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Banking Commission

Consolidated draft Opinions of the Banking Commission, July 2024

- **470/TA 941**
- **470/TA 942**
- **470/TA 943**
- **470/TA 944**
- **470/TA 945**

- For reference purposes the text of Opinion R491 is attached in the email

Ms. Christina E. Seierup
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Chair,
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Denmark

4 March 2024

Document 470/TA.941

Dear Ms. Seierup,

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

QUOTE

We kindly request your Official Opinion to the below query concerning a documentary credit issued subject to UCP 600.

Amongst other documents, the documentary credit called for a FULL SET CLEAN ON BOARD OR SHIPPED NEGOTIABLE MARINE BILLS OF LADING.

The presented bill of lading indicated the following statement on the document: *"Cargo Conditions As Per Survey Report issued by [name of survey company]."* (Note that the Survey Report was neither required by the documentary credit nor presented)

The issuing bank refused the presentation stating the following discrepancy: *"UNABLE TO DETERMINE IF CLEAN BILLS OF LADING PRESENTED AS BILLS OF LADING STATES CONDITION OF CARGO AS PER SURVEY REPORT ISSUED BY [name of survey company]"*

The argument from the issuing bank, for raising the discrepancy, is that since the survey report was not included as a part of the presented bill of lading it was not possible to determine that the bill of lading was in fact "clean".

The nominated bank's counter-argument was that even if UCP 600 article 27 is applied, the clause in the bill of lading did not expressly declare a defective condition. This is qualified by ISBP 821 paragraph E20 which provides examples as to what is considered "clean" or "not clean". For example, ISBP 821 paragraph E20

(b) provides an example where the statement in the bill of lading is considered inconclusive i.e., packaging may not be sufficient for the sea journey. Such wording does not expressly declare a defective condition of the packaging. The same principle would apply to the clause in the bill of lading in this case.

On the basis of the above, we ask the view of the ICC Banking Commission on the following questions:

1: Is the refusal raised by the issuing bank valid?
2: If the survey report had been presented along with the bill of lading, would it be subject to examination by the issuing bank (taking UCP 600 article 27 into account) or will it be disregarded (according to UCP 600 sub-article 14 (g))?

UNQUOTE

ANALYSIS

A credit was issued subject to UCP 600 requiring presentation of a full set clean on board or shipped negotiable marine bills of lading. The presented bills of lading included a statement indicating: “Cargo Conditions As Per Survey Report issued by [name of survey company].” The survey report was not required to be presented under the terms and conditions of the credit.

The issuing bank considered the bill of lading to be discrepant on the basis that as the survey report was not included as a part of the presentation, it was not possible to determine if the bill of lading was “clean”.

UCP 600 article 27 states that a clean transport document is one bearing no clause or notation expressly declaring a defective condition of the goods or their packaging, and that the word “clean “need not appear on a transport document.

Furthermore, ISBP 821 paragraph E20 highlights that a bill of lading is not to include a clause or clauses that expressly declare a defective condition of their packaging.

The statement on the bill of lading did not specifically indicate any express reference to a defective condition of the goods or their packaging. It is not for a document examiner to go beyond this by investigating references to another document which is not required under the terms and conditions of the credit.

Even if the survey report had been presented, UCP 600 sub-article 14 (g) clearly states that a document presented but not required by the credit will be disregarded and may be returned to the presenter.

It is also worth noting that the word “Conditions” is a very generic designation and can encompass factors such as terms, requirements, circumstances, environment, qualifications, and more. It is not a term, in the context in which it has been used, that can be checked by a document examiner, nor should it be.

CONCLUSION

1. No, the refusal by the issuing bank was not valid.
2. No, if a survey report had been presented it should be disregarded.

Yours Sincerely,

Tomasch Kubiak
Policy Manager Banking Commission
International Chamber of Commerce

Ms. Christina E. Seierup
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Chair,
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16 April 2024

Document 470/TA.942

Dear Ms. Seierup,

Thank you for your query regarding URDG 758. Please find below the opinion of the ICC Banking Commission Technical Advisers.

QUOTE

A demand guarantee, subject to URDG 758 and for which there was no mention of any applicable law or jurisdiction, was issued by a guarantor in Country A in favour of a beneficiary in Country B. The guarantee was advised to the beneficiary via an advising bank in Country B.

The guarantee included the following requirement:
"*As we have agreed to provide the Guarantee on behalf of the Principal, we, [Guarantor], hereby irrevocably and unconditionally undertake to pay You, [beneficiary] not exceeding the above amount upon receipt of the Beneficiary's written request containing the Beneficiary's statement indicating in respect to what clause and explaining which obligations the Principal has not fulfilled his obligations under the Contract, with no necessity for you to provide any additional evidence of such Principal's breach*."

The guarantee further stated:
"*For identification purposes the Beneficiary's payment request shall be submitted via its servicing bank [Bank B], SWIFT: [SWIFT address of Bank B] that will confirm that the Beneficiary's signature(s) thereon is/are authentic and legally binding upon the Beneficiary."*

Elsewhere in the guarantee, there is a reference to a reduction clause which states: "*Upon receipt of the documents specified … the Bank notifies the Beneficiary*

on decreasing the amount of the guarantee or termination of the guarantee by means of authenticated SWIFT message, sent via the Beneficiary's bank [Advising Bank and [SWIFT address of Advising Bank]."

Following the issuance of the guarantee, Country B was subject to comprehensive and mandatory sanctions that were applicable to the guarantor. Subsequently, the guarantor revoked the SWIFT keys previously exchanged with the advising bank.

Shortly before the expiry date of the guarantee, a "demand" was presented to the guarantor. The "demand" was received as a letter received via courier service, apparently from the advising bank but sent from a country other than Country B. The letter was followed by an unauthenticated SWIFT MT999, apparently from the advising bank.

The content of the MT999 was as follows, "*ACCORDING TO THE INFORMATION OF DHL COURIER SERVICE THE BENEFICIARY'S REQUEST FOR PAYMENT AND STATEMENT NO. 1 UNDER OUR COVER LETTER NO [number of cover letter] WAS DELIVERED TO YOUR GOOD BANK. PLEASE KINDLY CONFIRM RECEIPT OF THE DOCUMENTS AND PROVIDE US WITH THE DATE OF PAYMENT VIA MT999 TO FURTHER INFORM THE BENEFICIARY*."

As both means of delivery were not authenticated and no confirmation that the beneficiary's signatures are authentic and legally binding upon the beneficiary were received, the guarantor did not consider this to be the final demand according to URDG 758 sub-article 14 (c), on the basis that the required SWIFT message is deemed not to have been presented.

As background, the beneficiary did not fulfil its obligations under the contract. However, the reason for this was that they were prevented from doing so because of the sanctions that had been imposed. Likewise, it should be added that the advising bank did not attempt to forward an authenticated SWIFT message via another bank or contact the guarantor for alternative means to present a demand.

Based on the above, we ask kindly for an Official Opinion to the following questions:

1. Is it correct to consider the demand as not having been presented, as both means of delivery were not authenticated? Hence, there was no confirmation that the beneficiary's signature(s) are authentic and legally binding upon the beneficiary.
2. Would it constitute a valid refusal to state "SWIFT message not authenticated as required by the guarantee"?

3. Would it make a difference, in respect of the above answers, if the revoking of the SWIFT keys were based upon the policy of the guarantor or the applicable sanctions?

UNQUOTE

ANALYSIS

A demand guarantee was issued subject to URDG 758, including the following requirement: "*For identification purposes the Beneficiary's payment request shall be submitted via its servicing bank [Bank B], SWIFT: [SWIFT address of Bank B] that will confirm that the Beneficiary's signature(s) thereon is/are authentic and legally binding upon the Beneficiary."* It should be noted that this requirement does not infer that the demand and accompanying confirmation be made by SWIFT – it merely provides the SWIFT address of the advising bank.

A written demand was made by the beneficiary via courier service and apparently relayed through the advising bank directly to the guarantor. Although the courier details indicated a different country than that of the advising bank, it still represented a valid presentation. The demand was followed by an unauthenticated SWIFT message sent

by the advising bank, to the guarantor, seeking the guarantor's confirmation of receipt of the beneficiary's demand.

The content of the query evidence that the role of the "servicing bank" was taken on by the advising bank. As URDG 758 has no definition of a "servicing bank" then in theory, any bank could have provided the requisite beneficiary authentication in any manner as noted above.

From the query it appears that the guarantor was expecting an authenticated SWIFT message from the servicing / advising bank confirming that the beneficiary's signature, on its demand, was authentic and legally binding upon the beneficiary. However, the unauthenticated SWIFT message and the written demand were silent in this respect. Based on the wording of the guarantee, which did not mandate for an authenticated message from the servicing / advising bank, confirmation could have occurred via:

a) the advising bank or the beneficiary's "servicing bank" providing its certification manually on the beneficiary's written demand;

b) a separate written certification issued by the advising bank or the beneficiary's "servicing bank", or;
c) a SWIFT message sent by the advising bank or the beneficiary's "servicing bank" providing the certification, authenticated or non-authenticated.

For reference purposes, ISDGP 814 states:
"156. The URDG do not require that the beneficiary's signature is countersigned, certified or attested by any bank. Accordingly, the guarantor can only require that additional bank's countersignature, certification or attestation of a signature if the guarantee expressly so provides.
157. When the bank of the beneficiary countersigns or otherwise certifies in any form the signature of the beneficiary, that bank should not be deemed to certify the authority of the signatory to present a demand on behalf of the beneficiary. Rather, the countersigning or certification only indicates that the bank has satisfied itself as to the apparent identity of the person who signed the document".

ISDGP 814 paragraphs 88 and 89 do not refer to the situation outlined within this query, as the guarantee did not prescribe that the beneficiary's demand nor the accompanying bank certification be made via an *authenticated* SWIFT message.

URDG 758 sub-article 14 (c) does not apply to this query as the guarantee provided for a written demand.

However, URDG 758 sub-article 14 (b) is applicable "A presentation has to be complete unless it indicates that it is to be completed later. In that case, it shall be completed before expiry". From the query, it would seem that the presentation did not contain such a statement and, as such, the guarantor's presumption of an incomplete presentation is not correct.

Subsequent to the issuance of the guarantee, the country of the beneficiary was subject to sanctions that were also applicable to the guarantor. The guarantor must adhere to the specific content of the mandatory law. The issue of sanctions has been addressed in previous ICC opinions. For example, Opinion **TA930rev indicated, in part: "**More recently, this issue has been addressed in ICC Opinion TA.920rev, wherein it is stated that the Banking Commission cannot comment on specific sanctions or regulations and their application in respect of the involved parties, and that any delay in, or refusal to pay due to a sanctions clause is outside of the UCP 600. It was further stated that, unless mandatory law or regulation prohibits the issuing bank from honouring, it must do so if a complying presentation is made".

This Opinion is equally applicable to guarantees. Guarantors, and all parties, must follow applicable mandatory law.

If the SWIFT keys were cancelled by the guarantor solely based on its internal policies, they would have a duty to amend the demand guarantee accordingly and allow the beneficiary the opportunity to make a complying demand. When mandatory law requires the cancellation of SWIFT authenticator keys, it must be complied with. However, if the guarantor's mandatory law is not applicable to the beneficiary, the guarantor must amend its guarantee to allow a complying demand from the beneficiary, without an advising bank's authentication.

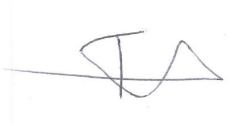
CONCLUSION

1. No. A paper presentation from the beneficiary was required by the guarantee and was made. The lack of a bank's confirmation and the fact that the presentation did not indicate it was incomplete means an examination is required.
2. No. The guarantee did not clearly request that an authenticated SWIFT message must be sent by the advising / servicing bank.
3. Yes. Revocation of SWIFT keys by the guarantor due to an internal policy cannot be used as a reason to refuse a demand.

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,



Tomasch Kubiak
Policy Manager Banking Commission
International Chamber of Commerce

Ms. Dana Milena Enss
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7 May 2024

Document 470/TA.943

Dear Ms. Enss,

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

QUOTE

Our bankers advised to us a Letter of Credit (LC) that expired in our country, and which stated that it was available at sight with any bank. The LC was advised only, not confirmed.

We forwarded the documents required under the LC to the advising bank, stating on our cover letter: “Please send documents on approval basis”, in order to have the documents immediately sent to the issuing bank, without further delay. The advising bank forwarded our documents to the issuing bank without a specific statement of “on approval basis”, but with the request to remit proceeds to their (advising bank’s) account. Unfortunately, the documents were lost in transit between the advising bank and the issuing bank.

Through the advising bank, we claimed payment from the issuing bank with reference to UCP 600 article 35 (paragraph 2) which provides that where documents have been determined to be compliant by the nominated bank but are lost in transit, the issuing bank or confirming bank has to honour or negotiate. Accordingly, we requested the advising bank, to send a statement to the issuing bank, confirming that the presentation was compliant.

The advising bank informed us that they cannot make such a statement, as our statement on the presenting letter “please send documents on approval basis” is by them and in the market understood that it is the beneficiary’s wish that a document examination is not to be performed by the advising bank.

They also stated, that even if the documents would have been examined and the result would have been a compliant presentation, UCP 600 article 35 does not cover the scenario of an advised LC available with any bank as this article clearly makes reference to “a nominated bank (…) whether or not the nominated bank has honoured or negotiated”. As the LC was available with any bank and not with a named nominated bank, and as they were merely acting as advising bank, article 35 does not apply here.

We would like clarification on the following questions:

1. Is a statement on a beneficiary’s cover letter “please send documents on approval basis” comparable to statements such as “as presented”, “without checking documents” etc., and to be understood, as per international standard banking practice, that documents should be sent to the issuing bank without being examined under UCP 600?
   If the answer is no, what would be the correct handling of a presentation under UCP 600 with such a statement from the beneficiary?
2. Is the following assumption correct: In case the LC is stating available with a named nominated bank, a document examination is only required if the named nominated bank is explicitly requested by the beneficiary to honour or negotiate?
3. Is the following assumption correct: For a named nominated or confirming bank, a statement “send on approval basis” means that presented documents must be examined and will, in case of their non-compliance, be forwarded to the issuing bank and that a refusal notice in accordance with UCP 600 sub-article 16 (c) (iii) (d) will be sent to the presenting beneficiary?
4. Is the statement that UCP 600 article 35 covers only a named nominated bank and confirming bank, in case of documents lost in transit, correct?
5. Provided, under an advised LC available with any bank, the presenting bank forwards documents to the issuing bank without a statement of “we have honoured the presentation” or “we negotiated the documents”, and the presenting bank has stated to the issuing bank that it has examined the documents and has determined the same as a compliant presentation, would UCP 600 article 35 (paragraph 2) apply, and could the beneficiary therefore claim payment from the issuing bank where documents are lost in transit?

UNQUOTE

ANALYSIS

The credit was available with any bank and payable at sight. Therefore, the advising bank or any other bank could have been approached by the beneficiary to accept the nomination to honour or negotiate a complying presentation. The beneficiary, in its cover letter to the advising bank, stated, “Please send documents on approval basis”. There would appear to have been no request for the advising

bank to act in the capacity of a nominated bank and to honour or negotiate. Accordingly, the advising bank did not honour or negotiate, nor did it examine the documents. Instead, it merely forwarded them to the issuing bank, without a statement that they were forwarded “on approval basis”, but with the request to remit proceeds to their account.

The documents were lost in transit between the advising / nominated bank and the issuing bank.

The query contains various questions regarding the applicability of the second paragraph of UCP 600 article 35; especially in respect of the role of a bank that simply forwards the documents to the issuing bank without examination.

For the purpose of questions 1 and 3, the term “send documents on approval basis” is not defined in UCP 600 or ISBP 821. However, it is widely understood to mean that the documents are to be sent to the issuing bank, e.g., due to possible discrepancies identified by the beneficiary during the preparation and collation of documents or simply to get the documents to the issuing bank without delay, and without prior examination by the receiving bank. Such an outcome would often also include an instruction such as “send without checking documents”.

Whether the documents are to be examined by an advising bank under a credit available with any bank, and whether that bank should also act in the capacity of a nominated bank, should be agreed between the beneficiary and the advising bank at the latest on the date of presentation.

For the purpose of question 2, according to UCP 600 sub-article 12 (a), “[u]nless a nominated bank is the confirming bank, an authorization to honour or negotiate does not impose any obligation on that nominated bank to honour or negotiate, except when expressly agreed to by that nominated bank and so communicated to the beneficiary.” As such there is no obligation on a bank that is nominated to honour or negotiate, and that is not a confirming bank, to examine the documents. It is therefore correct, there was no obligation on the advising bank to examine the documents.

For the purpose of question 4, according to UCP 600 article 2, a “[n]ominated bank means the bank with which the credit is available or any bank in the case of a credit available with any bank.” A nomination under a documentary credit is to be seen as an offer from the issuing bank, but a named nominated bank, or any bank as in this case, has the right not to act on its nomination. Even if the nominated bank

does not honour or negotiate, it may still agree with the beneficiary to examine the documents and forward same to the issuing bank.

The second paragraph of UCP 600 article 35 reads, “If a nominated bank determines that a presentation is complying and forwards the documents to the issuing bank or confirming bank, **whether or not the nominated bank has honoured or negotiated**, an issuing bank or confirming bank must honour or negotiate, or reimburse that nominated bank, even when the documents have been lost in transit between the nominated bank and the issuing bank or confirming bank, or between the confirming bank and the issuing bank.” [emphasis added].
As can be seen from this wording, the rule also covers the situation where a nominated bank has determined that the presentation is complying but has not honoured or negotiated and, in such case, the risk that the documents are lost in transit between the nominated bank and the issuing bank lies with the issuing bank.

For UCP 600 article 35 to apply, a nominated bank must first determine that the presentation is complying. To do that, it must have examined the documents. Even if it did not honour or negotiate, but still determined that the presentation complied, and the documents were lost in transit between the nominated bank and the issuing bank, the issuing bank should honour. Noting that the issuing bank will be at liberty to request copies of the presented documents prior to effecting honour.

CONCLUSION

1. Yes. The term is widely understood to mean that the documents should be forwarded to the issuing bank without any prior examination.
2. No. However, unless the nominated bank is a confirming bank or has otherwise agreed with the beneficiary to honour or negotiate, there is no obligation on that bank to examine the documents, either of their own volition or as a result of a request from the beneficiary.
3. No. The documents can be sent to the issuing bank without prior examination. However, the issuing bank must follow UCP 600 sub-article 16 (c) (iii) (d).
4. No. As stated in UCP 600 article 2, a nominated bank can also be any bank in the case of a credit available with any bank.
5. Yes, if the documents have been lost in transit under such circumstances, UCP 600 article 35 would apply, and the nominated bank could require the issuing bank to honour.

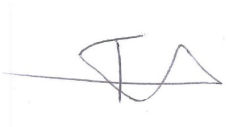
the Banking Commission renders its approval or disapproval of these opinion(s) at the next scheduled meeting.

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,



Tomasch Kubiak
Policy Manager Banking Commission
International Chamber of Commerce

Mr. Buddy Baker
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7 May 2024

Document 470/TA.944

Dear Mr. Baker,

Thank you for your query regarding UCP 600 and ISBP 821. Please find below the opinion of the ICC Banking Commission Technical Advisers.

QUOTE

It is common for commercial letters of credit issued subject to UCP600 to call for presentation of bills of lading consigned to order of shipper, blank endorsed, charter party bills of lading acceptable. Concerns have been expressed, especially for banks when acting as confirming banks, over whether a bill of lading is compliant when a party other than the beneficiary may be named, not as the shipper but as an agent for the shipper.

In a particular case that has given rise to this query, a charter party bill of lading was presented that evidenced “To Order” in the consignee field. The charter party bill of lading shipper box indicates “[YYYY Company] “for and o/b of” [Beneficiary Company]”. We believe that this makes “Beneficiary Company” the shipper of record and the party who has the rights of contract under the charter party bill of lading which, per the footnoted link*, is an important consideration.

“Beneficiary Company” has endorsed the charter party bills of lading in blank, without restrictions or qualifications, (stamp with Beneficiary Company’s name and signed in ink) which makes the charter party bills of lading bearer instruments. ICC’s stated goal is to ensure that the charter party bills of lading can be used by the buyer to obtain the goods. In this case, we see no restrictions relative to their obtaining the goods once the issuing bank releases the charter party bills of lading to the applicant.

Please provide us with your official opinion regarding the following question:

- Does the endorsement on a bill of lading consigned to order, blank endorsed need to match the name in the shipper's box, i.e., in this case, does YYYY Company need to sign "[YYYY Company] "for and o/b of" [Beneficiary Company]" or is the Beneficiary Company's blank endorsement sufficient?

We recognize that Official Opinion R491 may address this issue but for letters of credit issued subject to UCP500 (hence, it should probably be considered retired). And current ISBP 821 paragraph G12 (a) says, "When a charter party bill of lading is issued "to order" or "to order of the shipper", it is to be endorsed by the shipper. An endorsement may be made by a named entity other than the shipper, provided the endorsement is made for [or on behalf of] the shipper." This does not directly address this situation.
*029_2018_CML1810.pdf (nus.edu.sg)

UNQUOTE

ANALYSIS

A documentary credit was issued subject to UCP 600, requiring presentation of bills of lading consigned to order of shipper, blank endorsed, with charter party bills of lading being acceptable. The field for "shipper" on the presented charter party bill of lading indicated "[YYYY Company] for and o/b of [Beneficiary Company]", and was endorsed in blank by the "Beneficiary Company" with a stamp and signature.

ICC Opinion R491, in respect of a credit subject to UCP 500, remains valid under UCP 600. In this instance, the field for "shipper" on the bill of lading indicated "Third Party Trading Company for and on Behalf of Company T", and blank endorsement with a stamp only stating "Company T". It was concluded that such an endorsement was acceptable on the basis that it could be provided either by "Third Party Trading Company (as agent for Company T)" or solely by "Company T".

Based on the still valid conclusion of R491, the blank endorsement on the charter party bill of lading in this particular query could have been provided by either "YYYY Company" either with or without the addition of "(as agent for Beneficiary Company)" or "Beneficiary Company".

CONCLUSION

Blank endorsement by "Beneficiary Company" is acceptable.

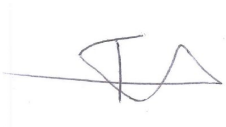
the Banking Commission renders its approval or disapproval of these opinion(s) at the next scheduled meeting.

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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7 May 2024

Document 470/TA.945

Dear Mr. Baker,

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

QUOTE

A nominated bank receives a set of compliant documents (including a full set of clean on-board ocean bills of lading, made out to order and blank endorsed) under an LC subject to UCP 600.

The nominated bank engages with the beneficiary to negotiate the compliant documents on a without-recourse basis and informs the issuing bank of its decision to act on its nomination under the LC.

The documents are included in a package which is sealed and sent to the issuing bank via international courier pursuant to the LC terms and conditions.

A few days later, the issuing bank transmits an authenticated SWIFT message to the nominated bank claiming to have received an empty, undamaged, sealed envelope from the nominated bank.

The nominated bank tracks the package online and sees that the courier attests to the following:

1) the arrival of the package at the issuing bank's counters and
2) the package's weight (as declared by the nominated bank to be 0.66 lbs) had not changed from its place of origin to its destination.

In the light of the above, the nominated bank immediately transmits a copy of the set of compliant documents to the issuing bank by email. It also sends an authenticated SWIFT message to the issuing bank claiming that the set of compliant

documents have been lost in transit and accordingly claims payment of the amount negotiated from the issuing bank based on UCP600 – Article 35, 2nd paragraph.

The issuing bank rejects the nominated bank's claim via authenticated SWIFT message alleging that paragraph 2 of UCP600 - Article 35 is not applicable as its internal CCTV can evidence that the envelope supposed to include the set of compliant documents was received sealed but empty.

Consequently, the set of documents could not be lost in transit. Moreover, in support of its decision to reject the nominated bank's claim for payment, the issuing bank further states that it has independently verified with the courier company delivering the package as to whether such package was lost in transit and has not received any response from the latter.

The nominated bank disagrees with the issuing bank's allegations and supports its claim arguing that the sealed package including the set of original and compliant documents did not leave its premises empty as evidenced by the courier company's website showcasing that the package weighted 0.66 lbs (i.e., the weight declared by the nominated bank) when it arrived at the courier company's facility.

Questions:

1. Is the issuing bank entitled to refuse the nominated bank's claim for payment made according to UCP600 Article 35 by arguing that the set of original documents subject to the dispute, did not qualify as documents lost in transit?
2. Is a confirmation from the courier company stating that documents were lost in transit a requirement to trigger the application of the UCP600 Article 35provisions?
3. In the light of the above-mentioned information exclusively, what would have been the best course of actions for the issuing and nominated banks?
4. What alternatives would the applicant have to release the goods without the original bills of lading being delivered?

UNQUOTE

ANALYSIS

Compliant documents were purportedly sealed in an envelope and couriered by the nominated bank to the issuing bank under a documentary credit issued subject to UCP 600. Subsequently, the issuing bank informed the nominated bank that the received envelope was empty.

The nominated bank despatched a copy of the compliant documents to the issuing bank, simultaneously forwarding an authenticated SWIFT message claiming payment on the basis of the 2nd paragraph of UCP 600 article 35, i.e. “If a

nominated bank determines that a presentation is complying and forwards the documents to the issuing bank or confirming bank, whether or not the nominated bank has honoured or negotiated, an issuing bank or confirming bank must honour or negotiate, or reimburse that nominated bank, even when the documents have been lost in transit between the nominated bank and the issuing bank or confirming bank, or between the confirming bank and the issuing bank." The issuing bank counter-claimed that the documents were not lost because the envelope, despite being sealed, had no content.

It is not appropriate to conjecture upon the possible events that resulted in this incident, be it an error in packing, theft, or loss or removal at some point during the handling, transit and shipping process. Such issues are a matter for the parties concerned and are outside the scope of UCP 600. Presuming that the receiver did appear to receive a weighted package as reported by the courier, it is presumed that the sender did insert the required documentation.

Nevertheless, the end result is that the documents were missing or lost. For this query, the term "lost" means that the items that were supposed to be inside the envelope were unaccounted for. Thus, even though technically there is nothing physically "lost" from the empty envelope, the expected contents are missing, and that is what is referred to as "lost" in the context of this query and UCP 600. Loss in transit can be pure 'loss', e.g., the mislaying of a package, or irretrievable damage to a package (package destroyed or badly damaged, or through theft.

CONCLUSION

1. No. The documents, in the context of UCP 600 article 35, are to be considered as lost in transit.
2. No. The decision is to be made solely upon the basis of UCP 600 article 35.
3. The nominated bank had already pursued the best course of action by sending a copy of the compliant documents to the issuing bank whilst making a claim by authenticated message. The issuing bank should honour in accordance with UCP 600 article 35.
4. The applicant, who requested issuance subject to UCP 600 including application of article 35, would be required to arrange (and pay for) a shipping guarantee for the release of the cargo.

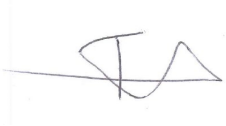
The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission's Technical Advisers based on the facts under "QUOTE" above. They do not necessarily reflect the opinion of the ICC Banking Commission until the Banking Commission renders its approval or disapproval of these opinion(s) 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,



Tomasch Kubiak
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International Chamber of Commerce