International Chamber of Commerce
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Policy and Business Practices

Ms. Marcelle Reijneker
ICC Nederland
Bezuidenhoutseweg 12
2594 AV DEN HAAG
The Netherlands

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Subject: Document 470/TA.752rev

Dear Ms. Reijneker,

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

QUOTE

A. <u>Background in connection with first query:</u>

1. We ("the Beneficiary") are the beneficiaries under a confirmed documentary credit "subject to the Uniform Customs and Practices for Documentary Credits (2007 revision) International Chamber of Commerce Brochure no. 600" ("UCP 600"). We kindly request an official Opinion of the ICC Banking Commission on the following facts and questions.

2. The irrevocable documentary credit was issued on 8 October 2010 by a bank in country L ("the L/C"). As quoted above, the L/C is subject to UCP 600.

3. That same day, 8 October 2010, a Western European bank ("the Confirming Bank") added its confirmation to the L/C.

4. On 17 March 2011 (within the validity period of the L/C), the Beneficiary presented documents complying with the L/C.

5. On 21 March 2011 the Council of the European Union issued Council Implementing Regulation no. xxx/2011, which added, among others, the issuing bank to a list of persons and entities subject to restrictive measures under Council Regulation no. xxx/2011 ("the Sanction List").

6. Article 5 of the Council Regulation applies certain sanctions to those on its Sanction List namely the freezing of their funds within the EU (Section 5 (1)) and prohibiting the making available of funds for their benefit (Section 5 (2)). Article 9 of this Regulation explicitly allows financial institutions in the European Union to credit frozen accounts, pay interest on those accounts and make payments to those accounts under obligations which arose before the date on which the person or entity has been included on the Sanction List.

7. On 3 May 2011, the Confirming Bank informed the Beneficiary that because the issuing bank was subject to EU sanctions the Confirming Bank did not feel obligated to effect payment under its confirmation of the L/C. The Confirming Bank thus refused to honour or even negotiate and forward the presented documents to the issuing bank and instead returned them to us.

8. **<u>Query 1:</u> Does the mere fact that the issuing bank was added to the EU Sanction List after presentation of the documents excuse the Confirming Bank from its obligations under UCP 600 sub-article 15 (b) and article 8?**

   8.1 The Beneficiary notes that neither of the Council Regulations appears to prohibit receipt of funds from any person or entity on the Sanctions List (under pre-existing obligation such as L/C or otherwise) or seeking reimbursement from anyone on the Sanction List.

   8.2 The Beneficiary further notes that just because a confirming bank may have practical difficulty obtaining reimbursement from an issuing bank should not be any justification for a confirming bank not to perform its independent and direct obligations to a beneficiary.

B. <u>Additional background in connection with a further query.</u>

9. On 26 March 2010, well prior to the Confirming Bank's confirmation, the ICC Banking Commission issued a "Guidance Paper on the Use of Sanctions Clauses for Trade Related Products … subject to ICC Rules (doc. no. 470/1129). Among other things, this Guidance Paper:

   (a) notes that so called sanctions clauses, purportedly giving the confirming/issuing banks discretion whether or not to honour, undermine the independent nature of L/C's and their irrevocability (Sections 2.4 and 2.6); and

   (b) condemned the use of sanction clauses (Sections 4.1 – 4.3).

10. Contrary to that ICC Banking Commission Guideline, the Confirming Bank added a clause to its confirmation mentioned in paragraph 3 above, using a translated text <u>identical</u> to that given as an example in Section 3.3 of the ICC Banking Commission Guidance Paper (with the addition of Country N in the last

sentence). At the same time, under the UCP the Confirming Bank was, among other things, undertaking to be "irrevocably bound to honour" the credit.

11. In its refusal to honour the presented documents, the Confirming Bank also referred to this "sanctions clause".

12. **QUERY 2: Does adding such a "sanction clause" to the confirmation relieve the Confirming Bank of its obligation under UCP 600 sub-article 15 (b) and article 8?**

UNQUOTE

We kindly ask your opinion regarding the above stated matter.

ANALYSIS / CONCLUSION

Mandatory laws to which the issuing or confirming bank is subject override the UCP and any undertaking contractually issued by the issuing and/or confirming bank. Directly applicable economic sanction laws are generally considered as being mandatory.

Regardless of the UCP and any obligation that it may have incurred in the ordinary course of its letter of credit business, a confirming bank has the legal duty to abide by mandatory economic sanctions that are applicable to it by law.

The addition of a sanction clause to the documentary credit or its confirmation does not by itself alter the obligation of the issuing bank or the confirming bank to perform under the documentary credit where the presentation is a complying presentation. As stated in the ICC Banking Commission recommendation paper (470/1129rev dated 19 February 2010), ICC recommends that practitioners, in transactions subject to ICC rules, refrain from including such clauses that bring into question the irrevocable nature of the credit, the certainty of payment or the intent to honour obligations.

Any disputes on the application of the particular sanction law to the confirming bank or its relevant activity have to be submitted to the competent court."

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,

Thierry Senechal
Senior Policy Manager
Banking Commission