Mr. Wilko Gunster
Secretary General
ICC Nederland
Bezuidenhoutseweg 12
2594 AV DEN HAAG
The Netherlands

8 February 2010

Subject: Document 470/TA.723

Dear Mr. Gunster

Thank you for your query regarding UCP 600 and including your national committee analysis and conclusion. Please find below the opinion of the officers of the Banking Commission.

QUOTE

We kindly ask your opinion regarding the following matter.

LC issued by Bank A (subsidiary of Bank B), confirmed by Bank B and advised by Bank C (us). The SWIFT advice of Bank B stated, amongst other conditions, "In case of presentation of discrepant documents, Bank B will send them on an agreement basis to issuing bank unless otherwise specified on your cover letter".

The required documents in the L/C included the following document:

- Freight invoice dated and signed in original plus 2 copies issued by the shipping company or its agent.
  Latest presentation date was 15 April 2009.

26 March, exporter presented documents for EUR345,369.58

We presented documents to Bank B, for negotiation, with the stipulation that documents should remain at our disposal until taken up by them. Among the documents was the freight invoice which mentioned also the name of the vessel, port of loading, port of discharge, date and B/L no. (in consecutive order on top of the page).

International Chamber of Commerce
38 Cours Albert 1er, 75008 Paris, France
Tel +33 (0)1 49 53 28 28 Fax +33 (0)1 49 53 28 59
E-mail icc@iccwbo.org Website www.iccwbo.org

2 April, we received a refusal message from Bank B stating that the freight invoice was not dated and that the cubage between B/L and packing list differed. Furthermore, the confirming bank informed us that documents had been sent to the issuing bank for approval.

7 April, we objected to the discrepancies as we are of the opinion that the freight invoice is dated. Although it is not dated separately on the bottom of the page, it is dated on the aforementioned top of the invoice. We were able to explain the difference in the cubage between B/L and packing list (we explained that the B/L also included the actual container cubage) referring to sub-article 14 (d) of UCP 600. Furthermore, we raised our objection to the fact that documents, against our instructions, had been sent to the issuing bank.

9 April, Bank B responded by insisting on their original findings.

20 April, we informed the confirming bank, again, that we did not agree with their findings. Furthermore, we asked for a formal response to our objection to sending the documents to the issuing bank.

30 April, we received a message from Bank B that Bank A is returning the documents due to the fact that the freight invoice, supposedly, was not dated (no mention of discrepancy no 2).

6 May, we requested Bank B to respond to our earlier queries and to hold documents at our disposal.

7 May, Bank B responded by stating that they would revert at the beginning of next week.

12 May, Bank B informed us that documents were returned by the issuing bank asking for instructions; the bank stated that documents were always kept at our disposal at their subsidiary's counters.

15 May, we informed Bank B that beneficiary was not satisfied with the response in respect of the disposal of the documents and insisted that documents were credit conforming.

18 May, Bank B responded by maintaining discrepancy no.1 however, agreeing that discrepancy no. 2 was indeed not a discrepancy. Furthermore, the confirming bank agreed that documents should not have been sent to the issuing bank as per our instructions.

9 June, we informed the confirming bank that we would raise this issue with the national committee as documents still remained unpaid.

We would like to have an opinion from the national committee on 2 issues:

1. Whether or not the freight invoice was indeed dated (sufficiently).
2. Whether by sending the documents to the issuing bank (against our instructions) the confirming bank blocked our ability to have the freight invoice amended in time. The time between being informed that documents were being returned by the issuing bank and the message that the documents were indeed received by the confirming bank was 12 calendar days. Latest presentation date was 15 April in Paris and the first refusal was dated 2 April. Bank B insists that documents were always at our disposal, even at the counters of Bank A, something which we contest as we feel that documents are at the disposal of the confirming bank when they present them to the issuing bank.

Looking forward to your reply.

UNQUOTE

ANALYSIS AND CONCLUSION OF NATIONAL COMMITTEE.

The Country N Group of Experts would like to respond first on the second issue.

From the information provided it appears that the confirming bank stated in their advice that in case of presentation of discrepant documents, the confirming bank would send them on an agreement basis to issuing bank, unless otherwise specified on the cover letter of the presenter. Furthermore, the advising bank appears to have sent the documents to the confirming bank with the explicit stipulation that they should remain at the disposal of the advising bank until taken up by the confirming bank. In spite of this clear statement and their own stipulation, the confirming bank informed the advising bank on 2 April that the documents had been sent to the issuing bank for their approval.

> UCP 600 sub-article 16 (c) states "[W]hen a nominating bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter." The notice must state:

a) that the bank is holding the documents pending further instructions from the presenter, or
b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver, or
c) that the bank is returning the documents, or
d) that the bank is acting in accordance with instructions previously received from the presenter.

Since Bank B stated in its notice that the documents had been sent to Bank A, 'for approval', Bank B failed to act in accordance with this article.

UCP 600 sub-article 16 (f) states "If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation."

Since the confirming bank failed to act in accordance with UCP 600 sub-article 16 (c) (iii) they are precluded from claiming that the documents do not constitute a complying presentation.

Whether the freight invoice was dated or not, is therefore irrelevant in this case.

We seek the agreement of the ICC Banking Commission to our findings.

ANALYSIS

Discrepancies in relation to the freight invoice:

ISBP, ICC Publication 681, paragraph 13 reads "Drafts, transport documents and insurance documents must be dated even if a credit does not expressly so require. A requirement that a document, other than those mentioned above, be dated, may be satisfied by reference in the document to the date of another document forming part of the same presentation (e.g., where a shipping certificate is issued which states "date as per bill of lading number xxx" or similar terms). Although it is expected that a required certificate or declaration in a separate document be dated, its compliance will depend on the type of certification or declaration that has been requested, its required wording and the wording that appears within it. Whether other documents require dating will depend on the nature and content of the document in question."

As referred to in the above paragraph, a requirement for the freight invoice to be dated may be satisfied by reference in the document (the freight invoice) to the date of another document forming part of the same presentation (i.e., the bill of lading).

The presented freight invoice evidenced details of the shipment including a date and number of the bill of lading. Even if the date was seen to be the date of the bill of lading (as opposed to the date of the freight invoice), there can be no disputing that the freight invoice bears a date and that date, according to ISBP Publication 681, paragraph 13, satisfies the requirement for the freight invoice to be dated.

The second discrepancy relating to the freight invoice has subsequently been withdrawn and is disregarded for the purposes of this opinion.

Handling of the documents by Bank B and the refusal notice:

UCP 600 article 3 states "[B]ranches of banks in different countries are considered to be separate banks."

Bank B specifically stated in their advice of confirmation that in the event of discrepancies being found they would send them on an 'agreement basis' to the issuing bank, unless the presenter gave alternate instructions in their cover letter. By such reference, the confirming bank is agreeing implicitly to act according to instructions that may be contained in the presenters covering schedule or letter that differ to the proposed action suggested by Bank B.

Bank C did provide alternate instructions by stating that the "documents should remain at our disposal until taken up [by them]" (i.e., Bank B). Bank B determined that the documents were discrepant, albeit that that is not the opinion of the ICC Banking Commission. Despite the instructions of Bank C, Bank B sent the documents to the issuing bank, Bank A. The refusal notice of Bank B should either have referred to the option in sub-article 16 (c) (iii) (a) "that the bank is holding the documents pending further instructions from the presenter" or sub-article 16 (c) (iii) (d) "that the bank is acting in accordance with instructions previously received from the presenter." and the documents remain with Bank B pending further instructions.

Bank B has failed to act according to the instructions that they themselves encouraged the presenter to provide and are therefore precluded from claiming that the documents were discrepant and must negotiate. They released the documents to Bank A when the clear instruction was to 'hold' them. Bank B's argument that the documents remained at the disposal of Bank C, when sent to and held with Bank A, is incorrect as the holding and disposal facility for the documents is confined to the counters of Bank B. In this respect, although the issuing bank (Bank A) is a subsidiary of Bank B, article 3 of UCP 600 considers them to be separate banks for the purposes of the rules.

CONCLUSION

The documents were compliant and Bank B (the confirming bank) must negotiate.

In any event, Bank B did not act according to the instructions of Bank C and is precluded from claiming that the documents were discrepant and must negotiate.

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