his acceptance and confirmation of payments on maturity dates as detailed here under"*, and that "*We therefore release documents to the applicant against his acceptance*".

7. Subsequently, Heytex agreed with Jibran two payment deferrals, both of which were communicated (the first on 9 January 2021, the second on 2 February 2021) by Sparkasse in SWIFT messages to which it received replies which said, amongst other things, that the deferrals were "*confirmed*", and in both instances that all other terms and conditions in respect of the new maturity date (original capitalised) "*shall remain the same as per our previous …acceptance message*". Under the second of these agreements, the first instalment (of €100,000) fell due for payment on 20 March 2021. In the event however, nothing has been paid to Heytex, whether by UTC or Jibran; it has been left without payment, or documents, or goods.

8. On 17 November 2021, a statutory demand was served by Heytex at UTC's previous registered office, claiming payment under the letter of credit, and on 25 January 2022 the Petition was presented on the basis that UTC, not having paid the sum demanded, is insolvent, unable to pay its debts within the meaning of sections 122(1)(f) and 123 of the Insolvency Act 1986. Pursuant to rule 7.10 of the Insolvency (England Wales) Rules 2016, notice of the Petition was given in the Gazette on 25 February 2022. Before me, there were no formally supporting or opposing creditors, although there was evidence of an unsatisfied Judgment given summarily against UTC in the London Circuit Commercial Court in favour of H. Stoll AG and Co. KG on 6 December 2021, in the sum of £540,000 plus interest and costs. On instructions, Mr Deal told me that as he understood it, UTC was or would be seeking to appeal or otherwise have that judgment set aside; that in any event, it was by some means to be challenged.

9. In substance, UTC's evidence was contained in the First and Second Witness Statements of its director, Dr Sukhendu Bhowmik made on 1 and 23 March 2022; UTC's website describes Dr Bhowmik as having "*earned his reputation in sourcing and facilitating Financial Instruments over 20 years of his experience in international trade finance*". Heytex's evidence was contained in the First and Second Witness Statements of Henning Wolfgang Fischer, an accountant employee, made on 6 April 2022 and 25 August 2022.

10. At the hearing, Heytex sought permission to rely on Herr Fischer's Second Statement, which was served out of time (not in accordance with the directions given by ICCJ Barber on 9 March 2022 at the first hearing of the Petition) and which exhibited copies of Heytex's standard terms of business and of the allegedly discrepant documents presented on 9 November 2020. That evidence was plainly relevant and material, and there was no objection to its admission, which I allowed, and which caused no unfairness to UTC.

11. In summary, at the hearing, UTC disputed its alleged liability under the letter of credit, and thereby opposed the Petition, on the following bases.

    i) First, it argued that it was not the issuer of the letter of credit, which had in fact been issued by an apparently closely connected company called Unity Trade Bank Limited ("UTB"), a company registered in Gambia with a registered office, according to its own website, at "*Enterprise House, 1 Enterprise Way, Banjul, Gambia*", and a "*representative office*" at the same address as UTC's registered office at Wood Green. UTB's website describes UTC as its "*UK based subsidiary*". This was not an argument that had been raised either by Dr Bhowmik in either of

his Statements (or previous correspondence) or in Mr Deal's Skeleton Argument.

ii) Second, that the presented documents were discrepant because they were not signed by "*all sides of LC*", a provision that required the signature of not only Jibran and Heytex, but also of Sparkasse and of the issuer itself (whether UTC or UTB). Again, this was not an argument raised as such in Mr Deal's Skeleton Argument, which described the alleged discrepancy as comprising the fact that "*the documents were not signed by Jibran and the Petitioner*". If correct, its effect would be to render an expressly "irrevocable" letter of credit, revocable at the instance of the issuer. Mr Deal explained to me that having only very recently been instructed, he had not seen Herr Fischer's Second Statement exhibiting the signed documents before he lodged his Argument.

iii) Third, that the "*waiver*" referred to in the message of 13 November 2020, was given by Jibran <u>alone</u>, and merely communicated by UTC and/or UTB on behalf of Jibran. It was argued that in those circumstances, and in consequence of the incorporation of UTC and/or UTB's "*Credit Norms*" into the terms of the letter of credit (modifying and prevailing over the UCP 600, and in particular, Article 16 of the UCP 600) UTC and/or UTB were entitled to release the presented documents to Jibran <u>without</u> themselves incurring or accepting any liability to Heytex whether under the letter of credit, which was thereby rendered "*void*", or at all (for example, in conversion): Heytex must, it was said, look to Jibran for payment.

iv) Finally, again by virtue of the allegedly incorporated Credit Norms, and in particular, Clause 2.6 of those Norms, it was argued that the letter of credit was rendered "*void*" by virtue of the variations to the payment schedule negotiated and agreed between Heytex and Jibran, and referred to above. Again, it was said that as a result, Heytex must look to Jibran alone for payment.

12. Ultimately therefore, in respect of the alleged liability under the letter of credit, the following issues arise.

i) Who was the issuer, UTC or UTB?

ii) What was required of Heytex by the express stipulation that the documents to be presented should be signed by "*all sides of LC*"? In light of that, were the presented documents, signed by Heytex and Jibran, in fact discrepant, or was the presentation compliant?

iii) Were the provisions of the Credit Norms incorporated into the letter of credit?

a) If so - contrary to Heytex's case - how should they be construed and applied? To what relevant extent, if at all, did they modify the UCP 600, and do they justify UTC's denial of liability?

b) If not, and assuming that the presented documents were discrepant, what is the effect of Jibran's waiver and the consequent release to Jibran (without any specific instruction having been given by Heytex) of the discrepant documents presented by Heytex?

13. This being the final hearing of a winding-up petition, the Court does not of course necessarily need to determine finally each of these issues in favour of UTC, although it may do so. The applicable principles are familiar and have been explained many times; they were not substantially in issue. For example, in *Angel Group Ltd v British Gas Trading Ltd* [2012] EWHC 2702 (Ch), [2013] BCC 265 at [22] Norris J said:

> *(a) A creditor's petition can only be presented by a creditor, and until a prospective petitioner is established as a creditor he is not entitled to present the petition and has no standing in the Companies Court: Mann v Goldstein [1968] 1WLR 1091.*
>
> *(b) The company may challenge the petitioner's standing as a creditor by advancing in good faith a substantial dispute as to the entirety of the petition debt (or at least so much as will bring the indisputable part below [the statutory threshold]).*
>
> *(c) A dispute will not be "substantial" if it has really no rational prospect of success: in Re A Company No.0012209 [1992] 1WLR 351 at 354B.*
>
> *(d) …..*
>
> *(e) There is thus no rule of practice that the petition will be struck out merely because the company alleges that the debt is disputed. The true rule is that it is not the practice of the Companies Court to allow a winding up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds, because the effect of presenting a winding up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in nature from the effect of an ordinary action: in Re A Company No.006685 [1997] BCC 830 at 832F.*
>
> *(f) But the court will not allow this rule of practice itself to work injustice and will be alert to the risk that an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute exists which cannot be determined without cross-examination (ibid. at 841C).*
>
> (g) *The court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application for summary judgment: (ibid. at 837B).*"

14. Whilst Mr Deal also cited *Tallington Lakes Ltd v South Kesteven DC* [2012] EWCA Civ 443 and *Rusant Ltd v Traxys Far East Ltd* [2013] EWHC 4083, to the effect that (*per* Etherton LJ in *Tallington Lakes Ltd* at [22]) "*in this context … it is well established that the threshold for establishing that a debt is disputed on substantial grounds ... is not a high one ... and may be reached even if, on an application for summary judgment, the defence could be regarded "shadowy"*", I do not regard those decisions as stating any different principle; they merely emphasise a different aspect, that a "*shadowy*" defence might nonetheless be regarded as raising a "*substantial*" dispute for these purposes.

15. Ultimately, the question is whether, on the evidence, the debt upon which the Petition is founded is substantially disputed in good faith by UTC.

16. Before considering the evidence in further detail, I shall set out something of the legal and commercial context in which letters of credit are agreed and issued. Again, in this respect, I understood the parties to have been in substantial agreement.

Letters of Credit & the UCP 600; the Context

17. The basic idea of a documentary or letter of credit is straightforward: a bank (or some such institution) commits itself to a financial undertaking that it will fulfil against presentation of stipulated documents. Used predominantly to facilitate international trade, a letter of credit affords the buyer the protection of payment against documents but in addition provides the seller with protection against buyer default by substituting a bank as the party to which, primarily (as a "*reliable and solvent paymaster*" - *Soproma SpA v Marine and Animal By-Product Corporation* [1966] 1 Lloyd's Rep. 367, 385) the seller looks for

payment, regardless of any dispute which the buyer might raise in respect of the underlying sale contract.

18. Such a transaction comprises a number of separate but interconnected contracts:

i) the contract of sale between the buyer and seller (in the present case, Jibran and Heytex);

ii) the contract between the buyer (as applicant) and the issuing bank (in this case, UTC or UTB);

iii) the contract between the issuing bank and, if there is one, the correspondent bank (which may advise and/or confirm the credit or pay as nominated bank on behalf of the issuing bank); in the present case, Sparkasse was (merely) an advising bank; it did not assume any payment obligations to Heytex as would have been the case had the credit been "confirmed";

iv) the contract between the seller and the advising/confirming bank; and finally,

v) the contract between the seller and the issuing bank.

19. Thus, as explained in *Brindle & Cox: Law of Bank Payments* (5th Edition), paragraph 7.001:

> "*The documentary credit was developed by the mercantile world in order to resolve the conflicting interests between the parties to a contract of sale. The seller ideally does not want to give up control of the goods before he has received the purchase price. The buyer ideally does not want*

to pay the price for the goods until the goods are no longer at the disposal of the seller. The conflict is most acute in the case of international sales where the buyer and seller are dealing with each other at a distance."

20. Letters of credit are useful not only because of these more or less inherent features, but also because they benefit from a "*remarkable degree of international standardisation*" (*Brindle & Cox*, paragraph 7.004) as a result of the worldwide adoption by banks of the rules embodied in the UCP, the first revision of which was formally adopted in 1933 by the Seventh Congress of the ICC, in Vienna. As stated above, the current revision is referred to as the UCP 600, and was adopted in 2007.

21. The UCP does not have force of law in the UK. Instead, it has the status of a set of standard contractual terms, and because of that, its application depends upon the fact and extent of its incorporation, according to the usual principles, into the particular credit (the contract) in issue. Although it follows therefore that in each case, its provisions must be construed in accordance with the applicable law's usual approach to commercial contracts, English courts have repeatedly emphasised that in conducting that exercise of construction, regard must be had to the UCP's international character, and to its purpose and function, facilitating international, cross-border trade. Thus, for example, in *Fortis Bank SA/NV v Indian Overseas Bank* [2011] EWCA Civ 58, [2011] 1 All ER (Comm) 288 at [29], Thomas LJ said:

"*In my view, a court must recognise the international nature of the UCP and approach its construction in that spirit. It was drafted in English in a manner that it could easily be translated into about 20 different*

languages and applied by bankers and traders throughout the world. It is intended to be a self-contained code for those areas of practice which it covers and to reflect good practice and achieve consistency across the world. Courts must therefore interpret it in accordance with its underlying aims and purposes reflecting international practice and the expectations of international bankers and international traders so that it underpins the operation of letters of credit in international trade. A literalistic and national approach must be avoided."

22. A similar point was made by Lord Sumption in *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64, [2018] AC 690 at [61], in respect of a letter of credit issued on the terms of the UCP:

> "*For all its unusual features, however, the instrument must be construed as a whole, and as far as possible in such a way as to make each part of it consistent with every other part. Moreover, it must as far as possible be read consistently with the UCP, which are expressly incorporated into it. The UCP may be modified or excluded in specified respects by the terms of the credit, but otherwise it is a code of rules which enables letters of credit to be routinely dealt with by banks across the world on a common basis. It is therefore fundamental to their acceptability in international commerce*".

23. It is therefore with good reason that a court will hesitate before concluding that the parties to a letter of credit genuinely intended to depart from such an internationally accepted regime; it is likely to require the clearest wording to evidence that intention. For example, in *Forestal Mimosa Ltd v Oriental Credit*

Ltd [1986] 1 WLR 631 (CA), the credit provided that it was subject to the UCP "*except so far as otherwise expressly stated*", and it was held that the UCP would be overridden only in the event of an "*irreconcilable inconsistency*" (*per* Sir John Megaw at 639). For the same reasons, the further that a suggested interpretation of a credit's express term departs from the commercial essence of a documentary credit (as embodied in the provisions of the UCP) the less likely will it be to reflect the intentions of the parties, and to be accepted as such by the court.

24. The provisions of the UCP of particular relevance to the present case are as follows.

25. Article 1 provides that once expressly incorporated into a credit (as in this case they were) the rules of the UCP 600 are "*binding on all parties thereto unless expressly modified or excluded by the credit*". As explained, parties are free to contract as they wish, but the court is likely to require clear language and/or irreconcilable inconsistency to support a conclusion of modification or exclusion, and in that connection will consider carefully the suggested degree of departure from the UCP.

26. Article 4 affirms what is known as "*the autonomy principle*": the credit is ("*by its nature*") separate from the sale on which it is based ("*even if any reference whatsoever to it is included in the credit*") and also from the facility between buyer (as applicant) and issuing bank; indeed, it is separate from each of the other created contracts described above at paragraph 18. In addition to their irrevocability, explained below, this characteristic of credits is fundamental to their function; in particular, it insulates their operation from any disputes that

might arise on the underlying contract between buyer and seller; its importance has been repeatedly reiterated. For example, in *Bolivinter Oil SA v Chase Manhattan Bank NA (Practice Note)* [1984] 1 WLR 392 (CA) 393, Sir John Donaldson MR said:

> "*The unique value of such a letter … is that the beneficiary can be completely satisfied that whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met. In requesting his bank to issue such a letter, bond or guarantee, the customer is seeking to take advantage of this unique characteristic. If, save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking … he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and guarantees will be undermined*."

And in *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2003] EWCA Civ 470, [2003] 1 WLR 2214, May LJ said (at [26]):

> "*Because the letter of credit is, subject to its terms, the equivalent of cash, the bank is not concerned with any disputed question, not within the terms of the letter of credit itself, which may arise under the underlying sale contract between the seller and the buyer … This is the autonomous nature*

of letters of credit. By means of it, banks are protected and the cash nature of letters of credit is maintained."

27. By Articles 2 and 3, by definition, a letter of credit is "*irrevocable*". Once opened, it cannot be amended or cancelled without the consent of the issuer and the beneficiary. Articles 7 and 15 contain the issuing bank's irrevocable undertaking to pay on presentation of stipulated and complying documents. Together with the autonomy principle, it is for this reason that credits are often said to be the equivalent of cash in hand (as for example by May LJ in *Sirius International Insurance Co*, above). Revocable credits (although of course possible, since parties are free to agree such terms as they choose) are comparatively rare for the obvious reason that they afford the seller no security of payment; they do not fulfil one of the basic, or at least usual functions for which credits were developed and designed.

28. By Article 5, "*Banks deal with documents and not with goods, services or performance to which the documents may relate*" and in that respect, Article 14 sets out the standard which the issuing bank should adopt when examining the presented documents to determine their compliance. It has often been said that an issuing bank is only obliged to pay (and entitled therefore to claim its indemnity from its own customer, the applicant) where there is "*strict compliance*" (in other words where the documents comply "*strictly*" with the terms of the credit). The classic statement of that principle is found in *Equitable Trust Company of New York v Dawson Partners Ltd* (1926) 27 Lloyd's Rep. 49, where Viscount Cave said: "*There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on*

any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction which it has financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the condition laid down, it acts at its own risk." Ultimately, the question of compliance depends on the terms and construction of the credit, and on what documents its terms require the beneficiary to present; if not presented as stipulated, if discrepant, the issuer is entitled to refuse, and at risk if it chooses not to.

29. In the case before me, as was common ground, Article 14(b), which gives the issuing bank up to five banking days in which to determine whether a presentation is compliant, was expressly (and successfully) excluded. As it happens, although no specific time limit was substituted, nothing turns on that point, or on whether a limit of some sort should be implied (as seems most likely) and if so what.

30. Finally, Article 16 addresses "*discrepant documents, waiver and notice*". In the present case, the extent to which Article 16 was modified, if at all, is of particular importance. It states as follows.

"*a. When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank determines that a presentation does not comply, it may refuse to honour or negotiate.*

b. When an issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies. This does not, however, extend the period mentioned in sub-article 14(b).

c. When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter. The notice must state:

(i) that the bank is refusing to honour or negotiate; and

(ii) each discrepancy in respect of which the bank refuses to honour or negotiate; and

(iii)

(a) that the bank is holding the documents pending further instructions from the presenter; or

(b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or

(c) that the bank is returning the documents; or

(d) that the bank is acting in accordance with instructions previously received from the presenter.

d. The notice required in sub-article 16(c) must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation.

e. A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may, after providing notice required by sub-article 16(c)(iii)(a) or (b), return the documents to the presenter at any time.

f. If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation.

g. When an issuing bank refuses to honour or a confirming bank refuses to honour or negotiate and has given notice to that effect in accordance with this article, it shall then be entitled to claim a refund, with interest, of any reimbursement made."

31. Article 16 has a number of fundamental features.

i) First, it provides that in the event of a non-compliant presentation, the issuer has only four options, and a failure to comply with one of those options precludes it "*from claiming that the documents do not constitute a complying presentation*": it cannot adopt any alternative option; the provisions are exhaustive. Moreover, on the proper interpretation of Article 16(c), this "preclusion rule" extends (subject to the terms of Article 16(e)) to the failure of an issuer to handle documents in accordance with its own notice of refusal: see for example, *Fortis Bank SA/NV v Indian Overseas Bank (Nos 1 & 2)* [2011] EWCA Civ 58 at [36]-[45].

ii) Second, under Article 16(c), if payment is to be resisted by the issuer, it must, in respect of the presenter's discrepant documents, either return them to the presenter, or otherwise (ultimately) act on the presenter's instructions; but it cannot properly release them to the applicant without receipt of a waiver from the applicant, which it agrees to accept, thus incurring liability to the beneficiary.

iii) From these short points, it follows that in the present case, the documents having been released to Jibran, one or other of UTC or UTB, whichever is the issuer (and regardless of the alleged documentary discrepancies) cannot deny liability to Heytex, unless by reference to the allegedly incorporated Credit Norms.

The Facts in More Detail

32. The letter of credit in the present case was issued, as is standard practice, by means of an MT700 SWIFT message sent by UTC (not UTB) to Sparkasse on 26 August 2020. It is exhibited to Dr Bhowmik's First Witness Statement. As was said by Christopher Hancock QC (sitting as a Deputy High Court Judge) in *Yuchai Dongte Special Purpose Automobile Co Ltd v Suisse Credit Capital (2009) Ltd* [2018] EWHC 2580 (Comm), at [20]: "*The SWIFT system provides a platform for secure financial messaging around the world. It employs a system of common standards and forms for such messages, including standard forms for the issuing and advising of LCs. Such messages and forms are intended to be read and understood internationally by specialists in the trade finance departments of financial institutions, as well as by exporter/sellers. That context clearly has to be borne in mind when construing a LC sent via the SWIFT*

messaging system. Documentary credits sent via SWIFT are dealt with through trade finance specialists, well-versed in SWIFT."

33. The fields of the message included the following details.

i) In field 50, the applicant was identified as Jibran.

ii) In field 51D, the "Applicant Bank" was identified as UTB – as stated below, I understand this to have been a reference to Jibran's bank. At [24/9] of *Yuchai*, the Deputy noted that the "*SWIFT messaging guide states that "This field specifies the bank of the applicant customer if different from the issuing bank"*", which of course implies that UTB was not the issuer.

iii) In field 59, the beneficiary was identified as Heytex.

iv) In field 40A, as mentioned above, the letter of credit was described as "*irrevocable*", which accords also with the definition of a "credit" in the UCP 600, at Article 1.

v) In field 40E, under "Applicable Rules" (which I accept is the field correctly used to incorporate terms into the contract by reference) it was provided:

"*Applicable Rules* *OTHR*

Narrative *UCP LATEST VERSION*"

vi) In field 45A, the description of the goods and/or services referred to the sale contract between Heytex and Jibran with a total invoice value of €200,707.50.

vii) In field 46A, the four varieties of document (commercial invoices, packings lists, bills of lading and insurance certificate/s) required to be presented in order to claim payment were identified.

viii) Field 47A is headed "Additional Conditions". The text included: (a) provision for negotiation of incomplete or discrepant documents (for a fee of €200), (b) (original capitalised) "*(5) All docs, except shipping line certificates, must bear L/C number and date and must be manually signed by all sides of LC*", and (c) reaffirmation that (again, original capitalised), "*(9) This documentary credit is subject to the version of the ICC Uniform and Practice for Documentary Credits, International Chamber of Commerce, Paris, France, Publication No. 600, latest revision, except clause 14B shall not be applicable*." No other exception to the UCP 600, or modification, was identified, although paragraph (8) stated that (again, original capitalised), "*The issuing bank will affect* (sic) *payment on due date under this credit to the beneficiary bank in accordance with their instructions upon receipt of documents required fully complying with LC terms and other conditions*". As stated above, the meaning of the expression at (5) is in issue.

ix) Field 78, under the heading, "Instructions to the Paying Accepting Negotiating Bank", contained text which relevantly provided (original capitalised): "*All documents are to be forwarded under one cover*

quoting our LC No. to our UAE Rep. Office at: Unity Trade Bank Ltd, Trade Services, Office No 923/B, Business Village Building, Deira, P.O. Box No: 66166, Dubi, UAE. This DLC shall be interpreted in accordance with the laws of England and is subject to the terms and other conditions governing the issuance of this credit, credit norms of the issuing institution and UCP 600. In the event of any conflict, contradiction or inconsistency between the issuing terms of this DLC and UCP 600/ISBP681 (as applicable), the issuing terms of this DLC shall prevail".

34. The only reference to the Credit Norms in the letter of credit, was in the text at field 78, which is the field used (or which ought to be used) by the issuer to give instructions regarding the mechanics of payment. Further, those Norms did not in any way accompany the letter of credit, and neither were they obviously made available to Sparkasse or Heytex, or said to be available by any particular or specified means. It was not said how or in what respects, if at all, they were intended to exclude or modify the provisions of the UCP.

35. At this point, I pause to consider one of Mr Deal's submissions. He suggested that although both sides had been able to adduce evidence (and had done so) I should nonetheless assume or contemplate that other relevant and material communications concerning the letter of credit and its terms – albeit unmentioned in the evidence - had also passed between the parties before UTC's message of 26 August 2020, including perhaps a draft or various drafts of the letter of credit, and that such evidence might in particular bear on the question of incorporation of the Credit Norms. So he suggested, for example, that Heytex

and Sparkasse would have had an opportunity to object or raise questions regarding the proposed credit, but must either have failed to do so, or have done so, but in any event, having had that opportunity, been content to accept the terms set out.

36. Whilst in principle true that other communications might have passed, I do not accept that submission. I am unwilling to speculate regarding either the possibility or content of other communications in circumstances where nothing of that sort was mentioned in the evidence. I will deal with the issues on the evidence before the court.

37. Returning to that evidence - on receipt of the MT700, in response, Sparkasse sent on 27 August 2020 an MT710 SWIFT message (also in standard form) headed "Advice of Third Bank's Documentary Credit". Amongst other things, at field 52A, under the heading "Issuing Bank", Sparkasse's message identified UTC, not UTB, as the entity issuing the letter of credit. On that point, there was no response from UTC or UTB.

38. The Credit Norms said to have been referred to in the letter of credit were exhibited by Dr Bhowmik to his Second Statement, which in particular identified Clause 2.6 and Clauses 3.8 and 3.9 as those upon which UTC relies. The Norms were headed "General Terms & Conditions of Unity Trade Capital", and amongst other things, they provided as follows:

    i) That the Credit Norms contained the "*terms and conditions upon which each Undertaking … may be issued or established by Unity … for the benefit of the Applicant … and are deemed incorporated into each request or application for the issue of an Undertaking by reference …*".

"*Undertaking*" was defined as "*any Credit, Guarantee Instrument or other form of undertaking for your (*i.e., the Applicant's) *benefit*", and the Applicant was defined as the person on whose request "*the Facility*" was to be provided.

ii) That the Credit Norms were intended to govern "*the mutual rights, obligations and liabilities of the APPLICANT and UNITY*", and in particular the "*application*" and "*issuance procedure*". The Applicant was required to read and sign the Credit Norms, with that signature being taken to be certify that the Applicant "*has fully read these Terms and Conditions, agrees with them and recognises them as binding*".

iii) At Clause 3.1, that in return for a fee, a "*Facility*" would be issued; a Facility was defined as "*an arrangement/agreement where UNITY agrees to Issue an Instrument (Letters of Credit, Stand-By Letters of Credit, Guarantees) to a Beneficiary which imposes on UNITY (or purports to impose on UNITY) any liability on behalf of the Applicant in the amount, for the terms and purpose, and on the specific terms specified in the application*".

iv) Clause 3.7 provided that UNITY "*may issue, LC and SBLC and the Guarantee under the FACILITY: 1) the Letters of Credit will be subject to Uniform Customs and Practice for Documentary Credits, 2007 Revisions, ICC Publication No. 600, as revised (UCP600) …*".

v) Clauses 5.1 and 5.4 provided for the Applicant to undertake to reimburse UNITY for "*drawings under the Letter of Credit*", such undertaking being "*absolute, irrevocable and unconditional*".

vi) Plainly, in the present case, "the Applicant" was Jibran; I did not understand that to be in dispute; in any event it is indisputable.

vii) Turning to the provisions cited by Dr Bhowmik in his Second Statement, first, Clause 2.6 provided:

> "*2.6 The APPLICANT agrees not to enter into any negotiation/settlement with the BENEFICIARY outside of the remit of the FACILITY issued by UNITY. The APPLICANT understands that such negotiation/settlement shall void the FACILITY issued by UNITY; UNITY shall have no further responsibility/liability pursuant to the FACILITY proffered to the APPLICANT*".

viii) I shall return to the meaning of this provision in due course, but it will be observed that as well as requiring the issuer to consider matters going beyond simple contractual compliance of the presented documents themselves, it appears to infringe the autonomy principle, because it makes the issuer's future or continuing liability under the credit depend on the conduct of the seller and buyer in respect of their rights and obligations under underlying contract of sale.

ix) Second, Clauses 3.8 and 3.9 provided (references to "*You*" and "*Your*" being to the Applicant, and thus to Jibran):

> "*3.8 Upon its review of the shipping documents presented by the Beneficiary's Bank in respect of the Facility issued by Unity to You (the 'Documents'):*

1. UNITY may acknowledge receipt of the Documents, notify the Beneficiary Bank of its receipt of the same and release the Documents on to You for payment; or

2. Unity may accept the Documents, notify the Beneficiary Bank of its acceptance of the same and release the Documents on to you for payment; or

3. Unity may deem the Documents discrepant and notify the Beneficiary Bank and You of its rejection of the same; or

4. Subsequent to (2) (sic) *above, as applicable and as confirmed by You, Unity may communicate waiver of the discrepancies by you to the Beneficiary Bank. Please note that acceptance of the Documents deemed discrepant by UNITY shall always be on Your own recognizance of payment either through us or directly to the Beneficiary. Your acceptance of Documents deemed discrepant and rejected by UNITY falls outside the remit of the Issued Facility and accordingly voids the Facility. You shall thereby be responsible for repayment of the full sum owing under the Facility.*

3.9 In respect of the Facility issued by UNITY to you, a waiver of discrepancies and acceptance of Documents by You (paragraph 3.8 above) will not obligate UNITY to waive the discrepancies as well. Both You and UNITY agree that a release of Documents contingent upon Your waiver and acceptance of the discrepancies shall release UNITY of all of its obligations under the Facility. Accordingly, upon

release of the Documents to You, You shall be responsible for payment of the sums owing under the Facility."

39. According to UTC, Clauses 3.8 and 3.9 modified (and prevailed over) the operation of Article 16 of the UCP 600 such that (on its construction of those provisions) it was entitled (or UTB was entitled) on Jibran's waiver of discrepancies, to release the documents to Jibran, and communicate Jibran's waiver of those discrepancies to Sparkasse and Heytex ("*outside the remit of the issued Facility*") but without incurring any liability itself – indeed, more than that, it was said that in those circumstances, the waiver by Jibran "*voids the Facility*" and "*shall release UNITY of all its obligations under the Facilty*". Plainly, if that were so (and in principle, as a matter of contract, it is not impossible) it would comprise a fundamental and somewhat startling departure from the scheme of the UCP, because it would allow for the seller/presenter's discrepant documents to be released by UTC/UTB to the buyer but without UTC/UTB accepting any liability to the seller under the letter of credit; the buyer would be put in precisely the position that letters of credit are generally designed to avoid, having lost control of its goods and documents, and seeking payment of an unsecured debt from a buyer abroad.

40. After the credit was issued on 26 August 2020, events unfolded as follows.

41. On 9 November 2020, Heytex (via Sparkasse) presented documents of the stipulated type, signed by (but only by) Heytex and Jibran; they were exhibited to Herr Fischer's Second Statement, and addressed to UTB. I note that prior to presentation, Sparkasse had twice asked UTC, by means of two separate SWIFT messages, for confirmation (or otherwise) that its reading of the expression

"*signed by all sides of LC*" (as requiring signature by Heytex and Jibran only) was correct, but that instead of answering directly, or at all, UTC had said, on 23 October 2020, "*Please note field 47A item no 5, is our control clause. The presented documents will have discrepancies. Generally applicant accepts all documents with discrepancies*", and had then simply failed to respond to the question's subsequent repetition, "*...please explain this clause. Under which circumstances must be documents mentioned be manually signed by whom.*"

42. On 12 November 2020, UTC/UTB sent the following SWIFT message to Sparkasse (using an "MT999 – Free Format Message 999") (original capitalised):

> "*We confirm receipt of 2 sets of documents on dated 12 Nov 2020 under your cover letter dated 9 Nov 2020.*
>
> *Please note that there are discrepancies in the presented documents as detailed below:*
>
> *1 Presented documents were not signed by all sides of the LC. Please refer to field 47A, clause no 5.*
>
> *With aforementioned discrepancies, the documents presented were non-compliant of LC terms and we refuse to accept the documents.*
>
> *We, therefore hold documents at your risk and responsibility and await your further instructions.*
>
> *Meanwhile we have sent one full set of non-negotiable shipping documents to applicant for his acceptance with discrepancies*."

43. This was described by Dr Bhowmik in his evidence as a "*clear and unequivocal*" rejection of the presented documents, on account of their

discrepancies. In Mr Deal's Skeleton Argument, he said that the notice of rejection complied with the requirements of Article 16 of the UCP 600 (being a single notice of refusal, stating the discrepancies and telling Sparkasse/Heytex what UTC/UTB had done and was intending to do with the documents in question).

44. Leaving aside the effect, if any, of the Credit Norms, it seems to me that the message of 12 November 2020 would comprise a notice falling within Article 16(c)(iii)(b), containing in effect a statement that "*the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver*". UTC's case is that when it said, "*Meanwhile we have sent one full set of non-negotiable shipping documents to applicant for his acceptance with discrepancies*", it was a referring to the possibility of a waiver and acceptance by Jibran on the terms of Clauses 3.8 and 3.9 of the Credit Norms, an acceptance that, as I have explained, would (it was said) make Jibran liable, but not the issuer, which would be "*released*".

45. On 13 November 2020, a further SWIFT message was received by Sparkasse from UTC/UTB, as follows (again, the original was capitalised).

> "*Following our discrepancy message sent to your good bank on DD 12 Nov 2020, we now confirm as follows:*
>
> *Applicant accepted all documents with discrepancies and advsied* [sic] *us to release all original shipping documents against his acceptance and confirmation of payments on maturity date as detailed here under…*

We therefore release documents to the applicant against his acceptance."

46. Under an unmodified Article 16, this message (and act) would have made UTC/UTB liable to Heytex under the credit, but under Article 16 as modified, submitted Mr Deal, it was no more than a communication by UTC/UTB of Jibran's own waiver and acceptance of liability "*outside the remit of the Issued Facility*".

47. Subsequently, as I have said, there were some variations to the agreed payment schedule, which were communicated to UTC/UTB via SWIFT.

    i) On 9 January 2021, an initial payment deferral agreed between Heytex and Jibran was communicated to UTC/UTB via SWIFT, and agreed by UTC/UTB, again via SWIFT, on 11 January 2021. Plainly, as Mr Day submitted, the communication of 9 January was with and to UTC/UTB rather than Jibran, which was party to the deferral agreement being communicated – in other words, UTC/UTB were not being used by Heytex as a conduit or agent for communication with Jibran. UTC/UTB's response added (original capitalised), "*All other terms of conditions in relation to this new due date remain the same as per our previous due date and acceptance message*", although of course on their case now, by that time, the credit had been made "*void*" and they had been "*released*" from any liability.

    ii) On 2 February 2021, a further proposed payment deferral agreed between Heytex and Jibran was communicated to UTC/UTB via SWIFT "*as we hear from our customer maturity dates to a.m. l/c should be postponed*", and was also agreed, after some delay, by UTC/UTB on 4

March 2021. The request communicated by Sparkasse noted that all charges in connection with the amendment were for the account of Jibran (a reference to the terms of the letter of credit set out above) and that therefore it should be charged the amendment fee. Again, UTC/UTB's response in agreement said (original capitalised): "*All other terms of conditions in relation to this new due date remain the same as per our previous due date and acceptance message*".

48. As before, Mr Deal argued that in the course of these communications, UTC/UTB were acting simply on behalf of Jibran, so that, for example, the references to "*our previous due date and acceptance message"* were references to Jibran's waiver and acceptance of liability, not that of the issuer. In any event, I note that in none of them (or in any other communication) did UTC/UTB suggest that the letter of credit had been terminated or that their role had been reduced to that of agent.

49. No sum due under these deferred payment terms has ever been paid and, until service of the Petition, UTC/UTB failed to reply to correspondence chasing payment – indeed, despite numerous messages, service of the statutory demand, and ultimately, the presentation of the Petition, nothing appears to have been received from UTC/UTB between 31 March 2021 and about 8 February 2022.

50. Against that background, I turn to the issues.

Issue 1: Who was the issuer, UTC or UTB?

51. In my judgment, the letter of credit was issued by UTC, and there is no real dispute in that respect. I reach that conclusion for the following reasons.

52. First, in his evidence on behalf of UTC, Dr Bhowmik, its director, a gentleman apparently knowledgeable and experienced in this field, as I have described, stated that the credit had been issued by UTC – indeed, he raised no point at all in this respect saying, for example, at paragraph 7 of his First Statement, that "*in accordance with Jibran's instructions, a letter of credit was issued by UTC in favour of* [Heytex] *as beneficiary on 26 August 2020 …*", and throughout his evidence treating UTC as the issuer. His evidence has not been corrected or changed in this respect, and I see no reason at all to disregard or doubt it. Similarly, as I have already said, the point did not appear in Mr Deal's Skeleton Argument.

53. Second, in any event, there is nothing otherwise in the contractual documents to suggest that UTB rather that UTC was in fact the issuer.

    i) The MT700 sent on 26 August 2020 was sent by UTC, not UTB, and in the ordinary course, one would therefore expect the contract to have been made by and with UTC not UTB. As was said by the Deputy Judge in *Yuchai Dongte* at [55], in respect of a similar issue, "*the starting point was the fact that the message format utilised was a MT700 format. Both parties were … in agreement that this connoted that the sender was the issuer; and that a different form, namely the MT710, should have been utilised had the sender intended to indicate that it was not an issuer but was instead an advising bank. Given that this is an international form, designed to be read in the same way across the world, and in the context*

of an industry that utilises mechanisation to a large extent, this is a very important consideration, and I understood both experts and Counsel to agree this."

ii) As mentioned above, Sparkasse's response, in the standard form MT710, on 27 August 2020, referred specifically and expressly to UTC as the issuer, and that reference was not contradicted; clearly, Sparkasse's belief, and presumably that of Heytex, was that UTC was indeed the issuer, and they proceeded on that basis.

iii) The references to UTB in the letter of credit do not assist UTC's argument (and do not displace what I agree to be the "*starting point*"): (a) at field 51D, UTB was referred to as the "Applicant Bank" but as I have said, that identifies the Applicant's bank, not the issuer, and if anything underlines the conclusion that UTB was not the issuer; and (b) similarly, the references at Fields 78 and 42D are, in my judgment, to UTB in its capacity as Jibran's bank.

54. In the circumstances, as I have said, there is no genuine or substantial dispute in respect of this issue; UTC was the issuer.

Issue 2: Were the Presented Documents Discrepant?

55. Mr Deal's submission was that the presented documents were discrepant because they were not signed by "*all sides of LC*", a stipulation that required, he argued, the signature not only of Heytex and Jibran, but also of UTC and Sparkasse (and in any event, the signature of UTC). I do not accept that argument; in my judgment, the presented documents were compliant, there was

no discrepancy; they were signed by "*all sides of LC*" as stipulated. I reach that conclusion for the following reasons.

56. First, as above, I note that this was not an argument raised as such in Mr Deal's Skeleton Argument, which described the alleged discrepancy as comprising the fact that "*the documents were not signed by Jibran and the Petitioner*", or indeed, in specific detail, in Dr Bhowmik's evidence (which referred to the alleged discrepancies, but without particularising them, a point which might also be made in respect of the rejection notice sent to Sparkasse on 12 November 2020, set out above at paragraph 42). Moreover, as I have also said, despite being asked twice before presentation, UTC failed to explain what it understood to be the meaning of the stipulation, and failed to contradict Sparkasse's stated understanding that it required the signatures of Heytex and Jibran only. The argument is a latecomer.

57. Second, as explained above at paragraph 18, the transaction comprised a number of separate but interconnected contracts. As a matter of language, "*all sides*" must be a reference to one of the following (the first two being UTC's case):

    i) Heytex and UTC, as seller and beneficiary under the credit itself;

    ii) Heytex, Jibran, Sparkasse, and UTC, being all those involved and in any role;

    iii) Heytex and Jibran, as seller and buyer; or (as Mr Day argued in the alternative),

iv) one or both of Heytex and Sparkasse (as representing the side of the seller) plus one or both of Jibran and UTC (as representing the side of the buyer).

58. I approach issues of construction of the letter of credit as explained in the authorities, and above, and therefore seeking to avoid a "*literalistic and national approach",* instead interpreting its terms "*in accordance with its underlying aims and purposes reflecting international practice and the expectations of international bankers and international traders …*". As was said by Lord Sumption in *Taurus Petroleum Ltd* [61], "*... the instrument must be construed as a whole, and as far as possible in such a way as to make each part of it consistent with every other part. Moreover, it must as far as possible be read consistently with the UCP, which are expressly incorporated into it. The UCP may be modified or excluded in specified respects by the terms of the credit, but otherwise it is a code of rules which enables letters of credit to be routinely dealt with by banks across the world on a common basis. It is therefore fundamental to their acceptability in international commerce*".

59. Approaching the issue in that spirit and construing the instrument as a whole, in my view, the expression "*all sides of LC*" means Heytex and Jibran, the third alternative, for the following reasons.

60. First, the credit was described as "*irrevocable*" by one of its own express terms. Moreover, the UCP 600 was expressly incorporated, and it too describes credits as irrevocable, as part of their very definition. As I have said, although not impossible to create a revocable credit, it is unusual to do so, because its basic function would tend as a result to be undermined; to achieve that end, clear

language would have been required, whereas in this case, although clear language was used, it was used to (further) describe the credit as irrevocable.

61. Furthermore, in the present case, there is nothing to suggest that a revocable credit would have been commercially acceptable to the parties, or was genuinely intended. Heytex's standard terms provided for payment in cash, and that must have been its most desired starting point; I infer that a credit, ordinarily considered to have a "*cash nature*" was an acceptable alternative.

62. However, if one of UTC's suggested constructions of the credit is correct, then essentially, the credit would have been revocable, because UTC could simply choose to withhold its signature, and bring about discrepancy. UTC's construction would therefore entail both a fundamental, internal inconsistency between terms of the credit, and a very significant departure from the scheme of the UCP 600, outcomes I should strive to avoid.

63. Second, the sale contract between Heytex and Jibran was the contract underlying the credit, which was only required and brought into existence because of that contract, to facilitate payment under it and reconcile the interests of the parties to it; the sale contract is thus the foundation of the whole, and the credit performed a function in relation to it; fundamentally, the two sides of the transaction were Heytex and Jibran.

64. In that context (and unlike those suggested by Heytex) UTC's suggested meanings of the provision serve no obvious commercial purpose – there is no reason (and none was suggested) to provide additionally for the issuer's signature on presented documents that must (and either do or not) otherwise comply with the contractual stipulations.

65. In the circumstances, assuming I am correct about the meaning of this provision, it follows that presentation was compliant, and that it crystallised UTC's liability to Heytex, under Articles 7 and 15 of the UCP 600. It follows that UTC was not entitled to give notice of rejection under Article 16, whether amended or not, and it follows that it owes the debt stated in the Petition.

66. However, even if that conclusion is not correct, the Petition nonetheless succeeds, for reasons I shall explain.

Issue 3: Were the Credit Norms incorporated into the letter of credit, and if so, to what effect?

Construction

67. UTC relied, as I have said, on Clause 2.6 and Clauses 3.8 and 3.9 of the Credit Norms. As UTC says they should be understood, they are or would be most unusual in the context of a letter of credit; they would entail a dramatic departure from the scheme of the UCP 600, and from the commercial essence of a letter of credit, in at least the following respects.

68. Essentially as explained, Article 16 of the UCP 600 entails either the return of discrepant documents by the issuer to the beneficiary, or a waiver and acceptance of the issuer's liability to the beneficiary, but in either case, protecting the beneficiary's interests. Against that, Clauses 3.8 and 3.9 of the Credit Norms are said to modify Article 16, and allow for the release of discrepant documents by the issuer/UTC to the applicant/Jibran, whilst at the same time making the credit "*void*" and "*releasing*" UTC from any further

liability to the beneficiary/Heytex, which is therefore left without goods, documents or payment.

69. Clause 2.6, also relied upon by UTC, is said to provide for the termination and avoidance of the credit, and the release of UTC from liability, in circumstances where the seller/beneficiary and buyer/applicant negotiate terms in respect of rights and obligations under their own discrete, underlying sale contract. Again, whilst perhaps not impossible, a provision of that sort would be most surprising, (a) because it would tend to undermine the autonomy principle, which is, with irrevocability, one of the characteristics fundamental to the function of credits, and (b) because it would require the issuer to consider matters beyond questions of narrow documentary compliance.

70. I do not however agree that they should be construed as having the effect for which UTC contends.

71. As to Clause 2.6, in my view, even if incorporated into the credit, its effect would not have been to relieve UTC of liability to Heytex. I say that for the following reasons:

    i) It provides that in the event of a settlement or negotiation between applicant and beneficiary, the "*FACILTY*" shall be rendered "*void*", and UTC shall have "*no further responsibility/liability pursuant to the FACILITY proffered to the APPLICANT*". However, I agree with Mr Day that the Facility was (as it was defined) the agreement and/or arrangement between UTC and Jibran; it was that by which UTC agreed to issue a letter of credit to another (the beneficiary, Heytex), but it was not, and did not comprise, the letter of credit itself. To terminate or avoid

the Facility is not therefore to terminate the letter of credit. None of that is surprising given that the Norms do not even purport to govern UTC's relationship with the third-party beneficiary.

ii) In any event, the effect of the provision was to release UTC from "further" liability, and again, I agree with Mr Day that in circumstances where by virtue of the compliant presentation, UTC had already become liable to Heytex, that release would not have been sufficient to extinguish and relieve it of its extant obligation to Heytex.

72. The first of those two points, the meaning of the word "*Facility*", is also relevant to an understanding of the effect of Clauses 3.8 and 3.9. Those Clauses again contemplate the avoidance of "*the Facility*" which again I construe as the avoidance of UTC's obligations to Jibran, but without effect on its obligations to Heytex. It follows that, even if incorporated, those Clauses would not have the effect contended for.

73. In any event, returning to the factual narrative set out above, it is difficult to accept that in the course of the messages sent to Sparkasse by UTC (and to UTC by Sparkasse) UTC was acting as no more than a conduit or agent of communication; at no point did it say or in any way suggest that, and at no point did it say or suggest that the letter of credit itself had been terminated or rendered "void". Reasonably understood (and as in fact understood by Sparkasse/Heytex) UTC's messages conveyed that Jibran had waived the discrepancies, and UTC had become liable under the credit.

74. Again however, even if those conclusions are not correct (and Clause 2.6 and Clauses 3.8 and 3.9 should be understood as Mr Deal submitted) the Petition nonetheless succeeds, for reasons I shall explain.

Incorporation

75. There was no real dispute about the general test governing the incorporation of terms into a contract by reference, which is that "*all that was reasonably necessary as a matter of ordinary practice should have been done to bring to* [the party's] *notice*" to the terms: *Thompson v London Midland & Scottish Railway Co* [1930] 1 KB 41 (CA) 52 (*per* Lawrence LJ).

76. The question of what satisfies that notice requirement turns on three factors:

i) The nature of the document and whether it is objectively intended to have contractual force. The document must be of a class which a reasonable person would expect to contain applicable contractual conditions: see *Parker v South Eastern Railway Co* (1877) 2 CPD 416 (CA) 422 (Mellish LJ). As *Treitel on the Law of Contract* (15th ed) explains at para 6.008: "*Whether a document falls into this class depends on current commercial practice, which may vary from time to time*".

ii) The timing of the notice. The terms must be made available before or at the time of contracting, and not after contracting. So, for example, a contract concluded at the hotel reception cannot incorporate terms only communicated to the customer on entering the hotel room: *Olley v Marlborough Court Ltd* [1949] 1 KB 532 (CA).

iii) The nature of the terms being incorporated. In particular, if the purported terms are onerous or commercially unusual (which turns on the context in each case) they may need, as was said by Denning LJ in *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461 (CA) 466, to be "*printed in red ink on the face of the document with a red hand pointing to it*". In this respect, *Chitty on Contracts* says (at para. 15.012), "*The practical equivalent of a 'red hand' may take the form of a 'clear reference' to the term, such as using bold print to highlight the term, the use of capital letters or otherwise giving the clause a degree of prominence in the contract*". Again, the requirements depend on the context: as Bingham LJ said in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (CA) 443 "*the more outlandish the clause the greater the notice which the other party, if he is to be bound must in all fairness be given*".

77. In my judgment the Credit Norms were not incorporated by UTC into the letter of credit, for the following reasons.

78. As I have already explained, the provisions of the Credit Norms, as UTC says they should be understood, would entail a dramatic departure from the scheme of the UCP 600, and from the commercial essence of a letter of credit. In addition to the Clauses particularly relied upon, and although not greatly developed in argument, other provisions of the Credit Norms, were they incorporated, would be equally, if not even more surprising in their effect. For example, Clause 2.2 stated "*The APPLICANT agrees that UNITY shall only pay and are only obligated to pay the drawings of the FACILITY if and when UNITY*

receives the same from the APPLICANT", a provision which Mr Deal, at any rate, would have me construe to mean that UTC's liability to Heytex depended on prior payment by Jibran, which if correct, would fundamentally undermine the purpose of the credit (certainly from the perspective of Heytex).

79. In consequence, I agree with Mr Day that (if this is what they mean) to have incorporated these provisions into the credit would have required very clear notice, the equivalent of Denning LJ's "*red hand*". However, in my judgment, for the following reasons, the terms and degree of notice relied upon by UTC were nowhere near enough.

i) If any terms were to be incorporated by reference into the letter of credit, they ought to have been identified in field 40E of the MT700 (under the heading "Applicable Rules"). However, the only rules referred to in that field were, as set out above, "UCP LATEST VERSION" (in other words, the UCP 600) and "OTHR" (which was otherwise wholly unspecified, but was relied on by Mr Deal as comprising an "alert").

ii) As explained above, Article 1 of the UCP 600 requires (once the UCP 600 is incorporated) any modification or exclusion of the rules to be "*express*". However, the MT700 only expressly identified one respect in which the UCP 600 was being varied or disapplied. Field 47A ("Additional Conditions") stated that "Clause 14B" was not applicable (see paragraph 33 above). I agree with Mr Day that a reasonable commercial party (and their advising bank) reading the MT700 would understand from field 47A that, save for that express modification, the UCP 600 otherwise applied without amendment.

iii) The only reference to the Credit Norms came at the end of the MT700 in field 78 (under the heading, "Instructions to the Paying Accepting Negotiating Bank"). That was not the correct field to use for incorporating terms by reference (in the context of a highly standardised and internationally used and understood means of communication) and in any event, nothing at all was said (let alone said expressly) about the supposed effect of the Norms on the provisions of UCP 600. The reference to "*other conditions*" in Field 47A at (8), was equally vague.

iv) On the evidence before the court, the reference at field 78 was in any event a reference to a document that was not at the time made available to Heytex and indeed, was not provided or made available until these proceedings (and even then, only in Dr Bhowmik's Second Statement).

v) Even if the Norms had been made available, they do not purport to govern the relationship between issuer/UTC and beneficiary/Heytex. On the contrary, as explained above, they are expressed to govern the relationship between UTC and/or UTB and Jibran, being the "*terms and conditions upon which each Undertaking … may be issued or established by Unity … for the benefit of the Applicant"*, and to govern "*the mutual rights, obligations and liabilities of the APPLICANT and UNITY*". That presents an additional complication, and an additional reason to require clarity, because even on UTC's case, not all of the provisions in the Credit Norms are relevant to or incorporated into the letter the credit. As stated in *Chitty* at para 15.010, footnote 45, "... *the court may be slower to incorporate a term into a contract between two*

parties where the term sought to be incorporated is to be found in a contract between two other parties or between one of the contracting parties and a third party: Barrier Ltd v Redhall Marine Ltd [2016] EWHC 381 (QB); Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL [2010] EWHC 29 (Comm), [2010] 1 Lloyd's Rep. 661; TTMI SARL v Statoil ASA [2011] EWHC 1150 (Comm), [2011] 2 Lloyd's Rep 220."

vi) Moreover, had they been made available, Heytex would have read at Clause 3.7 of the Norms, that UNITY "*may issue, LC ... under the FACILITY: 1) the Letters of Credit will be subject to Uniform Customs and Practice for Documentary Credits, 2007 Revisions, ICC Publication No. 600, as revised (UCP600) ...*".

80. In the circumstances, and in the context of a letter of credit made expressly on the terms of the UCP 600, UTC therefore cannot establish an arguable case that it gave sufficient notice to incorporate the terms of the Credit Norms into the letter of credit and/or to modify the operation of the UCP 600 to such a significant and highly unusual extent. It follows, amongst other things, as I have already said, that under Article 16, the release of documents to Jibran, even if discrepant, was only possible if at same time UTC became liable to Heytex under the credit.

Miscellaneous Points

81. Finally, I should add that Mr Day made two additional points which I record but upon which my decision is not based.

82. First, he said, on the basis of evidence in Herr Fischer's First Statement that in this case there are a number of "*concerning flags*" regarding the business of UTC and UTB, including for example, that the address of UTB's registered office in the Gambia appears in an article entitled "*Phantom Firms Haunt Gambia*", published by the "*Organised Crime and Corruption Reporting Project*" (OCCRP) in December 2019, in which it is alleged to be associated with large-scale fraud and the incorporation of "*fake banks*". In fact, it reports, "*the Enterprise Zone is an empty piece of scrubland near Banjul International Airport, and Enterprise Way does not appear to exist at all. The entire free-trade zone, complete with its own unofficial company registry, is a fiction*". This and other similar evidence did not however form any part of the case comprised in the Petition, and as I say, whilst noting it, I did not base my decision on it – it was not evidence to which UTC and/or UTB responded (for good reason).

83. Second, as I have said, Mr Day told me about the judgment in favour of H. Stoll AG, and on that basis said, by reference to assets stated in its micro-accounts to 30 June 2021, that UTC is plainly insolvent. Again however, whilst I record that submission, I do not make any findings about it.

Conclusions

84. In conclusion, for the reasons stated, in my judgment:

i) UTC was the issuer of the credit (not UTB), and is the correct respondent to the Petition;

ii) the documents presented on 9 November 2020 were compliant with the terms of the credit; they were signed by "*all sides of LC*" as that

expression is properly understood; they were not discrepant, and therefore at the point of presentation, UTC became liable;

iii) assuming UTC to be correct about their meaning and effect, the "Credit Norms" were not incorporated into the letter of credit, and the operation of the letter of credit was not made subject to those Norms;

iv) accordingly, even if the documents were discrepant, UTC would have acted in breach of the unmodified Article 16 of the UCP 600 by releasing them to Jibran, unless at the same time accepting and acknowledging its own liability to Heytex; it would therefore be precluded from relying on the alleged discrepancies;

v) but even if the Credit Norms were incorporated, they do not have the effect for which UTC contended, because, in particular, they govern and are directed at its relationship with Jibran, and the "Facility" which was agreed by UTC with Jibran, rather than the letter of credit which in fact resulted from that agreement.

85. In the circumstances, there is no real or substantial dispute in respect of the debt upon which the Petition is based and the Petition succeeds accordingly.

Dated 10 October 2022