LEGAL CIRCULAR 24:1

Date of Issue: October 1996
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Country Risk, Force Majeure and Natural Disaster

The original Legal Circular 30:3 issued September 1984 (now replaced by this circular) confirmed that natural disasters which rendered an importer incapable of paying were not reasons for an Import Factor to avoid payment under approval. There are also other reasons which may render an importer incapable of paying, such as country risk whether of a political or administrative nature and Force Majeure.

What then, is the effect of the GRIF when the importer cannot pay for these reasons?

The GRIF sets out the obligations of an Import Factor to pay under Approval in Article 24 and Article 27 sets out the exceptions to the obligations to pay.

These exceptions fall into two categories:

1. Disputes raised by an importer which are defined in 27 (i) as
   i) Defence
   ii) Counter Claim
   iii) Set Off

2. Breach of Warranties 32

In the past, the Legal Committee concluded that neither country risk (whether political or administrative) nor Force Majeure were included in these two categories of exceptions and therefore, if the importer was unable to pay for these reasons, then the Import Factor must pay under approval.

The Legal Committee were concerned that the implications of this may not have been fully appreciated by all FCI members and the subject was therefore discussed at the Annual Meeting in Vancouver (1995) and more fully in Bali (1996). From debates in the Membership Forum and in the Groups it was clear that the consensus of opinion supported the Legal Committee's views and that the membership were comfortable with the current position.

In arriving at this conclusion, a number of "cases" were considered during the Round Table discussions and some of these are captured in this circular.

CASE 1

Approved Importer A in Denpasar comes into severe financial difficulties as a result of a volcanic eruption of nearby Gunung Agung (relatively "quiet" since its disastrous eruption in 1963!).

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Question: Should our Indonesian Import Factor pay under approval?
99% answered “Yes”.

CASE 2

Approved Importer B in Los Angeles (a retailer) comes into severe financial difficulties as a result of race riots after a controversial decision in the O.J. Simpson trial (windows are smashed, looting occurs, etc., etc.).

Question: Should our U.S. Import Factor pay under approval?
100% answered “Yes”.

CASE 3

Approved Importer C in Paris comes into severe financial difficulties as a result of a general strike which paralysed France not long ago. The French Import Factor pays under guarantee 90 days after maturity date.

Question: Would your company as Import Factor pay under approval?
99% answered “Yes”.

CASE 4

Approved Importer D in Mexico comes into financial difficulties after the Peso collapse in December 1994.

Question: Should the Mexican Import Factor pay under approval?
100% answered “Yes”.

CASE 5

Approved Importer E in Romania is alive, but due to foreign exchange restrictions, is not allowed, at least temporarily, to buy U.S. dollars to pay the Import Factor in the original invoice currency.

Question: a) Suppose that the Import Factor receives the counter value in Romanian Lei instead, does the Import Factor have the obligation to try to make a dollar payment to the Export Factor?
99% answered “Yes”.

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b) If the Import Factor initially is not allowed to make the payment, but has an opportunity half a year later, should the Import Factor pay overdue interest as prescribed in the FCI Code, Article 13 e)? To be applicable for the period between day 90 and actual transfer date?
100% answered "Yes".

N.B. Virtually all participants agreed that overdue interest should be based on LIBOR, but with no penalty interest.

CASE 6

Approved Importer F in Vietnam comes into financial difficulties and the Import Factor is unable to collect funds, either in local currency or in the U.S.$ currency of the invoice.

The Import Factor, due to currency restrictions, is unable to make a dollar transfer on the 90th day after maturity date. Two years later, the currency restrictions are lifted and the Import Factor is entitled again to pay dollars.

Question: a) Is the Import Factor still under the obligation to make a payment under approval?
100% answered "Yes".

b) If "yes", in the original currency of the invoice?
100% answered "Yes".

c) Should "late payment" interest be paid by the Import Factor?
99% answered "Yes".

CASE 7

Approved Importer X in Venezuela comes into financial difficulties. The Import Factor is prepared to make a payment under approval, but the Government has decided that payments regarding all imports non-essential goods will be subject to a moratorium of 5 years. Over that period, the local currency devalues very considerably.

Question: a) Is the Import Factor still under the obligation to make a payment under approval after 5 years?
100% answered "Yes".

b) What about interest over the 5-year period?
Is it to be paid by the Import Factor?
100% answered "Yes".

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c) Should there perhaps be a time limitation for this type of risk, incurred by the Import Factor?
Practically all said "unlimited".

CASE 8

Approved Importer Y in Nigeria is financially unable to pay. The Nigerian Import Factor (an FCI member!) is victim as well of an economic/financial crises, but miraculously, survives.

The Nigerian Government, however, is overthrown by a new regime and all previous financial commitments to foreign parties (for instance, the Export Factor) are declared null and void.

Question: What would you do as Export Factor?

a) Write-off the claim on the Import Factor?
Practically all said "Yes".

b) Make a payment under approval to the exporter?
Those whose agreement with the export client was silent on Country Risk/Force Majeure said "Yes".

Those whose agreement excluded these risks said "No".

NOTE

During the discussions of the foregoing cases it became clear that many Export Factors exclude these risks from their Agreement. Those taking part agreed that even where this was the case, an Import Factor was still obliged to make payment under approval and that the Export Factor should pass the benefit of such payment to the Exporter.

LEGAL CIRCULAR 27:1

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Comment on Payment by Debtor to Supplier's Agent (Article 27 (i) of the GRIF and formerly Article 13 (a) of the Code)

The Code formerly provided that payment by the debtor to the agent of the supplier of a receivable assigned to the Import Factor was to be treated as a payment to the supplier (an "indirect payment"). This meant that such a payment would discharge the Import Factor's responsibility in respect of the receivables so paid.

The provision was made in accordance with the general philosophy of FCI that the Export Factor is responsible for acts and omissions of the supplier and on the basis that an agent is appointed by the supplier and acts as the supplier's "other self". On these grounds it was considered that wrongful receipt of money by the agent can be attributed to the supplier. The inclusion of a payment to the agent as payment to the supplier was not to validate such a form of payment but to protect the Import Factor from improper conduct of the agent who may be completely unknown to the Import Factor.

The provision has generated much discussion over the years including strong objections from Export Factors who may suffer from the misbehaviour of the agent; and this may apply even if the supplier is not insolvent.

In order to avoid the arbitrary and final cut-off of the Import Factor's responsibility in the case of such a payment the GRIF deals with it in a different way. It provides that refusal of a debtor to pay on the grounds that he has paid the agent (or even that he has received a claim for such payment from the agent) is a dispute and is to be dealt with accordingly. Article 27(i) of the GRIF includes a claim from a third party, which would include an agent, as a dispute.

In this way, after such a claim or payment, the Export Factor with the Import Factor's assistance has the opportunity to try to recover from the supplier, the agent or the debtor whilst the Import Factor remains potentially on risk for the limited periods described in Article 27.