Ms Suncanica Skupnjak-Kapic
Secretary General
ICC Croatia
c/o Croatian Chamber of Economy
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29 November 2013

Subject: Document 470/TA.795

Dear Ms Skupnjak-Kapic,

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

QUOTE

We would like to seek an official opinion and possible reconsideration of the Official Opinion R741 / TA700rev (Document 470/TA.700rev) (situation D) on the matters regarding charges deducted by issuing banks from their reimbursements/settlements under documentary credit issued subject to UCP 600.

We have faced the following situation: L/C available with advising bank (us) by payment, however we did not act under our nomination and have sent documents presented by the beneficiary to the issuing bank without examining them (in accordance with beneficiary's request). No message was received from the issuing bank, only on the fifth working day we received a MT910 from our correspondent bank informing us of the credit entry on our account and containing information in field 72: /EUR100 deducted as discr.fee/.

The documentary credit included the following clause: 'discrepancy fee of EUR 100.00 will be deducted from the proceeds any drawing if documents are presented with discrepancies'

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We have contacted issuing bank arguing that since they had not acted in accordance with UCP 600 sub-article 16 (c) (ii), quoting every single discrepancy they should be precluded from deducting discrepancy fee.

An answer was received that their action has nothing to do with UCP 600 article 16 and that if we want to find out about discrepancies we will have to ask for it. It seems that they are acting in line with the conclusion of a/m Opinion. Nevertheless, we cannot agree with it.

In our opinion and according to UCP600 sub-article 16 (a) an issuing bank determines if a presentation does not comply. By deducting their discrepancy fee they obviously wanted to indicate that the presented documents did not comply.

As per article UCP 600 sub-article 16 (b) issuing bank may in its sole judgment approach the applicant for waiver, but that does not extend period of time mentioned in UCP 600 sub-article 14 (b), nor does it (in our opinion) annul the provisions of UCP 600 sub-articles 16 (c), (d), (e) and (f).

Achieving applicant's acceptance of discrepancies does not justify the action of not listing all discrepancies, even when sending message indicating acceptance (such as in MT752).

Such practice disables beneficiary to dispute controversial or groundless discrepancies or at least to get information of what was 'wrong' as to improve it in the next presentations. It disables beneficiary in any way to disprove doubtable deductions however small they can be. It is our opinion that beneficiary is entitled to be informed within 5 working days of presentation of every possible discrepancy, giving them the opportunity to correct documents if they want. It should be their decision, as after all, documents belong to them. It could be also argued that without giving the opportunity to correct discrepant documents or to dispute discrepancies, this could also potentially have the effect of implying that supplier is unable to fulfill the terms of the contract.

As it went out from this particular case, it seems that the result is that beneficiary can get information of what went 'wrong' in their presentation only after additional correspondence, engaging additional resources, time and cost, as if they are not entitled to that information by the presentation of documents itself.

It seems that possibility to deduct discrepancy fee, without giving the explanation to the beneficiary (since there is no obligation or penalty for such action), has encouraged practice which would be contrary to any other usual charging of any other amount. Charging of any amount should be accompanied by proper bill and specification of what the beneficiary is paying for. It allows unilateral assessment of the basis of deduction from the issuing bank's side only. Even though we are talking of small amounts, such actions are not justified.

Implications of practice that recovery of small amounts rarely take place, should not affect the basic rights of the beneficiary.

We think that if issuing bank determines that presented documents contain discrepancies, all discrepancies should be quoted either in separate MT734 or in MT752 within 5 working days. Otherwise they are precluded claiming that documents are discrepant (and accordingly not allowed to deduct discrepancy fee)

ANALYSIS

The situation described in this query is similar to that covered by opinion 470/TA.700rev Situation D. A presentation of documents had been paid by the issuing bank deducting their discrepancy fee. Prior to payment no notice of refusal has been sent nor had any information on discrepancies been provided by the issuing bank. Analysis and Conclusion under 470/TA.700rev (and previous ICC Opinions R.380 and TA.659 to which it referred) also covered the issue of deduction of charges which exact amount had not been described in the documentary credit:

QUOTE

> Analysis: If the issuing bank wishes to make a deduction from the proceeds in respect of this [a] fee, then the credit should clearly indicate the amount or percentage of charges that will be deducted. In assessing what additional charges may be due to an issuing bank, where the credit states ‘all charges outside country X are for account of beneficiary’, a line needs to be drawn between those charges that are known or distinct possibilities i.e., a discrepancy charge, and those charges that materialise through requests of the nominated bank i.e., a request for an authenticated message confirming the due date, that payment has been effected etc. When an issuing bank finds discrepancies in documents, it has two options available to it under article

16: to provide a refusal message to the presenter in terms of sub-articles 16 (c) and (d) or, to approach the applicant for a waiver without first providing a notice of refusal (sub-article 16 (b)). When the option of approaching the applicant for a waiver is chosen, and such waiver is given and accepted by the issuing bank, the practice is for the issuing bank to honour, and such honour will be less any discrepancy fee that was stated in the credit. When this course of action is taken, the issuing bank should provide the presenter, as part of their payment message or in a separate communication, details of the discrepancies that were observed. The presenter can then choose to dispute the discrepancies, therefore questioning the relevance of the deduction representing the discrepancy fee. If the issuing bank does not provide such an indication, the presenter may seek, and the issuing bank must provide, such details. The actions of the issuing bank, as described in situation D, do not represent preclusion under sub-article 16 (f).

Conclusion: Situation D: The issuing bank is entitled to a discrepancy fee as outlined in the credit, but it should inform the presenter of the discrepancies that were found, either in the advice of payment or in a separate communication. The issuing bank is not required to send a notice of refusal to the presenter if it elects to contact the applicant for a waiver and to receive a waiver that is acceptable to it. Sub-article 16 (f) does not apply in these circumstances. If the covering schedule listed the discrepancies that the presenter had found, the issuing bank should either advise the presenter that the documents were taken up despite the discrepancies that had been identified by the presenter, or list the discrepancies for which the issuing bank had sought waiver from the applicant.

UNQUOTE

The issuing bank in the current query stated that they would only give information of the discrepancies found in the presentation if specifically requested to do so. This is not in line with the conclusion of 470/TA.700rev, which states that an issuing bank should inform the presenter of any discrepancies that were found, either in the advice of payment or in a separate communication.

It is only when an issuing bank does not indicate the discrepancies that there should be a need for the presenter to seek such details. The default position is that an issuing bank, in order to justify a discrepancy fee, should always indicate the discrepancies by one of the methods described above.

When an issuing bank has approached the applicant for a waiver, and received such waiver and decided to act upon it, it does not need to send a notice of refusal in accordance with UCP 600 sub-article 16 (c) in order to be entitled to deduct a discrepancy fee when it honours a presentation. In such circumstances, UCP 600 sub-article 16 (f) does not apply.

CONCLUSION

An issuing bank must provide information as to the discrepancies on which discrepancy fee deductions are based.

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.

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Neither the ICC nor any of its employees, nor any member of the Banking Commission, including the Chairman, Vice-Chairmen or Technical Advisers 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
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Banking Commission

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