Policy and Business Practices

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7 June 2011

Subject: Document 470/TA.744

Dear Mr. Aziz,

Thank you for your query regarding UCP 600. Please find below the opinion of the ICC Banking Commission Group of Experts and Officers.

QUOTE

We have an issue regarding non-payment of our export documents drawn under a LC.

Documents for USD48,652.50 were negotiated by our branch on 15 October 2010 but the issuing bank pointed out certain discrepancies. Our branch, in their reply, clarified the position and also removed the discrepancies by submitting amended documents within the presentation period, and also informed the issuing bank that since documents are now compliant with the L/C terms they are under an obligation to make payment in terms of their undertaking.

Meanwhile, it came to our knowledge that the issuing bank had allowed delivery of the goods to the applicant by endorsing an original bill of lading in their favour. This was brought to the notice of the said bank. Our branch also informed them that where the goods have been released there remains no justification for pointing out discrepancies in documents because taking delivery of goods by the applicant means an implied acceptance of those documents. It was also brought to their notice that after release of the goods, discrepancies in documents become meaningless. However, we are distressed to point out that instead of commenting regarding the release of goods, the said bank sent us a message insisting on their earlier stance that discrepancies have not been accepted and documents are being returned unpaid. It is interesting to point out that prior to sending their refusal message, they had already endorsed the B/L to the order of the applicant.

The documents (which included at the time of presentation a full set of 3/3 original bills of lading) are still held with the issuing bank.

We have a copy of the original bill of lading bearing the endorsement stamp and signature of the issuing bank as evidence of release of goods to the applicant.

We fail to understand the attitude of the issuing bank, and the way they have handled the documents in an unprofessional manner is highly painful. They are refusing payment when goods have already been released and the bank has been instrumental in the release of goods by endorsing the bill of lading. We informed them that when endorsing the bill of lading to the order of the applicant, they also had a duty of care to our bank and as a matter of best practice, should have obtained acceptance from the applicant for any discrepancies in the documents. Since they have endorsed the bill of lading to the order of the applicant, we hold them directly liable for making payment.

In reply, the said bank intimated to us that the applicant informed them that the goods are not as per L/C, and that payment cannot be effected. We advised them that issues relating to quality of goods should be resolved between buyer and seller outside the L/C therefore, there is no reason for non-payment. We also asked them to advise who authorized them to endorse the bill of lading without obtaining payment from the applicant? Our SWIFT message was sent to them on 8 December 2010 asking them to release payment to which they replied that the transaction has a signal of commercial fraud and according to their country law when the buyer has evidence of fraud they are allowed to postpone payment until the dispute is settled.

We advised them that an allegation of fraud should be supported by a court order and their argument is not valid and cannot be accepted unless a court order is produced. However, they do not agree with us and stated in their reply that according to their law, even if there is no court order stopping payment, the buyer has the right to stop payment as long as he has evidence of commercial fraud of the seller.

We are distressed to point out that the issuing bank has grossly mishandled our documents. They were not authorized to endorse the bill of lading in favour of the applicant without obtaining payment. Once they have done so, they are now bound to make payment, leaving apart the dispute between buyer and seller. This clearly proves their criminal connivance with the applicant that on the one hand they have allowed delivery of goods to them and on the other hand they are refusing payment on one pretext or the other.

We request an opinion from ICC whether our stance is correct.

ANALYSIS

Documents have been refused by the issuing bank on the basis of discrepancies that are not the subject of this query. The nominated bank sent amended documents within the presentation period but the issuing bank maintained its refusal of documents and informed the nominated bank that documents were being returned. It is not clear whether a further refusal message was sent in relation to the amended documents, but again this is not the subject of this query.

The nominated bank has not received back the documents which were said to be returned by the issuing bank. In this context, the issuing bank is required to return the documents in the same form and number of originals and copies as received from the nominated bank (see ICC Opinion R.214).

According to the text of the query the nominated bank received information, by way of a photocopy of an original bill of lading, that the issuing bank had assisted the release of the goods to the applicant by endorsing one original bill of lading. In view of this information, it would not be possible for the issuing bank to return a full set of original bills of lading following the release of one of them to the applicant.

Sub-article 16 (c) requires that a notice of refusal state the fate of the documents presented. For this presentation, the issuing bank decided to return the documents to the presenter.

By virtue of the fact that the documents have not been returned and that it would not be possible for the issuing bank to return all the documents in the form and substance as received from the nominated bank, the issuing bank is precluded under sub-article 16 (f) from claiming that the documents did not constitute a complying presentation.

CONCLUSION

From the evidence held by the nominated bank, it can be determined that the issuing bank endorsed one of the original bills of lading.

As the issuing bank did not return the documents, as stipulated in their notice, they failed to act in accordance with sub-article 16 (c) (iii) (c) and are precluded under sub-article 16 (f) from claiming that the documents are discrepant. The issuing bank is required to honour its undertaking.

The issues of potential fraud and the necessity of obtaining a court order to stop payment are subject to the applicable law and are outside the scope of UCP.

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission's Group of Experts and 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, Technical Adviser or any of the Group of Experts 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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