

# Injunctions on honouring BG's & LC's

1. Situations where you are Guarantor or LC issuer
  - 1.a Applicant has already obtained injunction
  - 1.b Applicant threatens you with legal action
2. Situations where you are not reimbursed by correspondent due to injunction on him
3. Cases

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# 1a Situations where you are Guarantor or LC issuer but your applicant obtained (or threatens us with) an Injunction

- Every case is different but some general guidelines apply
- Courts easily grant injunctions on us... Why?
- Never forget that injunctions are temporarily and need to be followed by a “normal” court decision!
- If Court already issued Injunction before you were informed=> ask copy and analyze it thoroughly on exact modalities: only prohibition to debit applicant? And/or to pay the bene? Often mistakes by lawyer of applicant...

## 1.a Continued

- Inform beneficiary about the injunction
- If you feel concerned about your good reputation and your business and if you're not convinced about fairness of Injunction=> dare to start legal action against your applicant !
- There are many arguments to convince Court to revise the injunction: autonomous nature of our commitment/ dispute is no fraud but "usual" commercial dispute between parties/no fraud at first sight/ importance of international reputation for a bank/...

## 1.b Injunctions: what can you do if your applicant threatens you with court action?

- Above all: always remain calm, objective/ neutral and cautious!
- Do not try to escape by searching for spurious discrepancies...
- Best solution is to obtain a final judgement from a Court. But your tactic in Court can be different on the case: although a bank is never a Judge and has to avoid to get into such role, you can have a differentiated approach:

a) if you believe your applicant has good grounds you can instruct your lawyer to remain neutral i.e. by only pleading in court that the claim was complying, that our commitment is autonomous from the underlying contract and that we leave it to the appreciation of the Court to evaluate whether fraud is involved or not.

# 1.b Injunctions: what can you do if your applicant threatens you with court action?

b) If on the contrary you believe your client has no good reasons you can instruct your lawyer to elaborate more on the arguments in principle why we should pay.



- Key issue is timing: UCP&URDG require you to honour a complying claim within short time but applicant begs for more time. Nevertheless do not pay overhastly under heavy pressure of time or by the bene. Why ?
- If your applicant threatens with a court action but has not started yet: you need at least a summon (writ) to appear in Court within short lapse of time allowed by URDG/UCP

## 2 What if you are not reimbursed by correspondent due to injunction on him?

- Each case differs; many scenarios
- Always demand copy of court decision and analysis it in-depth: in relatively many cases the injunction only prohibits that bank to debit his applicant but does not affect his obligations towards you...
- Determine your position and risks. If you have paid your customer or you're irrevocably committed without exceptions and you evaluated your chances as good=>start legal action locally

### 3. Some cases

H Troon vs Marysville Hotel: contractor Troon had to construct a hotel for Marysville Ltd. 2 PB's issued of 750,000 each with expiry date 28 days after Final Completion date. No URDG. WT Ltd. was surveyor to certify practical completion and final completion. Upon practical completion 1 PB was returned. Defects Liability Period of 12 months started. After that period contractor sent Final payment claim to surveyor but was not received by the latter. Bene claimed timely full amount of second PB stating that there were substantial remaining defects.

Contractor obtained interim injunction restraining Bene from calling the PB but Court also ordered Contractor to pay 350,000 for damages.

Later on, contractor requested Court to make injunction permanent claiming:

- 1) Bene breached its contract by not ensuring that Surveyor issued Final Completion within 28 days after expiry of Defects Liability period,
- 2) Bene was unconscionable by claiming more than a justifiable amount

### 3. Case 1 ( continued)

Bene replied: 1) contractor never submitted Final payment claim to Surveyor; 2) substantial defects which would have led a Note of Dispute pursuant to the Contract. Contractor was not entitled on any Final Certificate.

High court ruled that the Contract indicated that parties allocated the risk of a dispute onto the contractor pending its resolution. Cfr the contract and the wording of the PB: “unconditionnally undertakes to pay...” Moreover, the Bene had a reasonable basis to assert that Contractor breached the contract by failing to attend to formally notified defects

Therefore the Court dismissed the request of Contractor for permanent injunction and allowed claim for full amount.



# Case 2 BG combined with LC:facts

- LC issued by Algerian bank by order of EDIP ifo Cobel,confirmed by Belgian bank
- Same Belgian bank issued counterguarantee ifo Algerian bank for PB of 5 pct, covering a.o. hidden defects. No URDG
- LC fully utilised and reimbursed
- PB had to be extended 3 times
- Algerian bank validly claims under counterguarantee on 7 March
- Belgian bank informs Cobel same day

## Case 2

- On 10 March Cobel requests Court for injunction prohibiting belgian bank to pay. Injunction granted.
- Belgian bank opposes against injunction but is denied.  
Belgian bank appeals

Q1 Were the conditions to obtain injunction i.e. urgency and risk for irreperable damages ?

Q2 Is the claim by EDIP fraudulent considering LC was paid?

Q3 is the fact that EDIP lodged 3 times extend or pay fraud?

Q4 what do you think the Court of appeal decided?

### 3. Case study 3 Algerian export LC's

2 similar LC's of EUR 4 mln each issued by Algerian bank ("IB"), payable at sight (= Algeria= value 10 WD), available at KBC, confirmed by KBC, for export of 10,000 MT Ukrainian steel bars. As docs presented to us were complying we honoured our confirmation and paid bene. at sight

IB had to reimburse us for LC1 on 3 Feb and for LC2 on 17 Jan.

However bene informed us that an inspection report by Customs stated that diameter of bars was not complying with new import regulations.....

# Case study 3

- For LC1 the IB informed us on 29/1 that they would not reimburse us due to injunction. No further information
- For LC2 we received no funds, no refusal, no explanation... On 5 Feb their Legal Dept said there was a court action pending (which never resulted in an injunction!). For LC2 there was a third party garnishment order for EUR 2,5 mln in favor of a third (Algerian) creditor of the bene.

### 3. Case study 3 Algerian export LC's

IB clearly didn't respect UCP. Moreover, the injunction prohibited IB to pay the bene. It was even not opposable against KBC! It was clear that IB tried to hide themselves behind legal actions.

Their real problem was the Algerian import regulation which implies that Algerian banks can only get hard currency if they can proof that the goods were accepted by Customs. So Bene and we did many efforts to first get the steel unloaded after positive re-inspection (which proofed that only 20% of the bars were NOK, not 100% !).  
Lesson 1?

After that hurdle our many efforts to get paid remained without result and we had no other option than to start legal actions in Algeria to :  
1) annull the garnishment order 2) overrule the injunction 3) get reimbursed by IB.

## Case 3

- We succeeded in 1= as injunction forbid IB to pay the bene but bene was already paid by KBC. Court understood that injunction became irrelevant. However, IB reimbursed us only for 80 pct
- For LC 2 = garnishment order was without object for same reason (LC already paid to bene). IB reimbursed 100 pct
- We asked Central Bank of Algeria whether obligations under UCP prevail above import & exchange regulation. After 6 months we got reply in favor of UCP, but still no funds....
- We got our 20 pct after long negotiations with mother bank