INTERNATIONAL CHAMBER OF COMMERCE

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Subject: Document 470/TA.799

Dear Dr Spiliotis,

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 from the Banking Commission on the following questions regarding a document presented under a Letter of Credit issued subject to UCP 600.

The Letter of Credit issued by an issuing bank located in country X on behalf of an applicant also located in country X and confirmed by a Bank located in country Y required in field 46a "documents required" amongst other the following document:

Quote
Bank guarantee from international first class bank payable in country X equivalent to EUR xxxxx [the guarantee indicates an amount] valid till xx.xx.xxxx [the guarantee indicates a fix date].
Unquote

The bank guarantee presented to the confirming bank is issued by a bank located in country Y and states that it is subject to the laws of country Y. The wording of the presented guarantee shows the applicant of the Letter of Credit as beneficiary of the guarantee. The amount and expiry date of the guarantee are in compliance with the requirements stipulated in the Letter of Credit. The payment undertaking of the guarantee is worded as follows:

QUOTE
We, xxx [the guarantee indicates the guaranteeing bank], hereby irrevocably undertake to pay you [the guarantee is addressed and directed to the applicant of the Letter of Credit] without delay on your first written demand for payment an amount up to xxx [the guarantee indicates an amount] provided your demand for payment is simultaneously supported by (…)
UNQUOTE

The wording of the guarantee does neither contain an express indication that it is "payable in country X" nor any express reference to country X being the place of payment.

The confirming bank accepted the presented guarantee but the issuing bank raised the following discrepancy: "Bank Guarantee from international bank is not payable in country X.". Please let us have your official opinion whether and if so why the issuing bank was entitled to raise the discrepancy by answering the following questions:

1. Is the guarantee only compliant if it either indicates expressly that it is "payable in country X" or contains an express reference to country X being the place of payment? Or can it be argued that the guarantee meets the requirement "payable in country X" because it is issued in favour of a beneficiary located in country X and as it provides that payment thereunder has to be made to this beneficiary?
2. Would the requirement "payable in country X" be met if the guarantee is made out as described above but is not issued by a bank located in country Y but in country X?
3. Does the stipulated requirement "payable in country X" require the document checker to determine whether the presented guarantee's place of payment is country X?
4. Could the confirming bank argue validly that the Letter of Credit does not stipulate that the requirement "payable in country X" must be met by an express reference or wording in the guarantee document (e.g. 46a: Bank guarantee from international first class bank indicating that it is "payable in country X" equivalent to (…)") and that this requirement may therefore be

deemed as non-documentary and not stated and thus be disregarded according to UCP 600 sub-article 14 (h)?

5. Could the confirming bank argue validly that the checking of the document falls with respect to the requirement “payable in country X” under the auspices of UCP 600 sub-article 14 (f) because this requirement is worded in way that does not amount to a stipulation of the document’s data content?

ANALYSIS

The credit included, in field 46a of the MT700, a requirement for a guarantee to be issued by an international first class bank payable in country X (the country of the credit issuing bank). Apart from amount and expiry date, no other requirements were provided. The credit was confirmed by a bank in country Y (the country of the credit beneficiary).

The actual guarantee that was presented to the confirming bank was issued by a bank in country Y, stating that it was subject to the laws of country Y. The amount and expiry date were in accordance with the terms and conditions of the credit. No issues were raised concerning the concept of ‘international’ or ‘first class’.

The guarantee contained a statement from the guarantee issuing bank that they irrevocably undertook to pay the guarantee beneficiary (the applicant of the credit) without delay on first written demand for payment. It did not include an explicit statement or reference that the guarantee was payable in country X.

Whilst the confirming bank accepted the guarantee as a compliant document under the credit, the issuing bank refused on the basis that the guarantee was not payable in country X.

In view of the fact that the beneficiary of the credit was located in country Y, it is not unusual that they would use a bank in their own country to issue the guarantee, as was the case in this query. The guarantee had been issued directly in favour of the beneficiary (the credit applicant) in country X, and not via another bank in country X. It included a condition that payment would be made against first written demand to the bank in country Y. In view of the fact that any demand is to be made to the bank in country Y, this is construed as making the guarantee payable in country Y and not country X.

CONCLUSION

1. In the absence of any further qualifying statements in the credit, the guarantee needed to clearly state that it was payable in country X. In order to achieve this, it would have needed to be payable at the counters of a bank in country X, and not at the counters of the guarantee issuing bank in country Y. The fact that the guarantee was issued directly in favour of the beneficiary (credit applicant) in country X and was payable against first written demand, did not fulfil this requirement.
2. If the guarantee had been issued by a bank in country X, this would have met the requirements of the credit.
3. The place of payment of the guarantee was to be determined as country X.
4. The requirement for the guarantee was included in field 46a (Documents Required) of the credit conditions. In view of the fact that it expressly stipulated the document to be presented, and clearly stated that the guarantee was to be payable in country X, this cannot be considered as a non-documentary condition as stated in UCP 600 sub-article 14 (h).
5. The credit stated that the guarantee was to be issued by an international first class bank. This is a requirement which, according to UCP 600 sub-article 3, will be ignored. The guarantee did not, however, fulfil its function by virtue of the fact that it was not payable in country X.

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 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,

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Banking Commission