In the name of His Highness Sheikh Tamim Bin Hamad Al Thani,
Emir of the State of Qatar

Neutral Citation: [2020] QIC (A) 1
(on appeal from [2019] QIC (F) 6)

IN THE CIVIL AND COMMERCIAL COURT
OF THE QATAR FINANCIAL CENTRE
APPELLATE DIVISION

16 March 2020

Case No 12 of 2019 (on appeal from Case No. 3 of 2019)

Between:

LEONARDO S.p.A

Claimant/Respondent

v

DOHA BANK ASSURANCE COMPANY LLC

Defendant/Appellant

JUDGMENT

Before:

Lord Thomas of Cwmgiedd, President
Justice Chelva Rajah SC
Justice Ali Malek QC

ORDER

The application for permission to appeal is granted, but the appeals are dismissed.

JUDGMENT

Introduction

1. In August 2018 the Claimant/ Respondent, Leonardo SpA ("Leonardo") made demands under an advanced payment guarantee and a performance bond issued by the Defendant/Appellant ("DBAC"). DBAC rejected the demands on the basis that the demands did not comply with the terms of the guarantees.

2. Proceedings were commenced and on 5 September 2019 the First Instance Circuit (Justices Bruce Robertson, Frances Kirkham and Arthur Hamilton) in a judgment reported at [2019] QIC (F) 6 gave judgment in favour of Leonardo against DBAC in the sums claimed, €14,619,440.

3. On 15 October 2019 DBAC sought permission to appeal. On 19 November 2019 we ordered that the application for permission and the appeal, if permission was granted, be heard at a rolled-up hearing on 2 February 2020.

(1) Factual Background

4. The factual background, in brief, is as follows.

5. DBAC is a company established and registered in the Qatar Financial Centre ("QFC"). It has a licence to conduct long term insurance in or from the QFC and is regulated by the Qatar Financial Centre Regulatory Authority.

6. Leonardo, formerly known as Finmeccanica S.p.A., is an Italian company providing services in the sectors of aerospace, defence and security. Leonardo had contracted in July 2015 with the Qatar Armed Forces ("QAF") for the provision of a low-level radar system.

7. Leonardo and PAT Engineering Enterprises Co WLL ('PAT') entered into a sub-contract on 8 March 2016 whereby PAT was to provide engineering, procurement and construction of infrastructure works and plants for the low-level radar systems installation ('the Sub-Contract'). The Sub- Contract was amended in December 2016.

8. The Sub-Contract required PAT to provide an advance payment guarantee and a performance bond. PAT was a customer of DBAC. DBAC provided: (1) an advance payment guarantee no. P1/10/1930/16/0001 dated 19 April 2016, as amended by DBAC's letter dated 9 May 2016 ('the APG'); and (2) a performance bond guarantee no. P1/10/1931/16/0001 dated 19 April 2016 ('the PB') (together "the Guarantees). They are demand instruments.

9. On 13 May 2016 Leonardo paid PAT the sum of €12,210,000 by way of advance payment as agreed in the Sub-Contract.

10. Leonardo terminated the Sub- Contract by letter dated 14 May 2018 pursuant to Article 16 of the Sub-Contract.

11. By a letter written in May 2018 Leonardo made a demand on the APG in the sum of €12,210,000. The demand was rejected.

12. On 2 August 2018 Leonardo made a demand on the APG for €10,549,440. On the same date a demand was made by Leonardo on the PB for €4,070,000. The two demands were for a total of €14,619,440. DBAC rejected both demands.

(2) The Contracts: the Sub- Contract, the APG and the PG

The Sub-Contract

13. The Sub-Contract price was €40.7m. Pursuant to Article 4.1 Leonardo was to make a down payment to PAT of €12,210,000 upon presentation of both an invoice or claim and the APG in that amount. It provided for milestone payments by reference to completion and acceptance of elements of the work. Down payment recovery by Leonardo of the €12.2m was linked to those milestone payments.

14. Article 4.3 provided that payment to PAT would be made on "a flow down basis" and that payments would be effected after receipt of the relevant payment from the QAF. This meant that Leonardo would pay PAT only after receipt of the relevant payment from the QAF.

15. Article 8 contained the requirements for PAT to provide the APG and PG. Article 8.3 stated

> "Any Bond shall be irrevocable and to be used at simple request by [Leonardo]..."

16. By Article 14.1, if PAT failed under its own responsibility to deliver any or all of the work within 30 working days of a letter from Leonardo, Leonardo would be entitled to claim damages.

17. Article 16.1 permitted Leonardo to terminate the contract and to "claim for reimbursement by [PAT] of the damages" in various circumstances.

18. Article 16.1.7 provided that, in the event of termination of the contract between Leonardo and the QAF, Leonardo would "recognize to [PAT] an amount to be agreed by the parties for the works already executed and not paid before the termination."

19. Article 16.2 provided "In case of termination as aforesaid ..." PAT remained responsible for reimbursing Leonardo "...cost equivalent to the balance of the contract price paid by [Leonardo] for the terminated portion of the Contract."

20. By Article 18.1 the parties were required to submit disputes to arbitration in Geneva under the Rules of Conciliation of the International Chamber of Commerce ("the ICC") in effect at the time of the arbitration. By Article 18.2 the applicable law "will be Switzerland legislation."

(3) The Guarantees

The Advanced Payment Guarantee

21. The APG after referring to the Sub-Contract, provided (so far as is material):

> "[Leonardo] has to pay to PAT Euro 12,210,000 .. being 30% of the said contract price.

Therefore, [DBAC] irrevocably guarantee, as security for and joint debtor with PAT, the reimbursement in Euro in the same proportion as the above value of any sums up to Euro 12,210,000....., that [Leonardo] might have to claim back in writing from PAT.

This guarantee is unconditionally payable to [Leonardo] upon first written demand ....., in case PAT should fail to meet its obligations of delivery and/or completion of Design, Procurement and Construction of Infrastructures and Plants for LLRS Systems Installation under the above mentioned contract.

This guarantee will be automatically reduced proportionally to the value of each partial delivery and/or completion of Design Procurement and Construction of Infrastructures and Plants for the LLRS Systems Installation upon presentation by PAT to [DBAC] of copies of the above mentioned project's relevant documents (Progress Invoice) approved, certified and signed by [Leonardo] project representative."

...

This guarantee is subject to URDG (Uniform Rules for Demand Guarantees) ICC Publication 758."

The Performance Guarantee

22. The PG also refers to the Sub-Contract, then states (so far as is material):

"PAT is bound to supply and carry out to [Leonardo] Design, Procurement and Construction of Infrastructures and Plants for LLRS Systems Installation.

As per article 8 of the said contract, PAT will provide [Leonardo] [an] Insurance guarantee for the amount of Euro 4,070,000 ... representing 10% of total contract price.

Therefore, [DBAC] , irrevocably guarantee, as security for and joint debtor with PAT, the reimbursement in Euro in the same proportion as the above value of any sums up to Euro 4,070,000....), that [Leonardo] might have to claim in writing from PAT.

This guarantee is unconditionally payable to [Leonardo] upon first written demand...., in case PAT should fail to meet its obligations of delivery and/or completion of Design, Procurement and Construction of Infrastructures and Plants for LLRS Systems Installation under the above mentioned contract, but not later than 03/05/2019 and shall not be returned to us to be cancelled definitely.

....

This guarantee is subject to URDG (Uniform Rules for Demand Guarantees) ICC Publication 758.

(4)The proceedings before the First Instance Circuit

23. On 13 February 2019 Leonardo commenced proceedings against DBAC. At issue was the validity of demands made by Leonardo under the APG and PB.

24. The parties exchanged pleadings and, following the direction of the First Instance Circuit made on 21 April 2019, a list of issues was agreed between the parties and a number of preliminary issues were formulated. On 29 and 30 July 2019 a hearing took place which dealt with the main preliminary issues as well as two summary judgment applications brought by Leonardo; one was in respect of DBAC's case that the demands made by Leonardo were fraudulent; the other was in respect of DBAC's case that Leonardo was seeking to profit from its own wrong and was acting unconscionably as based on the principles of Singapore law set out by the Court of Appeal in Singapore in *JBE Properties v Gammon* [2010] SGCA 46 and *BS Mount Sophia v Join-Am [2012] SGCA 28* (see the judgment of the First Instance Circuit at paragraphs 95-106 of [2019] QIC (F) 6)

25. Leonardo's applications for summary judgment succeeded. The First Instance Circuit rejected DBAC's case that the demands under the Guarantees were dishonest or unconscionable. No application is brought in respect of those matters. However, permission to appeal is sought in respect of the First Instance Circuit's determination of three preliminary issues, where it held that:

(1) On the proper interpretation of the Guarantees the demands made by Leonardo complied with the terms of the Guarantees – see paragraphs 45-62 of the judgment. We refer to this as the interpretation issue.

(2) DBAC was, even if correct on the issue of interpretation, precluded from challenging the demands under the Guarantees on the basis that they were non-complaint– see paragraph 63-65 of the judgment. We refer to this as the preclusion issues.

(3) In relation to the APG, the demand was not excessive – see paragraphs 66-71 of the judgment. We refer to this as the excessive demand issue.

(5) The grant of permission to appeal

26. As we have set out both the APG and the PG are expressly subject to the Uniform Rules for Demand Guarantees ICC Publication 758" ("URDG 758"), a codification of the law and practice relating to independent demand guarantees. The appeal raised important points as to the approach to URDG 758 and their application. The focus in the oral argument was on URDG 748 rather than the case law.

27. We grant therefore permission to appeal under Article 35.1 of the QFC Civil and Commercial Court Regulations. We do so in accordance with the approach adopted by the Appellate Division in earlier cases –

(1) *Case No's 4 and 5 of 2010* where Lord Woolf, President, said at paragraph 11:

> "If this Court considers there is an arguable case it will usually readily grant permission to appeal";

(2) *Chedid & Associates v Said Bou Ayash* [2015] QIC (A) 2 where Lord Phillips, President, said at paragraph 17:

> "The remainder of the judgment on the merits raises arguable issues of general importance in relation to QFC employment and contract law, and accordingly we grant the Claimant permission to appeal against that judgment"; and

(3) *Qatar Financial Centre Regulatory Authority v First Abu Dhabi Bank PJSC* [2019] QIC (A) 3 where, as set out at paragraph 94, the Court granted permission

> "in light of the weighty arguments advanced by the Bank and the issues at stake".

28. The Court will nonetheless always have regard to the fact that, as Lord Phillips said in *Case No 16 of 2017* at paragraph 18 that the filter under Regulation 35 is

> "in the interests of the due administration of justice and protects an unsuccessful party from the fruitless expenditure of, and potential liability for, further legal costs in cases where there is no reasonable prospect that a case will succeed."

(6) The approach to Uniform Rules for Demand Guarantees (URDG 758)

29. The first attempt by the ICC to codify independent demand guarantee practice was s in 1992 by URDG 458. URDG 458 were recognised by the Court of Appeal of England and Wales as of "some importance" in *Meritz Fire & Marine Insurance v Jan de Nul* [2011] EWCA Civ 827 where it was pointed out that significant changes had been intended by those rules and carried into effect. In the years following their publication, URDG 458 were widely used. That use was subject to careful reporting to and monitoring by the ICC. This resulted in the establishment of a task force, under the aegis of the ICC Banking Commission and the Commission on Commercial Law and Practice, to revise and update them. The result was URDG 758.

30. URDG 758 apply to any guarantee incorporating URDG 758 after 1 July 2010. There are three core principles that underpin URDG 758.

31. First, the independence or autonomy principle. This is the principle that insulates Guarantees from the underlying contract. The autonomous nature of the Guarantees means that conditions giving rise to the obligation to pay are to be found exclusively in the Guarantees. This independence principle is embodied in Article 5(a) of the URDG 758:

> "A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary".

32. By Article 5(b) the same principle applies to a counter-guarantee.

33. As Blair J observed in the Commercial Court in London in *SET Select Energy GMBH v F and M Bunkering Ltd* [2014] EWHC 192 (Comm) at [38]

> "The [autonomy] principle has helped facilitate commerce, enabling the supply of a creditworthy institution, payable on demand, together with any supporting documentation required under the terms of the guarantee".

In the same paragraph he said of URDG 758 that

> "...these are rules issued by the ICC which banks internationally routinely incorporate in their demand guarantees".

34. Secondly, the documents principle. This is closely related to the autonomy principle. The principle is that the parties are dealing in documents only. Article 6 of URDG 758 provides:

> "Guarantors deal with documents and not with good, services or performance to which the documents may relate".

35. Article 6 is an application of the principle in Article 5. The guarantor is only concerned with the issue of whether the documents presented conform with the terms and conditions of the guarantee and not with whether the goods and services conform with the underlying contract.

36. In this context Article 12 is also relevant. It provides

> "A guarantor is liable to the beneficiary only in accordance with, first, the terms and conditions of the guarantee and, second, these rules so far as consistent with those terms and conditions, up to the guarantee amount".

37. Thirdly, the strict compliance principle This principle is concerned with the requirement that the documents presented must strictly conform to the requirements of the guarantee. This means that if the documents do not comply their presentation will be a non-complying presentation even if the discrepancy has no practical effect.

38. Each of these principles is aimed at the commercial importance of certainty and predictability just as is the case in the law and practice relating to documentary credits and in particular ICC Uniform Customs and Practice for Documentary Credits 600 (UCP 600). As pointed out by the leading work on URDG 758 written by Dr Georges Affaki and Professor Sir Roy Goode QC, *Guide to ICC Uniform Rules for Demand Guarantees URDG 758 (ICC, 2011)* ("*Affaki and Goode*"), at paragraph 569

"Through their revision, UCP 600 were a main source of inspiration for the URDG's drafting style and substantive solutions".

39. As URDG 758 is intended to be an instrument underpinning international trade and commerce and to harmonise international demand guarantee practice, it is important URDG 758 is not interpreted in a literalistic manner or by adoption of rules of national law. A similar approach to the interpretation of URDG 758 should be adopted as that in relation to the Uniform Commercial Practices (UCP), as like UCP, URDG is a code reflecting the views and practices of the market and is kept under review. That approach is set out in a number of works of scholars, but is most clearly expressed by Sir Thomas Bingham MR in the Court of Appeal of England and Wales in *Glencore v Bank of China* [1996] 1 Lloyd's Rep 135, at 148:

> "[the UCP] a code of rules settled by experienced market professionals and kept under review to ensure that the law reflects the best practice and reasonable expectations of experienced market practitioners. When courts, here and abroad, are asked to rule on questions such as the present they seek to give effect to the international consequences underlying the UCP."

40. It is referred to in a more recent decision of that court, *Fortis Bank S.A./N.V, Stemcor UK Limited v Indian Overseas Bank* [2011] EWCA Civ 58, [2011] 2 All ER (Comm) 288, [2011] 1 C.L.C. 276 at [29]:

> ".. 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."

41. We anticipate that that approach would be adopted by courts worldwide. We expressly adopt that approach under the law applied by this Court. By virtue of 34 of URDG 758, as the Guarantees were issued in Doha by DBAC, the Guarantees were governed by QFC law. These instruments are the lifeblood of commerce. Their purpose is to provide security for payment which can be called on promptly.

42. Once principles are clearly stated in a code which is made expressly applicable to the agreements before the court, it is generally unnecessary to refer to pre-existing case law. The approach that should be taken after codification is that applied to codifying legislation by Lord Herschell in his judgment in the House of Lords in *Vagliano v Bank of England* [1891] AC 107 at 145:

> "...the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions....".

43. This principle is the more important when applied to a code which is accepted to represent the law and practice applied internationally in respect of demand guarantees. National case law, however eminent, is no longer relevant on issues where the law and practice are set out in a code. We have therefore not found it necessary to refer to English cases such as *Edward Owen Engineering Ltd v Barclays Bank Ltd* [1978] 1 QB 159 or *I.E. Contractors v Lloyds Bank* [1990] 2 Lloyd's Rep 496. National law (as the proper law) will be important in respect of matters not covered by a code.

44. URDG 758 expressly governs the Guarantees. It sets out in very clear terms the applicable legal principles and international practice. Those engaged in international trade, commerce and finance should be entitled to rely on the terms of URDG 758 interpreted in the way we have explained without having to have in mind national case law which predates it. Moreover, if a dispute arises, it is far more cost effective and speedy to proceed by reference to the principles set out in URDG 758 in the way we have described rather than by reference to case law.

45. This approach to URDG 758 is consistent with the approach of this Court to the interpretation of QFC Regulations according to their natural meaning rather than in reliance on English authorities, as set out in *Chedid & Associates v Said Bou Ayash* [2015] QIC (A) 2 at paragraph 18.

46. Against this background we turn to consider the three issues in the appeal. At the hearing before us Leonardo contended that we should first determine the issue of preclusion, as if

Leonardo was correct on that issue, the issue as to the interpretation of the Guarantees did not arise. However, we consider first the issue as to the interpretation of the Guarantees and what they required be provided on the making of the demands as was it better to consider what the Guarantees required before determining whether DBAC were precluded from raising the point.

(7) The interpretation issue

(a) The demands made by Leonardo under the Guarantees

47. The facts are very straightforward. It is not necessary to refer to the details of the performance of the Sub-Contract between DBAC and PAT or the financial position as between them, given the issues we have to consider. The critical matter is the wording of the Guarantees. It is, however, necessary to set out the demands made on 2 August 2018:

a. Leonardo made demand on DBAC under the APG in the sum of €10,549,440. It stated (so far as is material):

> "Pursuant to Art. 15 of ... [URDG 758] [Leonardo] hereby states and declares that PAT has failed to perform its material obligations under Articles 2, 5 and 12 of the Contract and specifically that:
>
> > -PAT failed to perform the Final Design as per paragraph 4.4 of the Statement of Work....
> >
> > -....in violation of paragraph 1.2 of the Statement of Work PAT provided an absolutely unsatisfactory organisation....
> >
> > -PAT failed to provide evidence of the existence of long lead purchase orders...
> >
> > -PAT failed to provide evidence of the grade A qualification for building and Construction... which was a mandatory requirement for carrying out the contractual activities.
> >
> > -Moreover, PAT failed to remedy such breaches within the notified thirty (30) working days period, determining the termination of the Contract pursuant to Art. 16.1.5 of the Contract.
>
> Hence, and in accordance with the terms of the above mentioned Guarantee with this written demand. We immediately hereby request You to pay immediately the amount of Euro10,549,440....."

> Such amount is the result of the proportional reduction of Euro 1,660,560 of the total amount of the Advance Payment Guarantee (Euro 12,210,000) made in accordance with the terms of the Guarantee.
>
> The above proportional reduction has been made in consideration of the fact that PAT has issued on 23rd December 2016 and pursuant to Article 4 of Amendment no. 1 to the Contract the Invoice number # 224-01/002 equivalent to Euro 3,874,640".

b. By a further letter dated 2 August 2018 Leonardo made demand on DBAC under the PG for immediate payment of €4,070,000. That letter was in substantially the same form as Leonardo's letter of the same date making its demand under the APG.

(b) DBAC's contentions

48. DBAC's case was that the APG and the PG required Leonardo to make a claim in writing against PAT before making a demand and to record that it had done so in a supporting statement and/or by attaching those claims in writing to the demand. It relied on the final phrase in the relevant paragraph of each of the Guarantees.

a. In the case of the APG the phrase was:

> Therefore, [DBAC] irrevocably guarantee.... any sums up to Euro 12,210,000....., that [Leonardo might have to claim back in writing from PAT.

b. In the case of the PB that phrase was

> Therefore, [DBAC] , irrevocably guarantee ....any sums up to Euro 4,070,000....), that [Leonardo] might have to claim in writing from PAT.

Although the figures in each instrument differ and the APG, given its nature, refers to "claim back" rather than simply "claim", the provisions are identical.

49. There was no dispute about the facts. Nothing in the demand or in a document supporting the demand stated that claims in writing had been made against PAT. It was also accepted by Leonardo that there was no letter or notice from Leonardo to PAT setting out or making a claim for the amounts that were demanded from DBAC under the sub-contract.

50. The argument advanced by DBAC in support of its case can be summarised:

a. The words "that [Leonardo] might have to claim [back] in writing from PAT" required sums to be claimed by Leonardo from PAT in writing. First, the word "claim" required the assertion of a right against PAT. Second, the use of the words "in writing" required that such a claim had been asserted in writing; taken together the phrase could not refer to the making of a future claim. The word "might" did not refer to future claims that had not been made in writing at the time of the demand, but was used simply to claims that might be made after the Guarantees had been issued in 2016.

b. The words were therefore inserted to ensure DBAC was only required to make payment against documented claims against PAT. There was a good commercial purpose for this stipulation so that DBAC could be sure there was no double counting. This was borne out on the facts in that, as we have set out, the breaches alleged against PAT were the same in both demands.

c. It was clear that, as the Guarantees stipulated that Leonardo had made a claim against PAT in writing, the ordinary meaning of the word set out in the Guarantees required in their commercial context that the documents presented had to demonstrate that such a claim had been made in writing.

d. Article 7 of URDG 758 provided a stark choice to which there was only one answer. It followed from Article 7 that, if no document was specified to indicate compliance with a condition, then that condition should be disregarded. It was clear that the parties could not have contemplated the Guarantees operating without compliance with the condition that a claim be made in writing. Therefore, the guarantee should be interpreted to require the presentation of a document than ensured compliance with the condition that claims had been made in writing.

e. As it was common ground that no statement was included in the letter of demand that claims had been made in writing against PAT, the demands were non-compliant because they failed to include a statement that such claims had made in writing as provided in for the Guarantees.

Our conclusion

51. The First Instance Circuit concluded at paragraph 53, primarily by reference to URDG 758 and English case law, that the Guarantees did not specify that a demand must be supported by a copy or copies of any claim or claims made upon PAT nor by a document referring to such a claim or claims. The words "in writing" did not specify a requirement, but simply specified that claims whenever made had to be made in writing. They did not require the provision of any document referring to claims in writing to support the demand

52. We agree with the conclusion of the First Instance Circuit that no document was required which referred to the making of claims in writing. In our judgment the issue can and should be determined by reference only to the terms of the Guarantees and the URDG 758. We were referred to the decision of Ramsay J sitting in the Technology and Construction Court of England and Wales *in AES-3C Maritza East 1 Eood v Credit Argicole* [2011] EWHC 123 (TCC) where the bond was subject to URDG 458 and to *Esal (Commodities) v Oriental Credit Ltd* [1985] 2 Lloyd's Rep 546. However these two cases, which contain significant citation of other English authorities, set out nothing by way of principle that is not clearly set out in the URDG 758 which expressly governs the Guarantees. There is therefore no reason to consider the cases for that purpose. In so far as the cases deal with the specific wording of the guarantees in those cases, they are of no assistance in the interpretation of the wording of the Guarantees that must be ascertained in accordance with URDG 758 applied as we have set out in accordance with the principles discussed at paragraphs 29-45 above.

53. Article 15 of URDG 758 provides:

> *Requirements for demand*
>
> a. A demand under the guarantee shall be supported by such other documents as the guarantee specifies, and in any event by a statement, by the beneficiary, indicating in what respect the applicant is in breach of its obligations under the underlying relationship. This statement may be in the demand or in a separate signed document accompanying or identifying the demand.
>
> b. .....
>
> c. The requirement for a supporting statement in paragraph (a) or (b) of this article applies except to the extent that the guarantee or counter-guarantee expressly excludes this requirement. Exclusion terms such as "The supporting statement under article 15[(a)] [(b)] is excluded" satisfy the requirement of this paragraph.

54. As is made clear, a demand must be supported by such documents as are specified in the guarantee, if any. For example, it may be provided that the demand be accompanied by an engineer's certificate or an arbitration award. It is a question of construing the guarantee to see if any documents are specified and therefore required to be served with the demand. The guarantor then considers the document(s) specified by the guarantee and, as required by Article 19(a) of the URDG 758, determines, "on the basis of the presentation alone, whether it appears on its face to be a complying presentation."

55. In addition to this requirement as to documents, Article 15(a) of URDG provides that, whether or not stated in a guarantee, any demand must be supported by a statement by the beneficiary indicating in what respects the applicant is in breach. This statement of breach provides a degree of protection against an unfair calling. A beneficiary will be slow to make a demand for payment where it knows that there is no justification, because an intentionally false statement of breach will result in a fraudulent demand. In the present case, as appears from the text of the demand, the breaches are set out in the demands. No complaint is made by DBAC about the description of the breaches set out in the demands, their content or detail.

56. Thus the short issue which must be determined by applying URDG 758 is whether the terms of the Guarantees requires a statement in the demand or in a supporting document that claims in writing have been made against PAT. In determining this question Article 7 of URDG 758, as both counsel made clear in oral argument, is of considerable importance.

> *Non-documentary conditions*
>
> "A guarantee should not contain a condition other than a date or the lapse of a period without specifying a document to indicate compliance with that condition. If the Guarantee does not specify any such document and the fulfilment of the condition cannot be determined from the guarantor's own records or from an index specified in the guarantee, then the guarantor will deem such condition as not stated and will disregard it except for the purpose of determining whether data that may appear in a document specified in and presented under the guarantee do not conflict with data in the guarantee".

57. It is clear, in our judgment, from the Guarantees that no documents were required to be served beyond the demands for payment. They make no reference to anything other than a written demand being served. The essential inquiry, as Article 7 makes clear, is to determine whether

there was a documentary requirement. It is clear from reading the Guarantees that the reference to claims in writing on PAT does not give rise to a documentary requirement, as it is not expressed as such in the Guarantees. We consider the words are there to refer to the underlying contractual relationship between Leonardo and PAT and restrict the guarantees to such claims as are in writing. However, the Guarantees do not purport to set out a documentary requirement and cannot be construed as such. As Articles 7 and 15 make clear, in considering the Guarantees provided by DBAC to Leonardo, the focus is on the documentary requirements. It would have been simple to have set out a documentary requirement, if one had been intended. This was not done. We therefore conclude that the words can be disregarded, as Article 7 contemplates, in considering what was required when a demand was made.

58. Applying the approach we have set out to the interpretation of the Guarantees, we consider that no document or statement of the kind contended for by DBAC was therefore required and the demands made complied with the terms of the Guarantees.

(8) The preclusion issue

59. It was Leonardo's case, which the First Instance Circuit accepted, that DBAC was in any event precluded from relying on their assertion that the demand should have included a statement that a claim against PAT had been made in writing. That was because DBAC was advancing a defence that was not referred to in a notice served under Article 24(d) of URDG 758. As we have determined that DBAC was wrong in its contention that the demand should have included such a statement, it would not strictly be necessary to consider the preclusion issue. However, as we have set out, Leonardo argued that we should decide the preclusion issue first and we heard full argument on it. We will therefore set out our conclusion on this issue.

60. When a demand is rejected, the action the guarantor is required to take is set out in Article 24 of URDG 758:

Non-complying demand, waiver and notice

a. When the guarantor determines that a demand under the guarantee is not a complying demand, it may reject that demand or, in its sole judgement, approach the instructing party, or in the case of a counter-guarantee, the counter-guarantor, for a waiver of the discrepancies.

...

c. Nothing in paragraphs (a) or (b) of this article shall extend the period mentioned in article 20...

d. When the guarantor rejects a demand, it shall give a single notice to that effect to the presenter of the demand. The notice shall state:

i. that the guarantor is rejecting the demand, and

ii. each discrepancy for which the guarantor rejects the demand.

e. The notice required by paragraph (d) or (e) of this article shall be sent without delay but not later than the close of the fifth business day following the day of presentation.

f. A guarantor failing to act in accordance with paragraphs (d) or (e) of this article shall be precluded from claiming that the demand and any related documents do not constitute a complying demand".

61. When DBAC rejected Leonardo's demand under the APG it set out its position in a letter dated 26 August 2018. Paragraph 4.3 stated:

> By Article 15(a) of [URDG 758] any demand must be supported by a statement by [Leonardo], as the Beneficiary, indicating in what respect ... PAT is in breach of its obligations under the underlying relationship. In this regard, the Demand expressly states that 'PAT has failed to perform its material obligations under Articles 2, 5 and 12 of the [Sub-Contract]' and then cites four examples of what Leonardo says constitutes material breaches (the Alleged Breaches). Leonardo goes on to state that 'PAT failed to remedy such breaches within the notified thirty (30) working days period, determining the termination of the [Sub-Contract] pursuant to Art. 16.1.5 of the [Sub-Contract].
>
> DBAC requires notarized and authenticated copies ... of documents verifying that:
>
> > 4.3.1 the Alleged Breaches are breaches of 'material obligations' that would give rise to termination of the [Sub-Contract];
> > 4.3.2Notice was provided to PAT in relation to the alleged breaches as set out in the Demand; and
> > PAT failed to remedy the Alleged Breaches within the notified thirty (30) working days period."

62. DBAC rejected Leonardo's demand under the PG in materially the same terms by a letter on the same day.

63. The First Instance Circuit decided that DBAC would have been precluded because the letters written by it did not set out the discrepancies relied on; it rejected the contention that DBAC could amplify its case. It concluded at paragraph 65 that such an argument would

> "destroy the commercial purpose of an "on demand" guarantee by encouraging delayed challenges. Unless any challenge is made forthwith, the advantage of immediacy, together with the aims of clarity and precision, would be frustrated."

64. On the appeal DBAC contended:

a. The discrepancy was set out in its letters of 26 August 2018 as it identified Article 5(a) of URDG 758 and at paragraph 4.3 stated

> "DBAC requires notarised and authenticated copies (for use in the State of Qatar) of documents verifying that…Notice was provided to PAT in relation to the Alleged Breaches as set out in the Demand."

Its contention to us on what the Guarantees required was in substance the same argument as contained in its Article 24(d) notice, namely that Leonardo was required to provide copies of the documents relied upon by Leonardo which showed an entitlement to the sums demanded. In construing matters relied upon as discrepancies, a court should not construe them as if it were considering a pleading. It was also important to take into account that there was only 5 working days to formulate the discrepancies; this gave rise to practical difficulties that should be taken into account when considering what had been stated in the rejection notice.

b. Article 24(f) of URDG 758 did not bar DBAC from raising defences in proceedings that were not been canvassed in an Article 24(f) notice. Provided a valid Article 24(f) notice was served, Article 24(f) no longer applied and the guarantor could raise whatever defence it wished whether or not mentioned in the Article 24(f) notice. This was a fair and just interpretation of the Article and took into account the difficulties that

the bank employee would have in formulating all its arguments within 5 working days after it has received a demand.

65. The first argument advanced can be considered shortly as it involves simply examining the terms of the notices of rejection. In our view it is clear that the rejection notices did not raise the discrepancies relied upon before us. It is clear that all that DBAC was doing was making requests of the documents seeking to substantiate the breaches of Sub-Contract relied upon by Leonardo. These requests for information were not asserting any discrepancy. The notices contained in the letters did not specify the discrepancy subsequently relied upon by DBAC.

66. The second argument advanced by DBAC raises the more general point that the guarantor can raise further discrepancies because it served an Article 24(d) notice. We consider that it is clearly inconsistent with the language of Article 24(d) of URDG 758. The Article requires the guarantor who rejects a demand to state not only that it is rejecting the demand but also to state, *"each discrepancy for which the guarantor rejects the demand*". Each discrepancy therefore has to be identified. It is not possible to introduce new ones simply because an Article 24(d) notice has been given. This conclusion flows from the language of Article 24(d) referring to "*each discrepancy*". It is also supported by the commercial rationale for this requirement.

67. In the Introduction to URDG 758, published as part of the text of URDG 758, Dr Georges Affaki, the then Vice-Chair, ICC Banking Commission, stated in explaining the new provisions that replaced the provisions in URDG 458:

> "The guarantor's independent role is expressed in stronger and clearer terms and, more importantly, it is now expressed in exclusively documentary terms. The new URDG expect the guarantor to act diligently. For instance, a guarantor is expected to reject a non-complying demand within five business days by sending a rejection notice that lists all the discrepancies; otherwise, the guarantor will be precluded from claiming that the demand is non-complying and will be compelled to pay. Largely accepted in documentary credit practice under UCP, the preclusion sanction is necessary to discipline unfair practices that work to the detriment to the beneficiary."

68. As *Affaki and Goode* explain at paragraph 24.10:

> "Where the guarantor rejects a demand it must give -that is send (see article 24(c) -a single notice to that effect to the presentor of the demand stating that is rejecting the demand and specifying each discrepancy for which the demand is rejected. The effect of this rule is that the guarantor is allowed only one bite of the cherry. If the demand is discrepant in two respects and only one is notified to the presenter, the guarantor cannot rely on the other discrepancy to reject a subsequent demand that is otherwise a complying demand. This is a particular aspect of the preclusion rule in article 24(f)."

69. The commercial rationale is clear. Again, as *Affaki and Goode* state at paragraph 24.13:

> "The rationale behind URDG 758 article 24(d) - and its UCP 600 counterpart – is to stop the unfair practices witnessed in some instances where the guarantor, whether or not consciously or not siding with its customer, informs the presenter of the discrepancies in a piecemeal fashion over an extended period in order to leave as little time as possible to cure the discrepancies before expiry.....failing to advise the beneficiary of discrepancies of which the guarantor is aware until it is too late for the beneficiary to act on this information is not a good faith practice that is conducive to honest dealings.....Under the URDG, any such conduct is banned and liable to sanction under the preclusion rule in article 24(f). That is why it is so important for the guarantor or counter-guarantor examining a demand to strictly follow the procedure laid down in article 24(d) within the time limit indicated in article 24(e). The success of the URDG lies in offering the most reasonable balance among the legitimate interests of the parties. A similar reasoning has led the UCP to include a preclusion rule since the revision of 1974, UCP 290. It has been a hallmark of UCP since then."

70. The position under *UCP* 600 is well explained in *Hing Yip Fat Co Ltd v Daiwa Bank* [1991] 2 HKLR 35; *Jack, Malek and Quest: Documentary Credits* (4th Ed) at paragraph 5.65.

71. The time of 5 days provided for is not short. It takes into account the core principles we have set out at paragraph 30 above, the commercial rationale and the fact that the applicable principles are set out in a clear code which can be readily understood without reference to case law.

72. We therefore consider that the First Instance Circuit was correct in the determination of this issue. DBAC were in any event precluded from putting forward the contention raised in the interpretation issue.

(9)The excessive demand issue

73. The excessive demand issue applies only to the APG.

74. DBAC contended that the limit of the APG had been reduced and therefore Leonardo's demand under the APG was excessive, as Leonardo demanded a sum under the APG that was greater than the amount guaranteed by the APG. The demand was therefore non-compliant because it was more that the amount available under the APG. Reliance was placed on Article 17 (e) (i) of URDG 758

> *Partial demand and multiple demands; amount of demands*
>
> ...
>
> e. A demand is a non-complying demand if:
>
> i. it is for more than the amount available under the guarantee, or
>
> ii. any supporting statement or other documents required by the guarantee indicate amounts that in total are less than the amount demanded

75. DBAC's contention was dependent upon the amount under the APG having been reduced in accordance with its terms. The APG, as amended, set out a formula by which it would be

> "automatically reduced proportionally to the value of each partial delivery and/or completion of Design Procurement and Construction of Infrastructures and Plants for the LLRS Systems Installations upon presentation by PAT to [DBAC] of copies of ... a Progress Invoice approved, certified and signed by [Leonardo's] project representative."

76. The First Instance Circuit concluded (at paragraph 69) that there was no evidence of any presentation by PAT to DBAC of the Progress Invoice and that therefore on the facts the argument failed.

77. On the appeal, DBAC contended that this finding was wrong and that there had been a presentation. They relied on their possession of an invoice dated 23 December 2016 from PAT to Leonardo which required Leonardo to pay €3,874,640; this had been received by Leonardo on 28 December 2016. They also relied on a letter to PAT on 29 April 2017 in which it was accepted by Leonardo that this amount was due. These documents had made their way to DBAC. DBAC contended that taking these documents together and the fact that

they had come to DBAC, the terms of the APG were satisfied and were effective to reduce the amount of the APG.

78. We do not agree. In our view the APG required the presentation of the invoice approved, certified and signed by Leonardo. It was not sufficient that it could be shown that as between Leonardo and PAT that the amount had been agreed. There had to be a presentation of the document specified to DBAC, as what mattered, in our judgment, was not what had transpired between the parties to the sub-contract, but what was specified as the condition for a reduction - a presentation to DBAC of an invoice "approved, certified and signed by [Leonardo's] project representative". Obligations under the APG as between Leonardo and DBAC operate independently of the position between Leonardo and PAT as parties to the sub-contract. DBAC was only concerned with the terms of the APG and whether compliant documents were tendered under the Guarantee. It was not concerned with the financial position under the sub-contract between Leonardo and PAT. The position had to be certain and predictable; any reduction had to take place in accordance with the terms of the APG. There is no evidence that the presentation of these documents ever took place.

79. It follows from the above, that the APG was not reduced and therefore the demand was not excessive.

Conclusion

80. Although we have granted DBAC permission to appeal, we dismiss the appeal and order that the costs of the appeal be paid by DBAC to Leonardo.

By the Court,

Lord Thomas of Cwmgiedd
President of the Court

Representation:

The Appellant was represented by Mr Sanjay Patel, Counsel, 4 Pump Court, London.

The Respondent was represented by Mr Simon Hale, Counsel, 4 Pump Court, London.