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Department of Policy and Business Practices

Mr Barlen Pillay
Manager, Legal & Business Facilitation
The Mauritius Chamber of Commerce
& Industry
3, Royal Street
Port Louis
Mauritius

9 December 2014

Subject: Document 470/TA.808rev

Dear Mr Pillay,

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

QUOTE

Issuing Bank A in country E, issued a transferable credit subject to UCP 600 by order of the applicant situated in country D, nominating Bank B in country M as the transferring bank. Since Bank A did not have authenticator keys with Bank B, the credit was issued via SWIFT MT 700 through another bank in country M and then passed on to Bank B.

Field 78 of the MT 700 stated: "Upon receipt of credit conform docs stating that all terms and conditions are strictly complied with LC at our counters we undertake to effect payment and demanded by beneficiary as per payment instructions and receiving funds from applicant."

The original credit was available by deferred payment and then amended to be available 'by negotiation' prior to transfer. The amendment was accepted by the first beneficiary. At a later date, the first beneficiary submitted the operative instrument together with all amendments under the credit to Bank B for transfer of the credit.

Bank B transferred the credit, again subject to UCP 600, to a second beneficiary in country I via SWIFT MT 720, the only change being to the credit amount. Field 41D of the MT 720 stated: "By Negotiation". Field 47A of the MT 720 stated: "This letter of credit does not constitute a confirmation of the original letter of credit or an engagement on the part of Bank B. Upon negotiation, invoices of 2nd beneficiary will be substituted by those of 1st beneficiary. Applicant of master LC is in country D."

In addition, field 78 of the MT 720 stated: “Payment will be effected only after receipt of funds from issuing bank at maturity.”

Documents were subsequently presented under the transferred LC by the bank of the second beneficiary. Discrepancies were noted by Bank B and advised to the bank of the second beneficiary via SWIFT within five working days from receipt of the documents. Bank B contacted the first beneficiary for acceptance of the discrepancies and such acceptance was received. Bank B substituted the invoice and packing list with those of the first beneficiary and sent the full set of documents to the issuing bank.

Bank A accepted documents via authenticated SWIFT and included a statement that: “We accept docs on maturity 14.10.2013. We shall pay on maturity date and as per conditions of LC and as received funds from applicant.”

Upon receipt of this message, and in view of the fact that they did not hold authenticator keys with them, Bank B informed the bank of the second beneficiary via SWIFT MT 999 of the maturity date. They further stated that payment would only be effected after receipt of funds from Bank A.

Despite several SWIFT chasers, phone calls and emails, Bank A did not pay at maturity. They remained silent and did not revert with any update regarding the delay in payment or any information regarding the original documents. Bank B had been approached by the second beneficiary with information that that they had checked with the shipping company and goods were delivered to the applicant in December 2013 and January 2014.

We shall really appreciate your valuable views under this scenario which may help to resolve this long outstanding issue.

ANALYSIS

The query states that Bank B substituted the invoice and packing list with those of the first beneficiary. It should be noted that UCP 600 does not allow substitution of any document other than an invoice.

The documentary credit in question included wording which could be understood as an exclusion of the issuing bank’s obligation to honour or reimburse as per UCP 600 article 7. It is not clear from the query whether either of the beneficiaries were aware of this potential exclusion. However, the wording of the notice of acceptance was quite clear in describing the acceptance of documents being subject to receipt of funds from the applicant.

It would appear, from the content of the enquiry, that the documents had been released to the applicant against their commitment to the issuing bank to pay at maturity. The issuing bank had subsequently sent an authenticated SWIFT message stating that they would pay the documents at maturity only after receipt of funds from the applicant.

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Under the UCP, the issuing bank cannot be released from their liability and must pay. However, in this particular credit, such payment commitment was made subject to receipt of funds from the applicant.

The original credit and the subsequent transfer were poorly worded in that any payment under the credit was conditional upon receipt of funds by the issuing bank from the applicant thereby negating the irrevocability of the credit.

As a general point, good banking practice means that the issuing bank should be responding to the queries sent to them by the advising bank.

CONCLUSION

In view of the fact that it is unknown as to the exact circumstances preventing payment, it would be sensible for the advising bank to contact the issuing bank again and seek clarification.

Under the terms and conditions of this particular credit, the fact that any payment, future or otherwise, is contingent upon the applicant releasing funds to the issuing bank, means that there may be an unpredictable delay or even default in settlement.

The instrument as described in the query does not comply with the definition of a credit as stated in UCP 600 article 2 and banks should refrain from issuing such instruments subject to UCP. This is considered to be bad banking practice. A bank handling such a credit as a nominated or transferring bank should inform the beneficiary and second beneficiary in respect of such a clause.

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.

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Yours sincerely,

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