



THE READERS SPEAK

“DOCUMENTS ACCEPTABLE IN SPITE OF ANY AND ALL DISCREPANCIES”

DCW Editorial Advisory Board Member

Joe Colleran Writes:

The October 2010 issue of *DCW* published an article I wrote about the *Fortis v. ADIB* case. Witnesses in that case characterized the ADIB credit as “Synthetic” or “Structured”. Therefore I read with interest “Readers Speak” in the July/August 2011 issue of *DCW*. I also read comments in the June 2007 *DCW* issue. I am still concerned with certain components of such credits.

First, the “purpose” of the credits and the content of the credits seem to be different. Some years ago I was involved in litigation concerning 19 LCs. In reading the credits they seemed to be normal commercial credits issued to pay for the importation of merchandise from the US to the issuing country. However, the credits were actually issued to move US Dollars from the issuing country to the US. The credits contained merchandise descriptions and regular commercial documents such as invoice, bill of lading, insurance document, etc. Since no merchandise was to be shipped, the documents presented to US banks were fraudulent – they were actually created by the conspirators. US banks, finding discrepancies in the documents, sent discrepancy notices to the issuing bank in accordance with UCP in effect at that time. Invariably, the issuing bank sent return wires to the US banks waiving the discrepancies (at least one and probably more officers of the issuing bank were part of the conspiracy.) Since payment was of utmost importance to the conspirators, discrepancies only served to delay payment and might actually result in non-payment. Accordingly, an amendment was sent by the issuing bank amending all credits still outstanding “Any and all discrepancies are waived.” In this situation, all 19 credits appeared to be issued to back the importation of merchandise, but the “purpose” of the credits was entirely different.

A similar situation seems to exist in the “synthetic” credits. Nevertheless, banks handling such credits cannot be concerned with the “purpose” of the credit; rather the banks must be concerned with the content of the credits and the regulations under which the credits were issued.

The ADIB credit contained a number of unusual instructions:

1. DOCUMENTS ACCEPTABLE IN SPITE OF ANY AND ALL DISCREPANCIES
2. TYPING MISTAKES DO NOT CONSTITUTE A DISCREPANCIES
3. LATE PRESENTATION OF DOCUMENTS IS ACCEPTED ON THE CONDITION THAT DOCUMENTS ARE PRESENTED WITHIN L/C VALIDITY
4. BILL OF LADING PRESENTING A GREATER QUANTITY/AMOUNT THAN SHOWN ON INVOICE IS ACCEPTABLE
5. DOCUMENTS SHALL BE ACCEPTABLE AS PRESENTED

Some of these are ludicrous and internally inconsistent. For example:

Are (1) and (5) the same? I think not. (5) refers only to documents whereas (1) refers to “*ANY AND ALL Discrepancies*”. (emphasis added).

(3) If documents are presented within validity then there is no “late presentation”.

(5) If the LC calls for 3 documents and only 2 are presented, can a bank claim “missing document” as a discrepancy?

This is merely nitpicking because if the credit states (1) DOCUMENTS ACCEPTABLE IN SPITE OF ANY AND ALL DISCREPANCIES, why does one need the other exceptions?

Further comments on DOCUMENTS ACCEPTABLE IN SPITE OF ANY AND ALL DISCREPANCIES are necessary. If this instruction is included in the credit any other instructions regarding discrepancies are unnecessary because such instructions are useless; however the instruction DOCUMENTS ACCEPTABLE IN SPITE OF ANY AND ALL DISCREPANCIES is a very dangerous instruction.

Example: A synthetic credit is issued for USD 3,000,000.00 and contains an expiration date of August 15, 2011. It contains the instructions DOCUMENTS ACCEPTABLE IN SPITE OF ANY AND ALL DISCREPANCIES. The purpose of the credit is to provide financing to the beneficiary, but any bank handling the credit must be guided by the terms of the credit and the UCP that governs it – the bank cannot be concerned with the “purpose” of the credit – it may not know the purpose of the credit. Suppose the beneficiary of the credit is aware of the specific transaction that is covered by this credit. However, the applicant of the credit owes the beneficiary USD 4,000,00.00 for a previous transaction. The bene presents documents and a draft for USD 7,000,000.00. This is a discrepancy – excess drawing, however the instruction “ANY AND ALL etc.” is present in the credit. Must the bank honor the drawing? The real question is on what basis does the bank refuse to honor the drawing?

Same credit - another example: The bene fails to present a draft and documents for USD 3,000,000.00 until October 15, 2011. Now the discrepancy is “late presentation” or “credit expired” (different banks express this discrepancy differently). Same questions as above result.

The worst example: The beneficiary presents a draft and documents for USD 7,000,000.00 on October 15, 2011. Again, same questions as above result.

Actually, that is not the worst example. What is there to prevent the bene from drawing for 15 million, 30 million, or one hundred million and presenting the documents one year later, two years later, etc? The amounts and expiration dates are limitless.

When a bank issues or confirms a credit containing the instruction DOCUMENTS ACCEPTABLE IN SPITE OF ANY AND ALL DISCREPANCIES how does it enter such a credit on its contingent liability records?

The beneficiary of such a credit has a gold mine in its hands!

The name “evergreen” was given to credits that stipulated a specific expiration date but contained a clause saying the credit would be automatically extended for one year from the present or future expiration dates. Such credits also contained a clause stipulating that the credit would not be extended if the issuing bank notified the advising bank a specific number of days prior to the then-expiration date that the credit would not be extended. Such a credit would be entered on the issuing bank’s contingent liability records showing the original expiration date – if the bank decided not to send a letter informing the advising bank that the credit would not be extended, the issuing bank merely changed the expiration date on its contingent liability records.

A bank that issues a credit containing the clause “DOCUMENTS ACCEPTABLE IN SPITE OF ANY AND ALL DISCREPANCIES” is engaging in the ultimate “evergreen” credit and any entries made on its contingent liability records are for record-keeping purposes only. As described above, the dollar amount and expiration date can be disregarded at will by the beneficiary.

I do not know if there is any standards for issuing “synthetic” or “structured” credits, but I do know that there is no UCP for Synthetic/Structured credits. Moreover, I feel that if a bank issues an LC and wishes certain discrepancies to be ignored, the bank should specify such discrepancies. Any bank that issues a credit containing only the instruction “DOCUMENTS ACCEPTABLE IN SPITE OF ANY AND ALL DISCREPANCIES” is asking for trouble. ■