Finance for Development

Banking Commission

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Dear Mr. Aziz,

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

QUOTE

Two LCs were relayed by an advising bank, to a second advising bank, by SWIFT MT710 messages. Subsequently, the LC's were received by the beneficiary via their bankers.

Brief details of both LC transactions are mentioned below:

Applicant	ABC & CBA
Beneficiary	XYZ
Amount of LCs	USD 112,000/- and USD 131,000/-
LC issuance dates	January 30, 2018 and April 12, 2018 respectively
Issuing Bank	Country F
Advising Bank	Country W
Second Advising Bank	Country P
	Credits advised to beneficiary through their bankers located in Country P

Field 78 of each credit stated “The issuer will effect payment under this credit to the accepting / negotiating beneficiary’s bank in accordance with their instruction upon receipt of the documents required fully complying with LC terms and conditions.”

After receipt of both LC's the beneficiary exported the goods amounting to USD 243,000 (the total amount of both LCs) and presented shipping documents to the beneficiary’s bank. The shipping documents were handled by the beneficiary’s bank exactly as per the terms and conditions of the LC (as advised in the MT710) and dispatched to the Country D office of the issuing bank as per the dispatch instructions given in the MT710.

After receipt of shipping documents, the issuing bank advised the maturity dates of both presentations through the advising bank and second advising bank to the beneficiary's bank via SWIFT MT998 messages (extracts of the SWIFT messages are appended below in the Annexure).

Case No 1:	Case No.2
LC No. 01	LC No: 02
Amount: USD 112,000.00	Amount: USD 131,000.00
Available by Negotiation with any bank	Available by Negotiation with any bank
Shipment Date: 6th March 2018	Shipment Date: 22nd May 2018
Maturity Date: 04th July 2018	Maturity Date: 16-Aug-2018
Shipment to Country D	Shipment to Country D
Shipping documents sent to Country D office of issuing bank	Shipping documents sent to Country D office of issuing bank
Applicant Country D	Applicant Country D
Issuing bank Country F	Issuing bank Country F
Draft drawn on issuing bank	Draft drawn on issuing bank

In Case No.1, the issuing bank did not advise discrepancies, rather it advised the maturity date; but in Case No.2, discrepancies were advised and then the maturity date. There was no dispute as to the discrepancies or the content of the refusal notice.

Beneficiary's bank negotiated one of the bills and paid USD112,000 to the beneficiary under Case No.1.

However, after the lapse of the maturity dates, the issuing bank did not honour its obligation as required under UCP 600 article 7, even though the goods had already been released from the destination port and the maturity dates were advised to the beneficiary's bank.

The beneficiary's bank was in continuous follow-up with the issuing bank for the repatriation of the accepted bills and have sent them numerous reminders via the advising bank but export proceeds have not yet been remitted by the issuing bank. Beneficiary's bank only received the advising bank's confirmation that they have relayed the follow-up messages to the issuing bank without any commitment on their part.

Please note the beneficiary's bank has not added its confirmation to any of these LCs and as per sub-article 12 (c) a nominated bank is not liable to honour the presentation unless they have confirmed the LC. Therefore, the liability to honour the presentation still resides with the issuing bank.

Beneficiary's bank humbly requests ICC Paris to provide their opinion that in both cases who is liable to pay the beneficiary's bank (who is out of funds) and the beneficiary. Further, can the beneficiary's bank claim delay payment interest from the issuing bank, based on the above facts of the case and acceptance of the issuing bank?

Annexure

Notes:
The wording used by the intermediary bank in its acceptance messages i.e., SWIFT MT998 was as follows:

Case: 1
Quote:
"20: Transaction Reference Number
………………
12: Sub-Message Type
754
77E: Priority Message
Attn: We relay this message only as received from (Issuing Bank) …… please advise to (Beneficiary bank)……
Quote
.
Our LC No. …………… dd……………… for USD112,000.00
.
To:
Beneficiary Bank………………..
.
From:
Issuing Bank………..
.
Applicant:…………
.
Beneficiary………………
.
Your Ref No………..DD……….for USD112,000.00
.
We refer to your captioned documents.
.
Subject to our further authentication and payment from applicant, we hereby confirm receipt of your documents sent under the cover of letter reference no…….. dated…… we confirm the documents presented related to the following:
Invoice Amount: USD112,000.00
Invoice Ref: …….
Invoice Date:…….

Applicant has agreed for the payment of the A/M bill for USD 112,000/- on maturity dated 2018 July 04, and we will remit payment, directly to negotiating bank : XYZ Bank Karachi Pakistan A/C No. ……… with LMO bank, New York, USA , Amount USD One Hundred Twelve Thousand, 112,000, as per your instructions and terms and conditions of LC
Unquote

Case: 2 (message 1)

Quote:
"*20: Transaction Reference Number*
………………
12: Sub-Message Type
799
77E: Priority Message
Relay
Dear Bankers, this is being sent as MT799
The following msg for and on behalf of Attn: We relay this message only as received from (issuing bank)….. .. please advise to (Beneficiary Bank) without any risk and responsibility on our and your part.

quote
MT998
This msg is for
21: Related Reference
………..
23:…….
.
77A: *Subject to our further authentication and payment from applicant, we hereby confirm receipt of your documents sent under the cover of letter reference no…….. dated……*
This refers to documents presented by you under above ref …………. Dated……….. for USD131,000.00 under our LC No. ……… dated ……. Submitted.

Notwithstanding the foregoing, we reserve the right to examine the documents for compliance with our credit norms and other terms and conditions governing the issuance of the credit herein and shell [sic] *accordingly be checking your presentation for acquiescence prior to a confirmation of payment for the transaction.*

79: Narrative:
At this point we have already advised your of discrepancies to which we have not received any response till date. We are now as per request from the applicant side, prepared to provide you with an applicant acceptance for the payment of amount at due date by the applicant.

79: Narrative:
In view of the above we seek to deliver the documents to the applicant against the acceptance and undertaking to pay this liability to your bank on due date. As per the conditions governing the issuance of the mentioned letter of credit and the terms and conditions of the captioned credit we will deliver the documents to the applicant against the acceptance and undertaking to pay to you on due date unless your bank respond within five working days accordingly after which time we will release documents.

If we do not hear from you within five working days we shall deem that you agree to the acceptance in which case the due date will be as follows in order of payment date: ……..
Please note the dates accordingly for tall items listed in the schedule above.
Policy statement: this message is sent without waiver of any of our right contained in this credit and without prejudice to the terms and conditions of the credit and its issuance.

Unquote

Subsequent to the above MT998, another MT999 was received from another bank on behalf of the issuing bank which contains the following wording:

Case: 2 (message 2)
Quote
20: Transaction Reference number:
……..
21: Related Reference:
……….
79: Narrative
We (Intermediary Bank) … relay the below msg without any risk and responsibility on our side.
+++Quote+++
.
Dear Sirs,
Re: Your MT999 dated….. Ref: ……
Re: Our MT998 dated……Ref……..

As per our swift MT998 date ….. Ref. No. …… "Applicant has agreed for the payment of the A/M bill for USD131,000.00 on maturity date: …….. and we will remit payment, directly to negotiating bank ………………………….. with…………………….. amount USD One hundred thirty one thousand, 131,000.00 as per YR instructions and terms and condition of LC"

As per our message – payment will be affected as per terms and conditions of LC. Please note applicant has stated that the payment will be arranged before…………

Please refer to our MT700 date…. Field 78A – Item 1

Payment will be arranged as per above mentioned conditions.
Regards, (Issuing Bank)
Unquote

The MT999 referred to in the last message reads: "With reference to your MT998 dated 24-06-2018 and our series of tracers. Please note that we have not yet received the proceeds of the document from issuing bank. Therefore, you are requested to kindly convey message to issuing bank for early repatriation of the bill. Your immediate attention and reply is highly appreciated."

UNQUOTE

ANALYSIS

Two documentary credits were issued and relayed by the advising bank, to a second advising bank (via SWIFT MT710). Subsequently, the credits were received by the beneficiary via their own bank. Both credits were available by negotiation with any bank.

In the sequence of events, the beneficiary made a presentation under both credits. The beneficiary's bank forwarded both sets of documents to the Country D office of the issuing bank according to the mailing instructions in the credit.

Case No.1

It appears that no refusal notice was sent by the issuing bank. The maturity date was advised to the beneficiary's bank in a SWIFT message that included "*Subject to our further authentication and payment from applicant, ….*" and "*Applicant has agreed for the payment of the A/M bill for USD 112,000/- on maturity dated 2018 July 04, and we will remit payment, …"*.

The issuing bank's reference to 'further authentication' and, more importantly, receipt of payment from the applicant is not acceptable. The undertaking to honour when issuing a documentary credit is on the issuing bank and so is the obligation to honour once a complying presentation is made. It is therefore not correct to base honour from the issuing bank being subject to any further authentication or payment by the applicant.

It is not clear from the information provided, if any comment was made to the beneficiary with regard to the wording highlighted in the preceding paragraph, or whether the beneficiary's bank contacted the issuing bank to object to the wording and to remind the issuing bank of its obligation under UCP 600 article 7 to honour the complying presentation.

In any event, and after the issuing bank had provided the notification of the due date, the beneficiary's bank then agreed to a request to act on its nomination to negotiate, by negotiating the presentation for USD112,000 made under Case No. 1 and advancing the funds to the beneficiary.

The issuing bank did not honour the presentation on the due date.

Notwithstanding the wording of the issuing bank's message, and as no discrepancies were identified, the issuing bank was liable to honour on the due date. Such honour was due whether or not the applicant provided the issuing bank with covering funds.

Case No.2

Discrepancies had been identified and a refusal notice had been issued. There appears to be no dispute as to the validity of those discrepancies or the content of the refusal notice.

It is to be assumed that the refusal notice included a status of holding documents pending further instructions from the presenter (UCP 600 sub-article 16 (c) (iii) (a)) or, that the issuing bank was holding the documents until it received a waiver from the applicant and accepted it, or it received further instructions from the presenter prior to agreeing to accept that waiver (UCP 600 sub-article 16 (c) (iii) (b)). In either event, the issuing bank was not at liberty to release the documents to the applicant unless honour occurred or that they were so instructed by the presenter.

In the issuing bank's message 1, it is stated:

"*Subject to our further authentication and payment from applicant, …"*

and

"*At this point we have already advised your of discrepancies to which we have not received any response till date. We are now as per request from the applicant side, prepared to provide you with an applicant acceptance for the payment of amount at due date by the applicant.*"

and

"*In view of the above we seek to deliver the documents to the applicant against the acceptance and undertaking to pay this liability to your bank on due date. As per the conditions governing the issuance of the mentioned letter of credit and the terms and conditions of the captioned credit we will deliver the documents to the applicant against the acceptance and undertaking to pay to you on due date unless your bank respond within five working days accordingly after which time we will release documents.*

If we do not hear from you within five working days we shall deem that you agree to the acceptance in which case the due date will be as follows in order of payment date: ……..."

In the issuing bank's message 2, it is stated:

"As per our swift MT998 date ….. Ref. No. …… "Applicant has agreed for the payment of the A/M bill for USD131,000.00 on maturity date:…"

and

"Please note applicant has stated that the payment will be arranged before…"

Once again, the issuing bank's reference to 'further authentication' and, more importantly, receipt of payment from the applicant is not acceptable. The undertaking to honour when issuing a documentary credit is on the issuing bank and so is the obligation to honour once a complying presentation is made or discrepancies are waived by the applicant and that waiver is accepted by the issuing bank. It is therefore not correct to base honour from the issuing bank being subject to any further authentication or payment by the applicant.

Discrepancies had been advised to the beneficiary's bank and instructions sought for their handling. However, the subsequent two messages sent by the issuing bank, apparently sent in the absence of any instructions from the beneficiary's bank, merely include an applicant acceptance offer rather than acceptance of the documents, or an indication of an acceptance of any waiver of the applicant, by the issuing bank.

The messages from the issuing bank do not follow defined letter of credit practice as there is no indication that the applicant has provided the issuing bank with a waiver (as contemplated by UCP 600 sub-article 16 (c) (iii) (b)) or that the issuing bank is conveying an acceptance of any such waiver (under the same sub-article). If such a waiver had been issued and accepted, there would be no need for the two messages that were sent.

On the basis of the refusal notice that had been issued, and whichever of the two status were incorporated therein, the issuing bank was not authorised to release the documents to the applicant. The absence of a reply to the issuing bank's message 1 does not modify the requirements of UCP 600 article 16 in this respect. If the issuing bank were to dispose of the documents, without honour occurring, it could only be to the presenter in accordance with UCP 600 sub-article 16 (e). Disposal of the documents to the applicant without the express consent of the beneficiary's bank, as presenter, would invoke preclusion under UCP 600 sub-article 16 (f).

The issuing bank did not honour the presentation on the due date.

Notwithstanding the above, and from the information provided, it is not known whether the beneficiary was specifically referred to this offer; if so, whether it was advised as to the consequences of acceptance of the offer; or whether it accepted or rejected this 'offer', although it may have been optimal if, as an interim measure, the beneficiary's bank had reverted to the issuing bank indicating that no agreement could be given until the beneficiary responded.

In any event, the applicant and the issuing bank were in no position to enforce or act upon a time limit for a response to the 'offer'. The documents were to remain held until such time as the beneficiary's bank (as presenter) provided instructions for their further handling. If the documents were released to the applicant without instructions from the beneficiary's bank, the issuing bank was liable to honour on the due date.

In the context of the issues raised in this query, the following UCP 600 sub-articles should be noted:

UCP 600 sub-article 7 (a) includes the following wording "Provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour."

UCP 600 sub-article 9 (a) states: "A credit and any amendment may be advised to a beneficiary through an advising bank. An advising bank that is not a confirming bank advises the credit and any amendment without any undertaking to honour or negotiate."

UCP 600 sub-article 12 (c) states: "Receipt or examination and forwarding of documents by a nominated bank that is not a confirming bank does not make that nominated bank liable to honour or negotiate, nor does it constitute honour or negotiation."

CONCLUSION

Based on the information available:

Case No.1 - the issuing bank was obligated to honour.

Case No.2 – the issuing bank was obligated to honour if it had released the documents to the applicant without the agreement of the beneficiary's bank.

Any claim for interest is outside the scope of the UCP 600.

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,

Andrew Wilson
Permanent Observer to the United Nations
Interim Director, Financefor Development
International Chamber of Commerce