

Strict compliance in a Swiss steel case

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The decision of the Federal Supreme Court of 9 November 2006 in case 4C.393/2005 is a lesson for every steel trader. A German steel trading company had sold cold-rolled coils under a confirmed irrevocable documentary credit of USD 475,037.80. The credit required a forwarding agent's certificate of receipt issued by a named Italian company in the form of a *società per azioni* (spa). The document presented was issued by a company of the same name in the form of a *società a responsabilità limitata* (srl). The confirming bank refused the documents. The trader argued that the difference was a mere typing error of the kind that banks must disregard. The Federal Court disagreed. It held that banks examine the documents presented only for their formal regularity and that the documents alone form the basis of their decision. A difference in the legal form of the issuer is a material discrepancy.¹ The case illustrates the strictness that Swiss courts share with the international banking community. It also shows how easily a trader can lose the protection of a credit through a detail in a document issued by a third party.

The strict standard has two sides. It protects the applicant, who has paid for a bank's careful examination, and it gives the bank a clear rule: pay if the documents comply, refuse if they do not. It burdens the beneficiary, who bears the risk that a third party issues a document that does not exactly match. Swiss courts have consistently refused to soften the standard by reference to good faith. Earlier decisions of the Federal Supreme Court, among them BGE 115 II 67 and BGE 121 III 436, confirmed the principle of strict compliance and the contractual character of the UCP.²

1 Deferred payment, discounting and fraud: BGE 100 II 145

An older decision shows how Swiss law approached the deferred payment credit long before UCP 600 addressed it. In BGE 100 II 145 of 11 June 1974, a Swiss company had ordered Chinese embroideries worth some CHF 3

million from a supplier in Hong Kong. Payment was secured by deferred payment credits opened by Swiss and Italian banks and payable 90 days after the date of the bill of lading. Documents for about CHF 1.1 million arrived in February 1971. When the goods reached Hamburg, they turned out to be worthless. The buyer started criminal proceedings and instructed its bank not to pay. The bank, however, had already discounted the credit with a correspondent before maturity. The Federal Court held that the bank's payment obligation arises unconditionally once conforming documents have been taken up. It accepted that fraud by the beneficiary may exceptionally justify a refusal to pay, but only where the fraud is established by the time payment is due.³ The case anticipated two features of modern law. The first is the discounting of deferred payment credits, which Article 12(b) UCP 600 now expressly authorizes. The second is the fraud exception. Swiss law does not have a codified fraud rule comparable to Section 5-109 of the American Uniform Commercial Code. English law developed one in the decision of the House of Lords in *United City Merchants v Royal Bank of Canada* (1983).⁴ Swiss courts derive the exception from the prohibition of abuse of rights in Article 2 para. 2 of the Civil Code (ZGB). A beneficiary that knowingly presents forged or fraudulent documents abuses the formal position that the credit gives it, and a bank that knows of this abuse is not obliged to pay. The threshold is high: the fraud must be manifest and provable by documents or other immediately available evidence. The same standard governs demand guarantees, which are treated below.

Essentials. A documentary credit is a bank's independent undertaking to pay against documents. UCP 600, in force since 1 July 2007, governs almost all credits and is supplemented by ISBP 821 (2023). Banks examine documents only on their face, within a maximum of five banking days, and must give a single notice of all discrepancies or lose the right to refuse. Swiss law classifies the credit as a payment instruction (*Anweisung*) under Articles 466 ff. CO, applies strict compliance (Federal Supreme Court, 4C.393/2005: "srl" is not "spa") and allows a refusal for fraud only where abuse of rights is manifest and immediately provable.

2 Notes

1. Federal Supreme Court, judgment 4C.393/2005 of 9 November 2006, https://servat.unibe.ch/dfr/bger/2006/061109_4C-393-2005.html ("Alleinige Entscheidungsgrundlage bilden somit die Dokumente"). The court referred to Art. 13 UCP 500. ↩

2. Federal Supreme Court, 4C.393/2005 (above), citing BGE 115 II 67, BGE 121 III 436, BGE 130 III 462 and BGE 132 III 620. ↩
3. Federal Supreme Court, judgment of 11 June 1974, BGE 100 II 145, <https://servat.unibe.ch/dfr/bge/c2100145.html> (the obligation to pay arises "nach Aufnahme der ordnungsgemässen Dokumente bedingungslos"). ↩
4. United City Merchants (Investments) Ltd v Royal Bank of Canada [1983] 1 AC 168 (HL); Uniform Commercial Code, Article 5 (Letters of Credit), § 5-109 (fraud and forgery). ↩

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