Prof. Avv. Maria Beatrice Deli
Secretary General ICC Italia
Via Barnaba Oriani,
34-00197 Roma
Italy

2 December 2020

Subject: Document 470/TA.906rev

Dear Prof. Deli,

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

QUOTE

On 22 January 2019, a letter of credit was confirmed by us, as requested, and advised to the beneficiary. The credit was available by deferred payment with a value of EUR735,000.

Following presentation of compliant documents, on 29 May 2019 we sent an MT754 message to the issuing bank, and forwarded the compliant documents and honoured our confirmation obligation to the beneficiary by an advance payment operation value 13 June 2019. The settlement due date of the LC was 30 August 2019.

The issuing bank gave no reaction about the compliance or not of the documents, neither within the fifth day after receiving the documents nor later. The issuing bank did not even confirm its reimbursement obligation under the credit by the due date of 30 August 2019. In the course of subsequent contacts, the issuing bank informed us by phone that the applicant's account was frozen due to a justice decision and, consequently, the bank was not able to honour under the credit until receipt of the agreement of the local authorities.

On 28 August 2019, the issuing bank informed us officially, as follows, via MT 799 message, *"Further your MT 754 DD 29/05/2019 we inform you that we cannot proceed to the payment value date 30/08/2019 because the accounts are frozen. Best regards."*

Over further mail exchanges, the issuing bank gave some details of the true reason of the applicant's funds being frozen. The applicant was involved in a bankruptcy procedure and a special administrator had been nominated for a temporary management. Although such an event was totally outside the credit relationship, and the reimbursement was due, the issuing bank never took any possible action in order to clarify its position as debtor of a reimbursement of a payment made on its account by a confirming bank, or to allow us to act quickly by clarifying our creditor position by involving the local Central Bank, the international banking management and/or the Diplomatic representative in the issuing bank country.

By October 2019, such involvement had commenced with the local Italian Embassy and the Ministry of Finance but no result has been obtained so far. No judicial proceedings are under way.

We are fully aware that the reason for non-payment is not within the competence of the ICC Banking Commission. This is not the aim of this query.

The Italian NC Banking Commission considers that it would be valuable to receive the ICC Banking Commission's Opinion about the behaviour of the issuing bank when such bank denies its main role, whatever is the lawful reason. Is there a good banking practice to be followed in order to minimize as much as possible the serious damage that this situation causes to the interbank relationship? Is there a kind of effective co-operation to be carried out in order to clarify the mutual situation and to inform the local authorities claiming protection of the documentary credit independence? Is there an area of best banking practice to be respected for mutual advantages in this situation?

We would be grateful if the ICC Banking Commission will express their opinion about the following points.

1) It is a bad practice that an issuing bank does not inform the confirming bank about the acceptance or non-acceptance of the documents presented under a documentary credit, even after the fifth working day after the receiving of documents, and does not confirm the due day of the incurred deferred payment obligation, as in the case at hand.
2) It is a bad practice that the issuing bank informs the lack of reimbursement to a confirming bank with an official message sent only two days before the reimbursement is due with the simple reason "accounts are frozen" and without any (intentional?) specification of which accounts are frozen. Moreover, no copy of the authority's account freezing is sent, for clear and specific information to the confirming bank. The illicit statement made by the issuing bank (by phone) that they cannot reimburse because the applicant's account is frozen is a clear denial of the independence of the undertaking in the credit.

3) It is a bad practice that the issuing bank remains inactive, does not provide information of any initiative on its part in order to make it clear that it has to reimburse and not to pay, nor that it informs the confirming bank of any possible action to be carried out (even together) toward the local authorities.

UNQUOTE

ANALYSIS

Documents were sent to the issuing bank on 29 May 2019. The view of the confirming bank was that the presentation was compliant and the due date would be 30 August 2019.

It is stated that the issuing bank gave no indication of compliance or non-compliance by the close of the fifth banking day following the day of presentation. Under UCP 600 sub-article 16 (f), the issuing bank is thereby precluded from claiming that the documents do not constitute a complying presentation. In the normal course of events, it would be required to provide reimbursement to the confirming bank on the due date.

With regard to the imposition of a court order or such like, the Banking Commission has, over the years, responded in a consistent manner with the latest example being Opinion R902 (TA880rev) which states “an issuing bank cannot ignore a court injunction”, and banks “should seek to resist the imposition of such an injunction or, if an injunction has already been obtained, seek to have it lifted”.

ICC Opinion R519 (TA556) adds the following to this position by stating “There are no guidelines on this in the UCP, and the expectation is that the issuing bank will seek to uphold the principles outlined in the UCP and preserve the relationship that exists between the banks. This is part of the correspondent banking relationship between the banks".

The same position would apply to a justice decision issued by the local authorities that explicitly prevents an issuing bank from honouring a complying presentation. However, in the circumstances outlined, it appears that the judicial decision is only freezing the account(s) of the applicant. There is no indication that the judicial decision is stopping the issuing bank from honouring its undertaking on the due date. If the judicial decision was limited to freezing the applicant’s account(s) maintained with the issuing bank, the issuing bank remains obligated to honour the presentation, even if it cannot debit the applicant’s account.

In any event, an issuing bank is expected to advise a presenter at the earliest opportunity when it is the recipient of any communications, court orders, injunctions, judicial decisions, etc. that impact its ability to honour or reimburse under its credit.

CONCLUSION

In respect of the first question, even though it is good banking practice, there is no obligation under UCP 600 for the issuing bank to confirm the maturity date of a deferred payment commitment.

In respect of the second and third questions, the approach of the issuing bank is not in line with international standard banking practice and is, therefore, considered bad practice. If a bank is not in a position to handle documents presented under a credit subject to UCP 600 due to a justice decision or such like, it should inform the presenter without delay.

However, there is no indication that the judicial decision is preventing the issuing bank from honouring under its credit. This being the case, the issuing bank must honour without any further delay by reimbursing the nominated bank which has acted upon its nomination and honoured in good faith.

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 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,

David Bischof
Deputy Director, Finance for Development