



## *ITM Enters. v. Bank of N.Y.*

Supreme Court of New York, Appellate Division, Second Department

January 3, 2003, Submitted ; February 3, 2003, Decided

2001-05941

### Reporter

302 A.D.2d 359 \*; 754 N.Y.S.2d 663 \*\*; 2003 N.Y. App. Div. LEXIS 743 \*\*\*; 49 U.C.C. Rep. Serv. 2d (Callaghan) 1278

ITM Enterprises, Inc., Respondent, v. Bank of New York, Appellant. (Index No. 19262/96)

**Prior History:** [\*\*\*1] In an action, inter alia, to recover funds pursuant to a letter of credit, the defendant appeals from an order of the Supreme Court, Queens County (Posner, J.), dated February 6, 2001, which denied its motion for summary judgment dismissing the complaint.

### Core Terms

letter of credit, advising, summary judgment, damages, terms, punitive damages, cause of action, first cause, consequential, provisions, Practices, modified, shipper, advice

### Case Summary

#### Procedural Posture

Defendant bank appealed an order by the Supreme Court, Queens County (New York), that denied its motion for summary judgment in plaintiff shipper's action, inter alia, to recover funds pursuant to a letter of credit based on the bank's failure to accurately advise the terms of the letter of credit.

### Overview

When the bank transmitted a letter of credit, subject to the Uniform Customs and Practices for Documentary Credits (UPC), to a shipper's bank, it omitted a condition for payment. When the bank allegedly failed to satisfy the condition, a buyer's bank refused to issue payment on the letter of credit. The appellate court held that although the letter was not subject to the Uniform Commercial Code (UCC), the UPC was silent on the bank's duty to accurately transmit the terms of a letter of credit. Therefore, the appellate court considered N.Y. U.C.C. Law [§ 5-107\(c\) of the UCC](#) in its determination. There were disputed questions of fact as to whether the bank's role in the transaction was limited to that of an advising bank, and whether the omitted payment term was material to the underlying agreement. However, the shipper was not entitled to recover consequential and punitive damages.

### Outcome

The order was modified by granting that branch of the motion or summary judgment dealing with consequential and punitive damages; as so modified, the order was affirmed.

Commercial Law (UCC) > Letters of Credit (Article 5) > Formal Requirements

International Trade Law > Letters of Credit

Commercial Law (UCC) > Sales (Article 2) > General Overview

Commercial Law (UCC) > Letters of Credit (Article 5) > General Overview

### [HN1](#) **Letters of Credit (Article 5), Formal Requirements**

Although a letter of credit, which is subject to the Uniform Customs and Practices for Documentary Credits (UCP), is exempt from the Uniform Commercial Code (UCC) provisions dealing with letters of credit, courts may rely upon analogous UCC provisions if consistent with the UCP.

Banking Law > International Banking > Bonds, Guarantees & Letters of Credit > Letters of Credit

Commercial Law (UCC) > Letters of Credit (Article 5) > Advisers, Confirmers & Nominated Persons

International Trade Law > Letters of Credit

Banking Law > International Banking > Bonds, Guarantees & Letters of Credit > General Overview

Commercial Law (UCC) > Letters of Credit (Article 5) > General Overview

Commercial Law (UCC) > Letters of Credit (Article 5) > Issuer Obligations & Rights > General Overview

### [HN2](#) **Bonds, Guarantees & Letters of Credit, Letters of Credit**

[N.Y. U.C.C. § 5-107\(c\)](#) imposes a duty on an advising bank to accurately transmit the terms of a letter of credit.

Banking Law > International Banking > Bonds, Guarantees & Letters of Credit > Letters of Credit

Commercial Law (UCC) > Letters of Credit (Article 5) > Advisers, Confirmers & Nominated Persons

Banking Law > International Banking > Bonds, Guarantees & Letters of Credit > General Overview

Commercial Law (UCC) > Letters of Credit (Article 5) > General Overview

Commercial Law (UCC) > ... > Amendments, Cancellations, Duration & Issuance > Issuance > General Overview

Commercial Law (UCC) > Letters of Credit (Article 5) > Issuer Obligations & Rights > General Overview

Commercial Law (UCC) > Letters of Credit (Article 5) > Remedies > General Overview

Commercial Law (UCC) > Letters of Credit (Article 5) > Remedies > Damages

### [HN3](#) **Bonds, Guarantees & Letters of Credit, Letters of Credit**

Under [N.Y. U.C.C. § 5-107\(c\)](#) of the Uniform Commercial Code, once a beneficiary of a letter of credit receives written advice of its issuance, he acquires the right to collect damages from an advising bank if the purpose of the letter of credit is frustrated by the giving of an inaccurate advice.

Civil Procedure > Remedies > Damages > Punitive Damages

Commercial Law (UCC) > Letters of Credit (Article 5) > Remedies > Damages

Commercial Law (UCC) > General Provisions (Article 1) > General Provisions

Commercial Law (UCC) > ... > Application & Construction > Remedies > Damages

Commercial Law (UCC) > Sales (Article 2) > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Commercial Law (UCC) > ... > Buyer

Remedies > Damages > Consequential & Incidental Damages

Commercial Law (UCC) > Letters of Credit (Article 5) > General Overview

Commercial Law (UCC) > ... > Issuer Obligations & Rights > Rights of Issuers > Dishonor

Commercial Law (UCC) > Letters of Credit (Article 5) > Remedies > General Overview

Commercial Law (UCC) > Letters of Credit (Article 5) > Remedies > Wrongful Dishonor

#### [HN4](#) Damages, Punitive Damages

A claimant under a letter of credit may recover an amount that is a result of a dishonor or repudiation, as well as incidental damages, but not consequential or punitive damages. *N.Y. U.C.C. §§1-106, 5-111*.

**Counsel:** Robert J. Kochenthal, Jr., New York, N.Y. (Saiber Schlesinger Satz & Goldstein, LLC [James H. Forte] of counsel), for appellant.

Stephen I. Feder, Forest Hills, N.Y., for respondent.

**Judges:** GABRIEL M. KRAUSMAN, J.P., WILLIAM D. FRIEDMANN, WILLIAM F. MASTRO, REINALDO E. RIVERA, JJ. Krausman, J.P., Friedmann, Mastro and Rivera, JJ., concur.




## Opinion

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[\*359] [\*\*664] Ordered that the order is modified, on the law, by deleting the provision thereof denying that branch of the motion which was for summary judgment dismissing the second cause of action, and substituting therefor a provision granting that branch [\*360] of the motion; as so modified, the order is affirmed, without costs or disbursements.

This action arises from an international agreement for

the purchase and shipment of goods, which was financed by a letter of credit. [\*\*\*2] It is undisputed that when the defendant bank transmitted the letter of credit to the bank representing the plaintiff shipper, it omitted a condition for payment. When the plaintiff allegedly failed to satisfy this condition, the bank representing the buyer refused to issue payment on the letter of credit. The plaintiff shipper subsequently commenced this action seeking damages from the defendant bank for its failure to accurately advise the terms of the letter of credit.

Contrary to the contention of the defendant bank, the Supreme Court properly denied that branch of its motion which sought [\*\*665] summary judgment dismissing the plaintiff's first cause of action to recover the funds due under the letter of credit. The letter of credit was expressly made subject to the Uniform Customs and Practices for Documentary Credits (hereinafter UCP), which is a compilation of internationally-accepted commercial practices (see *Alaska Textile Co. v Chase Manhattan Bank, N.A.*, 982 F.2d 813; *E & H Partners v Broadway Natl. Bank*, 39 F. Supp. 2d 275, 281). [HN1](#)  ] Although a letter of credit which is subject to the UCP is exempt from the Uniform Commercial Code (hereinafter UCC) provisions [\*\*\*3] dealing with letters of credit, courts may rely upon analogous UCC provisions if consistent with the UCP (see *Nassar v Florida Fleet Sales*, 79 F. Supp. 2d 284, 291; *E & H Partners v Broadway Natl. Bank*, *supra*; *Canadian Imperial Bank of Commerce v Pamukbank Tas*, 166 Misc 2d 647, 632 N.Y.S.2d 918; *Ross Bicycles v Citibank*, 161 Misc 2d 351, 613 N.Y.S.2d 538). The UCP contains no provision governing an advising bank's duty to accurately transmit the terms of a letter of credit. Therefore, we may rely upon *UCC 5-107 (c)*, which [HN2](#)  imposes a duty on an advising bank to accurately transmit the terms of the letter, since it is not in conflict with the UCP. [HN3](#)  Under the UCC, once the beneficiary of a letter of credit receives written advice of its issuance, he acquires the right to collect damages from the advising bank if the purpose of the letter of credit is frustrated by the giving of an inaccurate advice (see *Sound of Market St. v Continental Bank Intl.*, 819 F.2d 384, 393; see also *Merchants Bank of New York v Credit Suisse Bank*, 585 F. Supp. 304, 307).

Guided by these principles, we agree with [\*\*\*4] the Supreme Court's denial of summary judgment dismissing the plaintiff's first cause of action because there are disputed questions of fact, inter alia, as to whether the defendant's role in the transaction [\*361] was limited to that of an advising bank, and, even if its

role was so limited, whether the payment term which it omitted in advising the letter of credit was a material component of the underlying agreement upon which the plaintiff relied (see [Voest-Alpine Intl. Corp. v Chase Manhattan Bank, N.A.](#), 707 F.2d 680, 682; [Merchants Bank of New York v Credit Suisse Bank](#), *supra*; [Sound of Market St. v Continental Bank Intl.](#), *supra*).

However, the Supreme Court should have granted that branch of the defendant's motion which was for summary judgment dismissing the plaintiff's second cause of action to recover consequential and punitive damages. [HN4](#)<sup>↑</sup>] A claimant under a letter of credit may recover the amount that is the result of the dishonor or repudiation, as well as incidental damages, but not consequential or punitive damages (see *UCC 1-106, 5-111*; [Nassar v Florida Fleet Sales](#), *supra at 293-294*).

Krausman, **[\*\*\*5]** J.P., Friedmann, Mastro and Rivera, JJ., concur.