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Policy and Business Practices

Ms Elena Filatova
Policy Director
ICC Russia
21/1 Bolshaya Polyanka Str.
119180 Moscow
Russia

26 January 2010

Subject: Document 470/TA.714

Dear Ms. Filatova,

Thank you for your query regarding UCP 600. Please find below the opinion of the officers of the Banking Commission.

QUOTE

A problem has occurred between our bank and Bank M, Country I. We appeal for your help in this matter and to provide us with your opinion as to which bank is correct. We are pleased to present the following facts:

On 20.12.07 we issued an irrevocable L/C, subject to UCP latest version, for EUR 14,656,000.00 under the instructions of Company S, Country R in favour of Company I, Country I.

Field 41A: Available with Bank M by payment
Field 46A (as amended on 27.12.07) included:

1. 60 PCT of contract value (EUR10,992,000.00) payable at sight against presentation of a set of documents (commercial invoice, packing list, original bill of lading);
2. 20 PCT of contract value (EUR3,664,000.00) payable against a Provisional Acceptance Certificate attesting completion of commissioning and start-up. In case such certificate is not presented within 12 months from last shipment date the amount will be payable against Beneficiary's Declaration in which they confirm that they have completed in full their obligations under Contract dd 16.04.2007 with the applicant

Field 47A: A post financing facility to be granted by Bank M for EUR 14,656,000.00
Field 49: Confirm
Field 31D: (as amended on 22.02.08): 090430, City M, Country I.

30.04.08 was the date of the last shipment under the L/C.

On 20.04.09 Bank M emailed us a scanned copy of Beneficiary's Declaration dated 16.04.09 in which the beneficiary confirmed that they had completed in full their obligations under Contract dd 16.04.2007 with the applicant. The Declaration was issued well before the period stipulated in the L/C for the presentation of the Provisional Acceptance Certificate had elapsed. On our request, Bank M tried, but failed to get any comments from the beneficiary and just advised us by e-mail letter that the beneficiary insisted on payment.

On 29.04.09 we sent the following SWIFT message to Bank M: "We are informed that beneficiary presented Declaration claiming on 30 April 2009 payment of EUR 3,664,000.00 being 20 PCT of LC amount designated for payment of commissioning and start up. This Declaration contains statement that Company I have completed in full their obligations under the Contract dd 16.04.2007 with Company S. In this regard we officially state that this Beneficiary's Declaration contains false statement. The Contract as well as LC terms envisage that this payment should be made upon completion of commissioning and start up. We have full evidence that these services are not completed. More than that, they have not even been initiated. As a proof of our statement we have sent to Mr. C by electronic mail a set of photos made on the construction site on 14.04.2009. In this situation, we see claim for payment of EUR3,664,000.00 as an act of fraud. Our decision about honoring this presentation will be based on this argument. Also we reserve the right to initiate appropriate legal procedures against the beneficiary in accordance with Country R law. We also think that formal approach in this situation cannot be applied…"

Later the same day (i.e., 29.04.09) we received SWIFT message MT 799 from Bank M stating: "PLS be informed that on 29/04/09 we sent you complying presentation for EUR 3,664,000.00 (20 PCT of Contract payable under the L/C). We pay benef. at sight for EUR3,664,000 financing you as per L/C terms…"

On 04.05.09 we received the original Beneficiary's Declaration and on 07.05.09 we sent our SWIFT message to Bank M with the following wording: "Hereby we refuse to honor the presentation called complying in your MT799 DD 29/04/09 which reached us on 04/05/09. Our refusal is based on the following discrepancies:

1. Beneficiary's Declaration, which is a single document in the presentation, could not be deemed complying on 29/04/09 since according to Field 46A Point 2 of the L/C it can be presented only in case if Provisional Acceptance Certificate (PAC) is not presented within 12 months from last shipment date. Last shipment date is 30/04/008, whence 12-month period for PAC presentation was not expired until close of your banking day 30/04/09.
2. The Declaration is dated 16.04.2009 and was received by you on 20/04/09, i.e. well before the end of 12-month period for PAC presentation.
3. The Declaration becomes effective only after the end of 12-month period for PAC presentation, i.e. starting from 01/05/09. Under current L/C terms the Declaration remains inoperable thus making the presentation non-complying. We are returning the documents to you…

Besides that, we insist that the Declaration itself is fraudulent, of which we kept you posted in advance by sending you on 22/04/09 a set of photos clearly showing no traces of installation or start-up activities on construction site. The Applicant also agrees with our conclusion that installation and start-up works have not yet been started…"

On 08/05/09 we received MT 799 from Bank M with the following wording: "We totally disagree with your arguments for the following reasons:

1) The presentation of "Beneficiary's Declaration" was effected in accordance with the 12-month period provided for in the L/C and within L/C validity being 30.04.2009.
2) As for the date of the Declaration (16.04.09), in view of the fact that the L/C does not require any specific date of issuance of the document, but only a presentation period, the document is fully complying with L/C terms and with sub-article 14 (i) of UCP 600. You are requested to revise immediately your position which is in contrast with the principles of UCP 600…"

On 15.05.09 in reply to the above message we sent MT 799: "We would like to stress the following points: your cover letter with enclosed Beneficiary's Declaration is dated 29.04.2009. We also received from you MT799 on 29.04.2009 informing us about Beneficiary's presentation. We conclude from this that the presentation was made on 29.04.2009. We consider this presentation as premature and consequently non-complying. We also think that Beneficiary's Declaration could not be dated 16.04.2009 when the period of presentation of PAC was not yet over".

On 01.06.09 Bank M sent Beneficiary's Declaration back to us stating that they cannot accept our refusal of their presentation as well as our arguments due to the following reasons:

1) The content of the document is in full compliance with the requirement of L/C
2) The L/C does not require any specific date of issuance of the document, but only a presentation period. Therefore the document presented is fully complying with L/C terms and with sub-article 14 (i) of UCP 600.
3) The presentation has been effected at the end of the 12-month period provided for the presentation of "Provisional Acceptance Certificate".

Bank M insists on the compliance of their presentation. We object to it.

ANALYSIS

There are comments made within the query, in relation to photographs of the construction site, that purport to reflect that the statements made in the beneficiary declaration could not be true as of the date of its issuance or presentation. Whilst this may be the case, the content of article 5 and sub-article 14 (a) provide the basis under which a bank is to determine compliance.

Article 5 states "banks deal with documents and not with goods, services or performance to which the documents may relate" and;
sub-article 14 (a) enhances this position by stating that "[A] nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, <u>on the basis of the documents alone</u>, whether or not the documents appear on their face to constitute a complying presentation." [*emphasis added*]

A bank's determination of compliance of the documents must be based on the data appearing in the document or documents before them and not in respect of any external factors or information that is made available to them. If the applicant has concerns with the status of the transaction or the goods, then it is for them to seek an appropriate solution with the beneficiary or, as a last resort, via the courts.

In addition to the above articles, article 4 includes "[B]anks are in no way concerned with or bound by such contract, even if any reference whatsoever is included in the credit."

The last shipment date of the goods is stated to be 30 April 2008. The credit provided for the beneficiary to draw 20% of the credit amount i.e., EUR3,664,000.00 against presentation of a Provisional Acceptance Certificate. This certificate was to be presented at any time following the date of the last shipment, subject to it being presented no later than the expiry date of 30 April 2009. The credit also provided for the beneficiary to present their own declaration, if within 12 months from the date of the last shipment the Provisional Acceptance Certificate is not presented, but again, subject to presentation no later than the expiry date of 30 April 2009.

The beneficiary declaration (dated 16 April 2009 and sent as an attachment to an email on 20 April) was clearly discrepant as it was not the original document and was seemingly being accepted by Bank M prior to the conclusion of the 12 month period from the last date of shipment. There is no indication in the query that Bank M intended the document to represent a presentation under the credit. If it was, the sending of this document, albeit by email, would constitute a presentation under the credit and the issuing bank should have sent their refusal message to Bank M according to article 16. This should have been completed by the close of 27 April.

The presentation consisting of the original beneficiary declaration (dated 16 April 2009 and sent to the issuing bank on 29 April) was received by the issuing bank on 4 May and a refusal message was sent on 7 May.

The credit used the terminology “is not presented within 12 months from last shipment date”. Article 3 of UCP 600 states “[T]he words “from” and “after” when used to determine a maturity date exclude the date mentioned.” In the context of this query, we are determining a ‘maturity date’ after which presentation of the beneficiary declaration may be made.

ISBP, publication 681, paragraph 17 states “[T]he term “within” when used in connection with a date excludes that date in the calculation of the period.”

CONCLUSION

The question before the Banking Commission is whether a document dated 16 April and forwarded by Bank M on 29 April complied with the requirement in the credit for the presentation of the beneficiary declaration?

Notwithstanding the comments in paragraph 6 of the analysis, the terms of the credit allowed the beneficiary to present a declaration on or before the expiry date i.e., 30 April 2009, being the day after the date falling 12 months from the date of the last shipment. Bank M was not correct in determining that the document complied on 29 April, but as of 30 April it was complying and the issuing bank must honour. The dating of the document is not material in the determination of compliance, only the date of taking up of that document under the credit.

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission’s officers based on the facts under “QUOTE” above. They do not necessarily reflect the opinion of the ICC Banking Commission until

the Banking Commission renders its approval or disapproval of these opinion(s) at the next scheduled meeting.

The reply given is not to be construed as being other than solely for the benefit of guidance and there should be no legal imputation associated with the reply offered.

If this query relates to a matter currently under consideration by the courts, the ICC Banking Commission will refrain from considering it for adoption as an opinion.

Neither the ICC nor any of its employees, nor any member of the Banking Commission, including the Chairman, Vice-Chairmen or Technical Adviser shall be liable to any person for any loss or damage arising out of any act or omission in connection with the rendered opinion(s).

Yours sincerely,

Thierry Senechal
Policy Manager
Banking Commission