

undertaking that turned solely on documents would be compromised. To an extent, technology has changed this dialogue radically. Today, there are systems in place that permit the applicant to determine the status of their LC accounts, permitting notice of when a presentation is received and, in some cases, to access images of the documents presented. The critical factor is that the judgment of the bank must be based on standard international letter of credit practice and not pressure from the applicant. Where there is such pressure and the basis for refusal seems questionable under standard international letter of credit practice, a court may well question the independence of the bank's judgment.

- 25. Discretion by the Issuer.** On the presentation of discrepant documents, the issuer can refuse them. While it can waive discrepancies, it is under no obligation to do so since its obligation is linked to a presentation that complies with the terms and conditions of the letter of credit.<sup>25</sup>
- 26. Approach the Applicant for a Waiver of Discrepancies.** While UCP600 Article 16(b) speaks of approaching the applicant for a waiver of discrepancies, there are really two waivers at issue, one by the issuer and one by the applicant. Although only the decision to waive by the issuer is determinative, it is not the one mentioned. UCP600 Article 16(b) does not help in understanding this difference in all probability because it is assumed that this point is obvious. Approaching the applicant is expressly mentioned because it has been a traditional principle of LC practice that the issuer should not approach the applicant prior to having made a determination that the presentation does not comply.
- 27. Agreement of the Issuer to the Applicant's Waiver.** UCP500 (1993) Article 14(b) (Discrepant Documents and Notice) focused on the ability of the issuer to approach the applicant for historical reasons. The need for the issuer's consent was presumed and unstated. This situation would have caused no particular question in the process of UCP600 absorbing the text of UCP500 Article 14(c) without any material change had it not been for the insertion into UCP600 Article 16(c)(iii)(b) of a more complete expression of waiver with an express reference to the issuer receiving applicant waiver and agreeing to accept it. Since this provision was not harmonized with the older provision regarding pre refusal waiver carried over from UCP500 and appearing in UCP600 Article 16(b), the question arises whether the issuer's agreement is only relevant in subarticle (c) and whether the applicant's waiver is decisive in subarticle (b). The reasons for this drafting can be explained in the drafting history of the two provisions which suggests that no difference was intended. Interpretation of the provisions should turn on policy considerations which are identical for both. It is the issuer's waiver that matters and whether described as its consent to the applicant's waiver or the issuer's own waiver, the issuer cannot be obligated to honor a non-complying presentation without waiver on its part, an action that cannot be implied from the act of approaching the applicant for waiver or it giving its waiver.<sup>26</sup> The act of approaching the applicant for a waiver does not imply that the issuer will itself waive the discrepancy absent an enforceable express undertaking to the effect that the issuer has consented to do so in advance and the few cases that have concluded otherwise are wrong.<sup>27</sup> While this interpretation is the only one that is consistent with the policies underlying the rule, prudent issuers will want to

25. ICC Opinion R 410 (UCP500) (when issuer determines that documents are discrepant, it can refuse them or waive discrepancies).

26. ICC Opinion R 418 (UCP500) (reference to previous ICC Opinions, which indicated that receipt of a waiver from the applicant does not bind the issuing bank to honour the documents).

27. ICC Opinions R 410 (UCP500) (issuer under no obligation to effect settlement even where applicant agrees to waive discrepancies); R 327 (UCP500) (applicant's waiver does not bind issuer); R 267 (UCP500) (applicant's waiver does not bind beneficiary); R 254 (UCP500) (issuer under no obligation to waive even if it receives "proper"

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avoid any debate about it by qualifying their communications to the applicant with an appropriate statement to the effect that any consent by the applicant to waiver is advisory and not binding on the issuer. They should similarly qualify any pre refusal statements to the beneficiary although such statements are highly problematic apart from the statement in UCP600 Article 16(c)(iii)(b) which brings the statement into the realm of post refusal waiver.

**28. The Issuer's Decision to Waive Discrepancies.** The applicant's waiver is relevant because it is part of the business decision of the issuer of whether or not it should waive the discrepancies. It relates to whether or not there will be a question about the bank's right to reimbursement from the applicant, not a matter that relates to the letter of credit undertaking. While it may forfeit its right to reimbursement from the applicant, the issuer can waive discrepancies without the consent of the applicant.<sup>28</sup> There are, however, other aspects of the waiver decision that are equally important, namely whether or not the issuer wishes to extend its credit to the applicant beyond the obligation represented in the LC. Waiver is beyond the terms and conditions of the credit. The issuer's credit obligation is conditioned on the timely presentation of a complying presentation by the beneficiary. Where the beneficiary has failed to do so, the issuer's obligation has not been triggered. If it waives the conditions of the credit, it does so above and beyond the credit. For that reason, judicial decisions that refer to a duty of the issuer or, even worse, a fiduciary duty, are seriously mistaken. It would be irresponsible for the issuer to make a decision to waive discrepancies and honor without making a separate credit assessment which should be made after the applicant signals that it is prepared to waive the discrepancies.

**29. What Constitutes a Waiver.** There is no indication in UCP600 Article 16 of what constitutes a waiver of discrepancies. Usually a waiver is manifested by making payment or otherwise honoring although pre refusal waiver can be implied from inaction.<sup>29</sup> As to whether or not a waiver can be oral, there is some doubt. The difficulty lies in the dangers created as a result of testimony about oral conversations between issuer and beneficiary. Whether such evidence should be admissible and the weight that it should be given is a matter for local law but the practices of the bank with respect to waiver would be highly relevant to such testimony.

**30. The Approach.** UCP600 Article 16(b) does not address the approach to the applicant other than by a casual mention. For that reason, the issuer will want to give careful consideration to the formality of its approach. Among the questions to be asked are what discrepancies are being waived, whether the applicant should be provided with a copy of the documents at that time, whether there should be a form and what it should say, whether the applicant's waiver is irrevocable, and whether any consideration has been given as to who has the authority to commit the applicant. While some of these matters should have been anticipated in the application or master credit agreement with the

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applicant waiver). The *Drafters' Commentary* at 73 suggests that they were aware of the difficulty although it would have been easier had they fixed it instead of commenting on it. They suggest that subarticle (b) should be interpreted in the same manner as subarticle (c) and that the issuer "has no obligation to accept [using here a different word than "agree" which is the term used in subarticle (c)(iii)(b)] a waiver it receives from the applicant." See e.g., *Bombay Indus., Inc. v. Bank of N.Y.*, N.Y.L.J. (N.Y. Sup. Ct. 1995).

28. Generally, the issuer would not do so, but it may do so in situations where the applicant is insolvent or otherwise unable to act but where the value of the goods justifies the business decision to purchase them.

29. One of the early reflections on waiver linked waiver and preclusion. ICC Opinion R 72 (UCP290) (issuer's notification that applicant accepted draft linked to failure to return documents in conclusion that issuer was liable). While this Opinion refers to an advice "that the beneficiary had accepted the draft for payment on the due date", the reference to the "beneficiary" must be a typographical error which is obvious in its context and does not render the opinion meaningless.