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Policy and Business Practices

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Subject: Document 470/TA.736 (UCP 500)

Dear Mr. Lee,

Thank you for your query regarding UCP 500. Please find below the opinion of the officers of the Banking Commission.

QUOTE

We would like to seek an opinion from the experts of the ICC Banking Commission as to whether or not the nominated bank retains the right to claim reimbursement from the issuing bank in a specific situation as follow:

The major events of the dispute can be summarized as follows:-

Date	**Event**
13 September 2006	The L/C is available with any bank by negotiation, with a reimbursement clause stating "we shall arrange payment of the bill upon receipt of the documents at our counter strictly in conformity with credit terms" and is subject to UCP 500.
1 October 2006	An amendment is issued stating (1) pre-shipment inspection certificate required, issued by a person designated by the applicant, (2) the issuing bank shall arrange payment of the bill upon receiving payment from export proceeds against export L/C No. ABCD12345 instead of existing.

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04 October 2006	The advising/nominated bank sent an MT799 to the issuing bank advising that the beneficiary refused the amendment dated 1 October 2006.
12 October 2006	Beneficiary presented documents to the advising/nominated bank, which negotiated and forwarded them to the issuing bank seeking reimbursement.
20 October 2006	Issuing bank sent an MT799 to the nominated bank advising that payment was refused due to non-presentation of pre-shipment inspection certificate, as required by their amendment dated 1 October 2006.
23 October 2006	Nominated bank sent an MT799 to the issuing bank clarifying that the amendment dated 1 October 2006 is not valid because the beneficiary had refused it and the nominated bank advised the issuing bank of this fact on 4 October 2006.
06 November 2006	Issuing bank sent an MT799 to the nominated bank advising that the applicant is willing to accept the documents if the beneficiary accepts the payment clause in the amendment dated 1 October 2006.
14 November 2006	Nominated bank sent an MT799 to the issuing bank stating "the beneficiary refused to accept payment clause of the amendment dated 1 October 2006 and therefore [nominated bank] would not accept [issuing bank's] request dated November 6, 2006."
23 November 2006	Issuing bank sent an MT799 to the nominated bank advising that the applicant refused to accept the documents because the beneficiary shipped defective goods.
24 November 2006	Nominated bank sent an MT799 to the issuing bank reminding them that an L/C is a separate transaction from any underlying contract and that banks deal with documents only. The nominated bank urged payment by the issuing bank.
02 March 2007	Issuing bank sent an MT799 to the nominated bank stating "Further refer to our MT799 dtd 26-11-2006 please be informed that we have contacted with the applicant for several times but in no way they agreed to accept and release the documents from our counter. Since we held the documents as per instruction of our hon'ble high court, consequently we have no alternative but to return

	the documents as we are holding the same at your risk and disposal. We look forward for your disposal instruction since we are going to return the documents to your end and close our file within seven banking days."
02 March 2007	Nominated bank sent an MT799 to the issuing bank stating “re your MT799 dated 2007.03.02. pls return all documents to us by registered airmail.”
04 March 2007	Issuing bank returned all documents to the nominated bank stating “Refer to your SWIFT MT799 dtd 03-03-2007 and our SWIFT MT799 dtd 02.03.2007 we are forwarding herewith full set of documents (original + duplicate) for your necessary action and closing our file on this day of 4th march 2007.”
26 March 2007	Beneficiary was informed by the Customs Authority, in the country of import, that the cargo had been auctioned on 21-03-2007 as consignee had not taken delivery within the stipulated time.

About one year after receipt of all documents from the issuing bank, the nominated bank decided to claim reimbursement from the issuing bank insisting that they negotiated the documents in compliance with the terms and conditions of the credit.

The key point in this debate is that the nominated bank allowed the issuing bank to return all documents to them in response to the issuing bank's request for disposal instruction, and the issuing bank returned all documents to the presenter accordingly.

We would like to have an opinion from the experts of the ICC Banking Commission as to whether the nominated bank still retains the right to claim reimbursement of their negotiation from the issuing bank or not. We also wish to hear a brief comment about the background to your conclusion.

Your opinion will be a good guideline in the future for any similar cases and will encourage uniformity of practice where individual practitioners differ in the way of handling documents presented under an L/C transaction worldwide.

ANALYSIS

Sub-article 9 (d) (i) states "[E]xcept as otherwise provided by Article 48, an irrevocable Credit can neither be amended nor cancelled without the agreement of the Issuing Bank, the Confirming Bank, if any, and the Beneficiary."

The amendment dated 1 October 2006 was rejected by the beneficiary and therefore the terms and conditions that existed prior to the amendment will apply to the presentation.

The issuing bank refused the documents based on the terms and conditions of the credit that existed as a result of the amendment dated 1 October 2006. As the documents were only refused for the absence of the pre-shipment inspection certificate, i.e., the documentary requirement incorporated into the amendment of 1 October 2006, the documents complied as of 20 October 2006. It therefore follows that the issuing bank was obligated at that time to honour the drawing in accordance with the settlement terms stated in the credit. The subsequent messages from the issuing bank, conveying the views or instructions of the applicant, have no bearing as the documents complied.

It is not until 2 March 2007 that the issuing bank indicates that a form of court order has been issued. The date, details and scope thereof are not declared, but for the purposes of this particular transaction have no bearing on the determination of compliance of the documents, which happened some 4+ months previous to this date. However, as a court order is in place, as of at least 2 March, the issuing bank is now not able to ignore that fact but should be cognizant of the fact that the documents did comply, did not require any further instructions from the applicant as to their settlement, and that they should approach the court for the removal of that order.

It is not clear as to why the nominated bank requested the return of the documents, even though the issuing bank had indicated that were returning them within seven banking days, or why it took one year to decide to once again pursue payment with the issuing bank. Despite requesting the return of the documents, and the delay in re-addressing this issue, this does not detract from the fact that the documents complied at the time of presentation and the issuing bank is required to honour the drawing, subject to the above comments. A request for documents to be returned or, even, the correction or alteration of documents deemed to be discrepant, does not imply that the discrepancy(ies) have been accepted as valid by the presenter. The presenter may do so out of necessity to expedite the transaction as opposed to an admission of default in the documents.

CONCLUSION

The documents complied as of the date of their presentation and the issuing bank should approach the court that issued the order to explain their responsibilities under the UCP, that the documents did comply and that the order should be removed in order that proper and due settlement can be made.

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,

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Banking Commission