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Ms. Kelly Lim
Executive (AEMEA),
Global Business Division
Singapore Business Federation
10 Hoe Chiang Road #22-01
Keppel Towers
Singapore 089315

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Subject: Document 470/TA.765rev

Dear Ms. Lim,

Thank you for your query regarding UCP 600. We refer to our letter dated 16 May 2012. Please find below the opinion of the ICC Banking Commission.

QUOTE

One of our members received documents from its customer under an LC and negotiated them in accordance with its terms and conditions. However, the issuing bank refused the documents. The discrepancies were:

i. On board notation not shown in the AWB;
ii. Invoice shows FCA Singapore Changi Airport instead of FOB Singapore

Our member disagreed with the discrepancies. However, the issuing bank insisted and subsequently honoured, but deducted USD$100 discrepancy fee from the proceeds. It would be appreciated if you could let us have your opinion whether the discrepancies raised by the issuing bank, are valid.

Background:

i) One of the documents required in the L/C was "[F]ull set "clean on board" air transport documents consigned to the order of the issuing bank and ...."

House air waybill is acceptable. In its Fields 44E and 44F, the credit showed:
44E: Singapore Changi Airport
44F: Mumbai International Airport
Description of Goods: XX cases of computer chips, FOB Singapore, as per purchase order No. ....

ii) The air waybill presented by the beneficiary complied with the requirements stated in UCP 600 article 23. Furthermore, the air waybill stated the actual flight details and flight date. As it was an air waybill, there was no "on board" notation.

iii) As the shipment was effected by air, the invoice showed "FCA Singapore Changi Airport". Beneficiary and our member bank opined that the FOB term was not proper for an air shipment as it is used only for sea and inland waterway transport. Moreover, according to the beneficiary, the Incoterm was not even quoted in the purchase order. The purchase order quoted only that shipment is to be effected by an air cargo agent nominated by the applicant and the air transport document is to be marked as freight collect.

iv) Upon receipt of the refusal notice from the issuing bank, our member bank rebutted and disagreed with the discrepancies noted. But the issuing bank refused to accept and insisted that the documents were discrepant.

v) Its' reason was that banks must follow strictly the terms stated in the LC. It even quoted the "on board paper" recently published by the ICC Banking Commission that on board could also mean on board the truck, train and airplane. It means the ICC Banking Commission also allows such practice. As such, it claimed that it was not wrong for an LC to call for "clean on board" air transport document. It further argued that under an FOB term, the risks of loss of or damage to the goods would be transferred from the seller to the buyer only when the goods were delivered and loaded on board the airplane. It was different from FCA, as for FCA, the risk of loss of, or damage to, the goods would be transferred from the seller to the buyer when the seller delivered the goods to the carrier or another person nominated by the buyer at the seller's premises or another named place.

It sounds reasonable, but it is not. Now, the opinion is also divided. Some claim that the issuing bank was right and documents presented by the beneficiary must strictly comply with the terms of the LC whether or not the terms were reasonable. Some claim that an "on board" notation should apply only for sea or inland waterway transport document called for under the LC and FOB should not be used for air transport document.

It would be appreciated if the ICC Banking Commission could provide its opinion whether the refusal notice given by the issuing bank is reasonable.

ANALYSIS

Discrepancy 1: "On board notation not shown in the AWB".

The credit required presentation of "[F]ull set "clean on board" air transport documents consigned to the order of the issuing bank and …."

This wording is: (a) more suited to a bill of lading; and (b) not in line with the usual or standard construction of wording that is used when an air transport document is being called for.

There is no requirement in UCP 600 article 23 for an air transport document to contain an 'On Board" notation. The requirement in UCP is for an air transport document to indicate that the goods have been accepted for carriage and its date of issuance will be deemed to be the date of shipment. A requirement in a credit for an air transport document to bear an "on board" notation cannot be interpreted as a requirement for the air transport document to indicate a specific notation of the actual date of shipment (including flight number details), and such a requirement will be disregarded.

The issuing bank, in its justification for the discrepancy, has stated that the 'On Board Notation Paper' issued by the ICC Banking Commission refers to the fact that an 'on board' notation can also pertain to loading goods on to a truck, train or aircraft. Such reference in the 'On Board Notation Paper' is given to solely emphasise that a statement of "shipped on board" appearing on a bill of lading may not directly relate to the loading on board a vessel named in that document. The paper is not advocating that air transport documents indicate an on board notation or that a credit should or may include a requirement for an air transport document to include such an indication.

Discrepancy 2: "Invoice shows FCA Singapore Changi Airport instead of FOB Singapore"

This discrepancy was refuted by the beneficiary's bank on the basis that FOB is not the proper Incoterm for air shipments and the purchase order did not quote an Incoterm.

Issuing bank's counter argument was that credit terms must be strictly complied with and they further argued that under FOB the risk of loss or damage to the goods would be transferred from the seller to the buyer only when the goods are loaded on board the aircraft. Since the credit called for a "clean on board" air transport document it was correct in using FOB as the Incoterm.

UCP 600 sub-article 18 (c) states "The description of the goods, services or performance in a commercial invoice must correspond with that appearing in the credit." and the trade term "FOB Singapore" was part of the description appearing in the credit. There was no reference made to the application of "Incoterms 2010".

The Invoice presented under the credit stated "FCA Singapore Changi Airport".

When checking documents, banks are only obliged to examine the information that appears on the face of a document without further investigation as to whether it is accurate or necessarily appropriate for the underlying transaction. The fact that the purchase order did not quote a trade term does not have any bearing on the examination of the documents since the credit is separate from the underlying contract (refer UCP 600 sub-article 4 (a)).

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It must also be noted that the beneficiary is responsible for ensuring that the terms of the credit correspond to the terms of the underlying purchase order prior to dispatch of the goods and presentation of documents. If there are inconsistencies between the credit and the purchase order, the terms of the credit will prevail when documents are examined under UCP 600.

In this instance the trade term stated in the invoice does not correspond to the trade term stated in the credit.

CONCLUSION

The first discrepancy is not valid.

The second discrepancy is valid.

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission based on the facts under "QUOTE" above.

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