INTERNATIONAL CHAMBER OF COMMERCE
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Department of Policy and Business Practices

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Subject: Document 470/TA.884

Dear Don,

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

QUOTE

We are writing to you requesting an official opinion from the ICC Banking Commission, in the hope of addressing what appears to be becoming a very unfortunate trend by a bank regarding commercial letters of credit issued by them, all of which are subject to UCP 600. We have recently had a few presentations refused, under different credits, quoting the following or similar reasons: "NOTE THE DOCUMENTS HAVE BEEN REJECTED AND RETURNED TO YOU BY COURIER BECAUSE OF LOCAL AND INTERNATIONAL LAWS AND REGULATIONS AND INTERNAL POLICY FOR AML/CTF AND FOREIGN SANCTIONS IN ACCORDANCE WITH OUR L/C TERMS."

The credits in question included the following sanctions clause: "OUR BANK PROCESS TRANSACTIONS IN ACCORDANCE WITH LOCAL AND INTERNATIONAL LAWS AND REGULATIONS, AND RESERVE THE RIGHT TO COMPLY WITH FOREIGN SANCTIONS AS WELL. CONSEQUENTLY DOCUMENTS ISSUED BY OR SHOWING ANY INVOLVEMENT OF PARTIES SANCTIONED BY ANY COMPETENT AUTHORITY OR CONTAINED ANY INFORMATION THEREON MIGHT NOT BE PROCESSED BY OUR BANK AT OUR SOLE DISCRETION AND WITHOUT ANY LIABILITY ON OUR PART."

When questioned, the issuing bank confirmed that its refusals were not caused by the presentations being non-compliant with the terms and conditions of any credit. Rather, follow up responses from the bank appear to indicate that the refusals were due to regulatory concerns, which were then subsequently clarified to relate to internal policy and risk concerns, rather than regulatory.

Verbal exchanges were made to better understand the nature of these concerns. Upon discussion, it was clear that the refusals stemmed from an internal policy relating to risk(s) arising out of either:

A. A vessel's shipping route throughout a given period, rather than solely on the vessel's route for the shipment under the letter of credit; or
B. The applicant itself, presumably arising from internal knowledge that manifested after issuance of each credit, but not arising to the level of a prohibition under applicable laws or regulations.

To date, the presentations in question remain unpaid and are not the subject of any current legal injunctions or orders that we are aware of. While we understand the need to be proactive with respect to applicable laws and regulations, the actions here appear to go beyond legal and regulatory obligations and were determined instead by internal risk factors specific to this bank.

Our Questions:

A. Given the irrevocable nature of a credit, we understand that a bank should carefully evaluate its clients prior to issuing it, given that the bank is taking on the payment risk of the applicant. However, having issued its own irrevocable credit, is an issuing bank permitted under UCP 600 to refuse a presentation based on internal policies and/or concerns over its applicant?
B. If a refusal notice does not comply with the requirements of UCP 600 article 16, is the issuing bank now precluded from citing discrepancies and therefore must honour each presentation?
C. We understand that applicable law overrides a bank's obligations under UCP 600. However, if a bank cites the refusal as being due to a legal or regulatory reason, we presume that international standard banking practice requires that the bank substantiate its refusal upon the presenting party's request. When failing to provide such reason(s), we presume that the issuing bank must immediately honour a presentation pursuant to UCP 600 sub-article 16 (f). Is this correct?

UNQUOTE

ANALYSIS

A. ICC Opinion R515 (TA227) highlights that UCP is to be seen as the basis upon which international trade, which is subject to payment by documentary credits, is to be completed. The UCP 600 provides the basic level of requirements and responsibility of the parties, unless the credit states otherwise. In addition, ICC Opinion R720 (TA712rev) highlights that the actions of the applicant should not be an influence or deciding factor over whether compliant documents are honoured.

In accordance with UCP 600 sub-article 7 (b), an issuing bank is irrevocably bound to honour as of the time it issues a credit. Sub-article 7 (a) states that provided the stipulated documents are presented to the issuing bank and that they constitute a complying presentation, then the issuing bank must honour.

As stated in ICC Opinion R394 (TA366), the UCP comes into effect at the point where the documentary credit is either signed or transmitted by the issuing bank. On that basis the beneficiary, advising and/or confirming bank, and any nominated bank are entitled to rely on the credit having been issued in accordance with the issuer's own internal procedures and any local or national directives. There should be no reason to question the validity of such issuance.

Whilst banks are compelled to act in accordance with any relevant internal policies, banks involved in international trade should ensure that any such policies do not work against nor contravene articles of UCP 600, nor issue documentary credits that breach internal policies. If this is the case, then any differing requirements that result from such breach should be clearly stated in the terms and conditions of each credit.

B. UCP 600 sub-article 16 (c) states that when an issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter. Such notice must state each discrepancy in respect of which the bank refuses to honour or negotiate. ICC Opinion R672 (TA605rev) highlights that a refusal notice must specifically indicate the context in which the documents are discrepant.

For the case in question, the message from the issuing bank cannot be considered a formal refusal notice, based on UCP 600 article 16 (i.e., mentioning discrepancies according to the credit requirements and the UCP 600). Additionally, the message introduces a new element: "AND INTERNAL POLICY FOR AML/CTF AND FOREIGN SANCTIONS IN ACCORDANCE WITH OUR L/C TERMS" which is factually inaccurate in that the 'compliance' clause stated within the credit does not (and should not) make reference to any "internal policy" considerations.

Banks must act in accordance with local laws. However, it would appear from the query that the refusals were subsequently clarified to be internal policy and internal risk concerns-related, rather than regulatory. As the messages from the issuing bank provided no indication of discrepancies in each presentation, each presentation must be understood to be complying with the terms and conditions of each credit.

Reference is made to ICC Document No.470/1238 " Guidance Paper On The Use Of Sanctions Clauses In Trade Finance-Related Instruments Subject To ICC Rules". Chapter 2.4 includes the following wording: "If the sanctions clauses in trade finance-related instruments, including letters of credit or demand guarantees or counter-guarantees, allow the issuer a level of discretion as to whether or not to honour beyond the statutory or regulatory requirements applicable to that issuer, they bring into question the irrevocable and documentary nature of the letter of credit or guarantee. The implementation by a bank of an internal sanctions-related policy that goes beyond what is required under the laws and regulations applicable to that bank is an illustration of that discretion. It may cause a serious problem when considering the role of a confirming bank, a nominated transferring bank, a guarantor or a beneficiary. If the reference to an internal, sanctions-related policy were to allow the bank discretion to honour or refuse payment, one could even question if that bank has in fact assumed a legally binding obligation, a question that of course has to be determined under the applicable law."

As such, a documentary credit and, by extension, any form of refusal/non-payment notification should not include any references that bring into question the irrevocable and documentary nature of the credit. This includes a reference to "internal policies".

C. It is stated in ICC Opinion R735 (TA741rev) that an issuing bank is compelled to honour in respect of a complying presentation and cannot, under the UCP, be released from their liability. As stated within the Analysis of this Opinion, there may well be circumstances under applicable law where the issuing bank could seek such a release including fraud, provisional court measures, or the nullity of the undertaking.

Various ICC Opinions, including more recently TA752rev3, clarify that mandatory laws, including directly applicable sanctions, to which an issuing bank is subject whether by virtue of, inter alia, its country of operation, its home country or the currency of the transaction override the UCP and any undertaking contractually issued by that issuing or confirming bank.

In the event that an issuing bank refuses to honour a presentation for legal or regulatory reasons, it is reasonable that such bank should provide additional details should further substantiation be requested.

However, based on the fact that, even without detailed evidence, applicable law overrides obligations under UCP 600, sub-article 16 (f) cannot be applied in such circumstances.

CONCLUSION

A. No. Under such circumstances, an issuing bank has an obligation to honour a complying presentation.

B. Yes. An issuing bank that fails to act in accordance with the provisions of UCP 600 article 16 shall be precluded from claiming that the documents do not constitute a complying presentation. Furthermore, a notification that a bank is prevented from honouring its obligations based on sanction regulations should not be construed nor structured as a formal refusal notice.

C. There may be scenarios wherein an issuing bank is obligated to honour in accordance with UCP 600, but is prohibited from doing so based upon an established sanction or law. In such a scenario, it would be reasonable to expect the issuing bank to provide a reference to the applicable law or sanction regulation, and the document and/or data to which it relates in the presentation. However, as mentioned within the Analysis, applicable law overrides a bank's obligations under

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UCP 600 and, therefore, sub-article 16 (f) cannot be applied in such circumstances.

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission's Technical Advisers 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,

Olivier Paul
Head of Policy, Banking Commission

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