



THE READERS SPEAK

WHEN CONFIRMER REFUSES, WHAT HAPPENS TO THE CONFIRMATION?

Query:

We confirm a letter of credit for a customer but the documents that are submitted are discrepant, thereby nullifying our confirmation. We then send them on to the issuing bank overseas on a collection basis.

The foreign bank then gets the applicant to sign a waiver for the discrepancies and the issuing bank then accepts the documents. When we receive notification that the issuing bank has accepted the documents, is the LC made whole and our confirmation re-instated?

UCP600 (Art. 8) states that the confirming bank must honor the credit if the documents “constitute a complying presentation”. I have heard some people say that once the acceptance is issued by the foreign bank, the confirmation is re-instated. Others argue that it is still not a complying presentation but one consisting of waived, discrepant documents, thereby still nullifying the confirmation. Who is correct?

DCW Responds:

A sufficiently worded and timely given refusal of a presentation received by a confirming bank does not “nullify” the confirmation; the refusal establishes a valid defense to the confirmer’s dishonor of that presentation and preserves that defense against an affirmative defense of preclusion (which displaces waiver and estoppel).

Forwarding the documents to the issuer should normally be done by a bank so as to constitute a presentation to the issuer under the LC. Nominated banks should avoid saying that they are forwarding documents on a “collection” or “approval” basis. That statement may accurately describe the forwarding bank’s role, but might also be interpreted as describing the receiving bank’s role, with the effect of excusing the issuer from processing the forwarded documents under the LC. A knowledgeable beneficiary wants his documents presented to the issuer for examination and payment under the LC. He wants to be paid, if at all possible, under, not outside, the LC. The issuer might decide the presentation complies. The applicant might waive discrepancies with the effect of inducing the issuer to honor. The issuer might inadvertently preclude itself from raising discrepancies. A forwarding bank should not assume that it is authorized by the beneficiary to switch the presentation on the

issuer from LC to documentary collection law and practice. In this regard, it is not necessary for any nominated bank, including a confirmer, to tell an issuer that the confirmer found the documents discrepant; it is enough for the confirmer to say that presentation is made to the issuer under its LC by the forwarding bank on behalf of the beneficiary and not to claim reimbursement for itself.

If, after confirmer refusal, the issuer honors its LC undertaking, whether or not

based on applicant waiver of discrepancies, that should not change the status of the nominated bank's confirmation or the status of its refusal notice. If the issuer only "half honors" (by accepting a draft or incurring a deferred payment undertaking but not paying at maturity), that should not affect the confirmer. To put it differently, preclusion is specific to the bank that precludes itself. In the question posed, the confirmer has not precluded itself from raising non-

compliance as a defense.

The analysis and result should apply whether the LC is subject to UCP600, UCP500, or the UCC. A confirmer is not bound by the issuer's obligation to honor documents that were rightfully refused by the confirmer.

Comments to all queries posed to DCW are not necessarily those of DCW and are not provided as legal advice. If legal advice or other expert assistance is required, the service of a competent professional should be sought.