



International Chamber of Commerce

The world business organization

Policy and Business Practices

Commission on Banking Technique and Practice

Draft Opinions of the ICC Banking Commission

Attached are the consolidated Draft Opinions to be discussed at the October 2011 Banking Commission meeting to be held in Beijing.

These Draft Opinions represent the first to be completed with the involvement of the Group of Experts. The experts appointed to these Opinions were Ma Shen (China), Nicole Keller (Germany) and Pavel Andrlé (Czech Republic).

In respect of query 751, we would like to point out that views were sought from two eminent members of the ICC's Transport Commission. Their views supported the conclusion that has been reached.

In accordance with the agreed procedure, comments should be sent to the secretariat NO LATER than 2 weeks prior to the Commission meeting. National Committees are therefore requested to send their comments by **11 October 2011, end of business day (CET)**.

To: Natalie Montelongo at:

email: nmo@iccwbo.org

Please also copy your comments to Gary Collyer at:

E-mail: gary@collyerconsulting.com

Please bring all documents to the meeting. They will not be re-distributed.

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Mr. Ahsan Aziz,
Chairman,
Banking Commission,
ICC Pakistan National Committee
V.M. House, West Wharf Road
P.O. Box 4050
Karachi 74000
Pakistan

7 June 2011

Subject: Document 470/TA.744

Dear Mr. Aziz,

Thank you for your query regarding UCP 600. Please find below the opinion of the ICC Banking Commission Group of Experts and Officers.

QUOTE

We have an issue regarding non-payment of our export documents drawn under a LC.

Documents for USD48,652.50 were negotiated by our branch on 15 October 2010 but the issuing bank pointed out certain discrepancies. Our branch, in their reply, clarified the position and also removed the discrepancies by submitting amended documents within the presentation period, and also informed the issuing bank that since documents are now compliant with the L/C terms they are under an obligation to make payment in terms of their undertaking.

Meanwhile, it came to our knowledge that the issuing bank had allowed delivery of the goods to the applicant by endorsing an original bill of lading in their favour. This was brought to the notice of the said bank. Our branch also informed them that where the goods have been released there remains no justification for pointing out discrepancies in documents because taking delivery of goods by the applicant means an implied acceptance of those documents. It was also brought to their notice that after release of the goods, discrepancies in documents become meaningless. However, we are distressed to point out that instead of commenting regarding the release of goods, the said bank sent us a message insisting on their earlier stance that discrepancies have not been accepted and documents are being returned unpaid. It is interesting to point out that prior to sending their refusal message, they had already endorsed the B/L to the order of the applicant.



The documents (which included at the time of presentation a full set of 3/3 original bills of lading) are still held with the issuing bank.

We have a copy of the original bill of lading bearing the endorsement stamp and signature of the issuing bank as evidence of release of goods to the applicant.

We fail to understand the attitude of the issuing bank, and the way they have handled the documents in an unprofessional manner is highly painful. They are refusing payment when goods have already been released and the bank has been instrumental in the release of goods by endorsing the bill of lading. We informed them that when endorsing the bill of lading to the order of the applicant, they also had a duty of care to our bank and as a matter of best practice, should have obtained acceptance from the applicant for any discrepancies in the documents. Since they have endorsed the bill of lading to the order of the applicant, we hold them directly liable for making payment.

In reply, the said bank intimated to us that the applicant informed them that the goods are not as per L/C, and that payment cannot be effected. We advised them that issues relating to quality of goods should be resolved between buyer and seller outside the L/C therefore, there is no reason for non-payment. We also asked them to advise who authorized them to endorse the bill of lading without obtaining payment from the applicant? Our SWIFT message was sent to them on 8 December 2010 asking them to release payment to which they replied that the transaction has a signal of commercial fraud and according to their country law when the buyer has evidence of fraud they are allowed to postpone payment until the dispute is settled.

We advised them that an allegation of fraud should be supported by a court order and their argument is not valid and cannot be accepted unless a court order is produced. However, they do not agree with us and stated in their reply that according to their law, even if there is no court order stopping payment, the buyer has the right to stop payment as long as he has evidence of commercial fraud of the seller.

We are distressed to point out that the issuing bank has grossly mishandled our documents. They were not authorized to endorse the bill of lading in favour of the applicant without obtaining payment. Once they have done so, they are now bound to make payment, leaving apart the dispute between buyer and seller. This clearly proves their criminal connivance with the applicant that on the one hand they have allowed delivery of goods to them and on the other hand they are refusing payment on one pretext or the other.

We request an opinion from ICC whether our stance is correct.

ANALYSIS

Documents have been refused by the issuing bank on the basis of discrepancies that are not the subject of this query. The nominated bank sent amended documents within the presentation period but the issuing bank maintained its refusal of documents and informed the nominated bank that documents were being returned. It is not clear whether a further refusal message was sent in relation to the amended documents, but again this is not the subject of this query.

The nominated bank has not received back the documents which were said to be returned by the issuing bank. In this context, the issuing bank is required to return the documents in the same form and number of originals and copies as received from the nominated bank (see ICC Opinion R.214).

According to the text of the query the nominated bank received information, by way of a photocopy of an original bill of lading, that the issuing bank had assisted the release of the goods to the applicant by endorsing one original bill of lading. In view of this information, it would not be possible for the issuing bank to return a full set of original bills of lading following the release of one of them to the applicant.

Sub-article 16 (c) requires that a notice of refusal state the fate of the documents presented. For this presentation, the issuing bank decided to return the documents to the presenter.

By virtue of the fact that the documents have not been returned and that it would not be possible for the issuing bank to return all the documents in the form and substance as received from the nominated bank, the issuing bank is precluded under sub-article 16 (f) from claiming that the documents did not constitute a complying presentation.

CONCLUSION

From the evidence held by the nominated bank, it can be determined that the issuing bank endorsed one of the original bills of lading.

As the issuing bank did not return the documents, as stipulated in their notice, they failed to act in accordance with sub-article 16 (c) (iii) (c) and are precluded under sub-article 16 (f) from claiming that the documents are discrepant. The issuing bank is required to honour its undertaking.

The issues of potential fraud and the necessity of obtaining a court order to stop payment are subject to the applicable law and are outside the scope of UCP.



The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission’s Group of Experts and Officers 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.

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Yours sincerely,

A handwritten signature in black ink, appearing to read 'Thierry Senechal', with a stylized flourish at the end.

Thierry Senechal
Policy Manager
Banking Commission



Ms. Caroline Rantzau
ICC Denmark
Boersen
1217 Copenhagen K
Denmark

28 June 2011

Subject: Document 470/TA.745

Dear Ms. Rantzau,

Thank you for your query regarding URDG 758. Please find below the opinion of the ICC Banking Commission Group of Experts and Officers.

QUOTE

We kindly ask your opinion to the following query related to demand guarantees issued subject to URDG 758.

We have seen demand guarantees subject to URDG 758 that include clauses such as:

1. This guarantee will expire upon Final Acceptance.
2. This guarantee is valid until completion of the contract.
3. This guarantee is valid until released by the beneficiary.

The demand guarantees in question do not include an expiry date nor is there any required document to specify the “expiry condition”.

We ask you kindly to advise if the “3 year rule”, as described in URDG 758 sub-article 25 (c), applies to guarantees such as those mentioned above.

ANALYSIS

URDG 758 article 2 includes the following definitions:
“**expiry** means the expiry date or the expiry event or, if both are specified, the earlier of the two;

expiry date means the date specified in the guarantee on or before which a presentation may be made;



expiry event means an event which under the terms of the guarantee results in its expiry, whether immediately or within a specified time after the event occurs, for which purpose the event is deemed to occur only:

- a. when a document specified in the guarantee as indicating the occurrence of the event is presented to the guarantor,

or

- b. if no such document is specified in the guarantee, when the occurrence of the event becomes determinable from the guarantor's own records.

guarantor's own records means records of the guarantor showing amounts credited to or debited from accounts held with the guarantor, provided the record of those credits or debits enables the guarantor to identify the guarantee to which they relate;"

URDG 758 article 7 Non-documentary conditions states:

"A guarantee should not contain a condition other than a date or the lapse of a period without specifying a document to indicate compliance with that condition. If the guarantee does not specify any such document and the fulfilment of the condition cannot be determined from the guarantor's own records or from an index specified in the guarantee, then the guarantor will deem such condition as not stated and will disregard it except for the purpose of determining whether data that may appear in a document specified in and presented under the guarantee do not conflict with data in the guarantee."

URDG 758 sub-article 25 (b) states:

"Whether or not the guarantee document is returned to the guarantor, the guarantee shall terminate:

- i. **on expiry,**
- ii. when no amount remains payable under it, or
- iii. **on presentation to the guarantor of the beneficiary's signed release from liability under the guarantee.**" [emphasis added]

URDG 758 sub-article 25 (c) states:

"If the guarantee or the counter-guarantee states neither an expiry date nor an expiry event, the guarantee **shall terminate after the lapse of three years** from the date of issue and the counter-guarantee shall terminate 30 calendar days after the guarantee terminates." [emphasis added]



If any of the respective clauses is deemed to constitute an expiry event (as defined in article 2), then the “three year rule” stated in sub-article 25 (c) will not apply.

For an expiry event to be effective under URDG 758 it must be either documentary in nature (the guarantee must specify a document to be presented to the guarantor indicating the occurrence of the event) or determinable from the guarantor's own records (records of the guarantor showing amounts credited to or debited from accounts held with the guarantor).

If not, a guarantee containing one of the three clauses listed in the query will, by virtue of sub-article 25 (c), expire after the lapse of three years from the date of issue, provided that the guarantee does not terminate earlier by virtue of URDG 758 sub-articles 25 (b) (ii) or (iii).

Clause 1: “This guarantee will expire upon Final Acceptance”

The guarantee did not specify any document to be presented indicating the occurrence of the event (final acceptance). Its occurrence cannot be determined from the guarantor’s own records (as defined in article 2).

If the parties intended the guarantee to expire on the presentation of a document, i.e., a document certifying “Final Acceptance”, the guarantee should have clearly specified this requirement. A reference to “Final Acceptance” cannot be understood to represent a request for a document showing final acceptance.

The clause is a non-documentary condition and according to URDG 758 article 7 is deemed as not stated and will be disregarded. Sub-article 25 (c) therefore applies.

Clause 2: “This guarantee is valid until completion of the contract”

The guarantee did not specify any document to be presented indicating the occurrence of the event (i.e., completion of the contract). Its occurrence cannot be determined from the guarantor’s own records (as defined in article 2).

The clause is a non-documentary condition and according to URDG 758 article 7 is deemed as not stated and will be disregarded. Sub-article 25 (c) therefore applies.

Clause 3: “This guarantee is valid until released by the beneficiary”

The guarantee did not specify any document to be presented indicating the occurrence of the event (the release by the beneficiary). It also did not indicate how the release by the beneficiary is to be accomplished. Its occurrence cannot be determined from the guarantor's own records (as defined in article 2).

Absent a documentary requirement to act as evidence of release by the beneficiary, the clause is a non-documentary condition and according to URDG 758 article 7 is deemed as not stated and will be disregarded. Sub-article 25 (c) therefore applies.

Application of URDG 758 sub-article 25 (b) (iii):

Even though Clause 3, as written, is deemed to be a non-documentary condition, URDG 758 sub-article 25 (b) (iii) permits the presentation to the guarantor of the beneficiary's signed release from liability under the guarantee as one of the circumstances when a URDG 758 guarantee may terminate. This signed release may be given whether or not the guarantee has an expiry date or event. In respect of Clause 3 (and also Clauses 1 and 2), if a beneficiary's signed release is presented to the guarantor prior to the lapse of three years from the date of issue the guarantee will expire as of the date of its presentation.

It should be noted that the referenced clauses are examples of poor drafting and may lead to significant problems and misunderstanding. Guarantors should take care to avoid the drafting of clauses that are of a non-documentary nature.

CONCLUSION

Under URDG 758, all three clauses listed in the query are to be disregarded and the guarantees in which they are stated will terminate after the lapse of three years from the date of issuance pursuant to sub-article 25 (c).

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission's Group of Experts and Officers 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.

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Yours sincerely,

A handwritten signature in black ink, appearing to read 'Thierry Senechal', with a horizontal line underneath the name.

Thierry Senechal
Senior Policy Manager
Banking Commission



Ms. Amalie Butze
ICC Denmark
Boersen
1217 Copenhagen K
Denmark

7 June 2011

Subject: Document 470/TA.746

Dear Ms. Butze,

Thank you for your query regarding UCP 600. Please find below the opinion of the ICC Banking Commission Group of Experts and Officers.

QUOTE

We kindly ask your official opinion to the following query related to documents presented under a documentary credit issued subject to UCP 600.

The documentary credit calls for:

“Insurance document covering Institute Cargo Clauses (C) showing the appointed settling agent in Taiwan”.

Presented is a certificate of insurance. In the field “Insured Goods” (at the body of the document) it is stated:

“The Appointed Settling Agent in Taiwan is shown below”.

Below (just above the signature) the following is stated:

“In case of damage apply immediately for survey to:

XX Marine Surveyors

[Address and phone number in Taiwan]

Att. Mr. YY”

The presentation is refused by the issuing bank citing the following discrepancy:

“Insurance certificate does not show the appointed settling agent in Taiwan”.

The nominated bank questions the refusal arguing that the reference made to “the appointed settling agent in Taiwan” can only be to *XX Marine Surveyors* as this is the only company in Taiwan mentioned on the document. Further, the fact that *XX*



Marine Surveyors are mentioned as surveyors does not mean that they are not also an appointed settling agent.

The issuing bank argues that “*XX Marine Surveyors*” is mentioned as surveyors only and not as appointed settling agent.

We ask you kindly to advise if the discrepancy cited by the issuing bank is correct.

ANALYSIS

UCP 600 sub-article 14 (a) states: “[A] nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.”

UCP 600 article 2 defines complying presentation: “[C]omplying presentation means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.”

The credit required an insurance document to show an appointed settling agent in Taiwan. The insurance certificate, in the field “Insured Goods”, states: “*The Appointed Settling Agent in Taiwan is shown below*”. Below this statement there is a name: “*XX Marine Surveyors*” and their address and phone number.

It is also indicated that they are to be applied to, for survey, in case of damage (“*In case of damage apply immediately for survey to*”), i.e., they were clearly appointed to act as the surveyor.

There is no other company with a location in Taiwan mentioned in the document.

In marine insurance a settling agent is a person authorized to pay losses out of funds provided by the marine underwriter. Such agents have usually broader powers than the claim agent (also called a surveyor), whose authority is limited to surveying and certification of losses.



CONCLUSION

“XX Marine Surveyors” are apparently appointed to act as “a surveyor”. The reference to *“The Appointed Settling Agent in Taiwan is shown below”* in the field “Insured Goods” may be related to this surveyor, however on its own does not suffice to nominate *“XX Marine Surveyors”* to be a “settling agent”. The discrepancy is valid.

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission’s Group of Experts and Officers 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.

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Yours sincerely,

A handwritten signature in black ink, appearing to read 'Thierry Senechal', with a horizontal line underneath.

Thierry Senechal
Senior Policy Manager
Banking Commission



Ms. Amalie Butze
ICC Denmark
Boersen
1217 Copenhagen K
Denmark

7 June 2011

Subject: Document 470/TA.747

Dear Ms. Butze,

Thank you for your query regarding UCP 600. Please find below the opinion of the ICC Banking Commission Group of Experts and Officers.

QUOTE

We kindly ask for your official opinion to the following query related to documents presented under a documentary credit issued subject to UCP 600.

The documentary credit calls for a "Certificate of Origin". The credit does not stipulate by whom the document is to be issued or its data content.

Part of the presentation is a document (with no letterhead / header / footer) that (only) includes the following information:

Quote

We certify that the goods are of French origin.

Company AB
[Signature]

Unquote

Company AB is the beneficiary to the documentary credit.

The presentation is refused citing the following discrepancy:
"The certificate of origin shows no linkage to the LC or the transaction".

We ask you kindly to advise if the discrepancy cited by the issuing bank is correct.

ANALYSIS



The credit did not specify any required data content in respect of the Certificate of Origin.

UCP 600 sub-article 14 (e) states: “[I]n documents other than the commercial invoice, the description of the goods, services or performance, if stated, may be in general terms not conflicting with their description in the credit.” (emphasis added)

The use of “if stated” in sub-article 14 (e) does not require a description of goods to appear on every stipulated document. However, international standard banking practice for the completion and examination of a Certificate of Origin, as reflected in ISBP Publication 681 Paragraph 183, highlights a specific requirement - “[T]he certificate of origin must appear to relate to the invoiced goods. The goods description in the certificate of origin may be shown in general terms not in conflict with that stated in the credit or by any other reference indicating a relation to the goods in a required document.” (emphasis added)

There must be an indication of the goods to which the Certificate of Origin relates. This can be achieved by:

- a goods description that corresponds to that stated in the credit;
- a goods description shown “in general terms” not conflicting with the description stated in the credit; or
- by any other reference indicating a relationship to the goods that are described in a stipulated document such as by reference to the invoice number, or data contained in the transport or delivery document presented under the credit including the bill of lading number.

The Certificate of Origin was presented with the words “We certify that the goods are of French origin” and bore the name of the beneficiary and a signature. There was no relationship to the invoiced goods and therefore the document does not satisfy the requirements of international standard banking practice.

CONCLUSION

Although the refusal could have been worded more precisely, it is clear enough that the words “no linkage to” refer to a lack of relationship to the invoiced goods. The discrepancy is valid.

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission’s officers based on the facts under “QUOTE” above. They do not necessarily reflect the opinion of the ICC Banking Commission until



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Yours sincerely,

A handwritten signature in black ink, appearing to read 'Thierry Senechal', with a horizontal line underneath the name.

Thierry Senechal
Senior Policy Manager
Banking Commission



Ms. Amalie Butze
ICC Denmark
Boersen
1217 Copenhagen K
Denmark

6 July 2011

Subject: Document 470/TA.748

Dear Ms. Butze,

Thank you for your query regarding UCP 600. Please find below the opinion of the ICC Banking Commission Group of Experts and Officers.

QUOTE

We kindly ask for your official opinion to the following query related to a bill of lading presented under a documentary credit issued subject to UCP 600.

The bill of lading is issued/signed as follows:

The headline of the bill of lading reads: “Carrier: Hapag-Lloyd Aktiengesellschaft, Hamburg”

The bill of lading is signed as follows:

“Hapag-Lloyd Denmark,
Branch of Hapag-Lloyd AG, Germany
As Carrier”

We ask you kindly to advise if the bill of lading is signed in accordance with UCP 600 article 20 (a) (i).

ANALYSIS

A bill of lading to be presented under a documentary credit must be signed in accordance with UCP 600 sub-article 20 (a) (i):

“A bill of lading, however named, must appear to:

- i) indicate the name of the carrier and be signed by:
 - the carrier or a named agent for or on behalf of the carrier, or
 - the master or a named agent for or on behalf of the master.

Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.

Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.”

“Hapag-Lloyd Denmark” is stated to be a branch of “Hapag-Lloyd AG, Germany” and, as such, does not act as an agent. The fact that it is a branch in a country different to the parent company is not relevant. The entity that is the carrier is Hapag Lloyd AG, Germany and any of its stated branches may issue bills of lading and sign as carrier.

The bill of lading fulfils the requirements of sub-article 20 (a) (i) by indicating:

- (a) the name of the carrier i.e., Hapag-Lloyd Aktiengesellschaft, Hamburg
- (b) that the signature is that of the carrier: “Hapag-Lloyd Denmark, Branch of Hapag-Lloyd AG, Germany As Carrier”.

CONCLUSION

The bill of lading is signed in accordance with sub-article 20 (a) (i).

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission’s Group of Experts and Officers 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.

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Yours sincerely,

A handwritten signature in black ink, appearing to read 'Thierry Senechal', written in a cursive style.

Thierry Senechal,
Senior Policy Manager
Banking Commission



Ms. Amalie Butze
ICC Denmark
Boersen
1217 Copenhagen K
Denmark

6 July 2011

Subject: Document 470/TA.749

Dear Ms. Butze,

Thank you for your query regarding UCP 600. Please find below the opinion of the ICC Banking Commission Group of Experts and Officers.

QUOTE

We kindly ask for your official opinion to the following query related to documents presented under a documentary credit issued subject to UCP 600.

It has been noted that some shipping companies, when issuing certificates (e.g., in respect of the classification, seaworthiness and age of the vessel) are, in addition to the certification required by the credit, including “disclaimer texts” on said certificates.

Here are two examples:

Example 1:

“This certificate does not form part of the contract of carriage and no reliance can be placed upon its contents in support of or as evidenced in the bill of lading no. xxxx. The ship owner’s obligations are restricted to the duty to exercise due diligence at the beginning of the voyage to make the vessel seaworthy.”

Example 2:

“This certificate does not form part of the contract of carriage and no reliance can be placed upon its contents in support of or as evidence in any dispute or claim under the terms of the contract of carriage as evidenced in the bill of lading no xxxx.”

We ask you kindly to advise if these texts make the document discrepant under UCP 600.

ANALYSIS



UCP 600 sub-article 14 (d) states “Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.”

By inserting the “disclaimer text” the issuer separates the content of the certificate from their contract of carriage. Neither this action nor the wording of the disclaimer will create a conflict with the data that is required to appear in the certificate.

CONCLUSION

Provided a certificate otherwise complies with the requirements of the credit, the inclusion of a disclaimer text as indicated above will not make that document discrepant.

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission’s Group of Experts and Officers 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.

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Yours sincerely,

A handwritten signature in black ink, appearing to read 'Thierry Senechal', with a horizontal line underneath.

Thierry Senechal
Senior Policy Manager
Banking Commission



Ms. Amalie Butze
ICC Denmark
Boersen
1217 Copenhagen K
Denmark

18 August 2011

Subject: Document 470/TA.750

Dear Ms. Butze,

Thank you for your query regarding UCP 600. Please find below the opinion of the ICC Banking Commission Group of Experts and Officers.

QUOTE

We kindly ask for your official opinion to the following query related to documents presented under a documentary credit issued subject to UCP 600.

An ocean carrier (“Carrier”) has replaced its agency (“Agent”) in the UK by a registered branch office (“Branch”). Since the Branch is part of the Carrier company and not an independent legal entity, as was the Agency, the bills of lading issued in the UK by the Branch are effectively issued by the Carrier itself. Consequently, the Carrier’s bills of lading are no longer signed by the local agent “as agent”, but by the local Branch “as carrier”:

New form:

“Signed as the Carrier [Name of Carrier]

[Signature of the branch]
[Name of Branch] (branch)”

It should be noted that the names of the Branch and the Carrier are not identical.

The bank rejected the bill of lading and subsequently argued as follows:
“It [the bill of lading] needs to be signed as I have shown it below. If it is not signed this way then the sign off does not conform to UCP 600 as it does not clearly show that [the Branch] are the agents for the carrier [Carrier]. [...]”

Signed as the Carrier [Carrier]
[Signature] [Branch] (branch) AS AGENTS”
(Emphasis added)

The ocean carrier responded:

“[The new form] signature fulfils the requirements of articles 19-21 of the UCP 600 which require that:

- the bill of lading indicates the name of the carrier; and
- the capacity of the party signing must be included.

The commentary to the UCP 600 (provided by the UCP 600 drafting group) explains that "...whatever the name of the company that issued the transport document, an indication to the effect that the issuing company or another company is the carrier is required. This requirement will also be fulfilled if the party signing the document indicates that it is signing "as carrier...". Clearly our proposal "Signed as Carrier..." satisfies this requirement as it directly names the carrier.

The commentary goes on to state that "if the party is signing as agent, the name of that agent must be included, as well as the capacity in which it is signing". As [the Branch] is not signing as agent, this is not relevant. The UCP 600 makes no reference to branch set-ups, however we are obliged to fulfill the requirement to state the capacity of the party signing, which is the branch. This does not alter the fact that [the carrier] is the carrier as they are the same legal entity.”

Further, it would seem that the form requested by the bank is contradictory in that it states “signed as carrier” (above the signature) and “as agent” (under the signature). Clearly, the signatory cannot be both carrier and agent.

To the ocean carrier’s reply, the bank responded:

“We, as a bank, are not obliged to understand the legal standing and linkage of companies and are not expected to either. We still would regard this as a discrepancy as [the Branch] should be identified as agents.”

Since the Branch, as stated above, is a part of the Carrier company, it would be legally wrong to classify it as “agent”, since that requires the agent to be a legal entity that is separate from the carrier.

Indeed, the bank is correct that it should not be obliged to understand the corporate structure of the signatories or carriers. In this case, however, the bill of lading clearly states that the branch signs as carrier, and such express statement must be compliant. The fact that the branch has a different name than that of the carrier (although being part of same) should not make the signature form discrepant either.



In light of the above you are kindly requested to assist in the interpretation of UCP 600 sub-article 20 (a) (i) as for:

1. whether the ocean carrier's new signature form is sufficiently clear to determine the capacity of the signatory as carrier i.e., if it is acceptable that a branch (however named) of the carrier signs the bill of lading.
2. whether, generally, a transport document that specifically states "Signed as the Carrier" followed by a signature, regardless of how the signatory is named, complies with the relevant provisions in articles 19 to 25.

ANALYSIS

Question 1

A bill of lading must be signed in accordance with UCP 600 sub-article 20 (a) (i):

"A bill of lading, however named, must appear to:

i. indicate the name of the carrier and be signed by:

- the carrier or a named agent for or on behalf of the carrier, or
- the master or a named agent for or on behalf of the master.

Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.

Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master."

The bill of lading in question has been signed as follows:

"Signed as the Carrier [Name of Carrier]

[Signature of the branch],
[Name of Branch] (branch)"

It is stated that the names of the branch and the carrier are not identical.

The signatory is apparently identified as a branch, of the stated carrier, and, as such, does not act as an agent. The fact that it is a branch in a country different to the parent company is not relevant. Neither is the fact that the name of the branch differs to the name of the carrier.



The bill of lading clearly indicates the name of the carrier. Any of its branches may issue bills of lading and sign them as a branch of the named carrier.

The bill of lading thus fulfils the requirements of sub-article 20 (a) (i) by indicating:

- (a) the name of the carrier [Carrier]
- (b) that the signature is that of the carrier: “Signed as the Carrier [Name of Branch], Branch”.

Question 2

UCP 600 sub-articles 19 (a) (i), 20 (a) (i), 21 (a) (i), 23 (a) (i) and 24 (a) (i) stipulate provisions related to the signing of transport documents by a carrier.

In accordance with these provisions, a signature by the carrier must be identified as that of the named carrier.

A transport document that is signed by the use of expressions such as 'signed as the carrier' or 'as carrier' or 'carrier' will be acceptable provided it identifies the named party (i.e., the named carrier) for whom the signature was given.

The signatory and the carrier must be the same entity, which will include the possibility of the signatory being a branch of the named carrier, provided it is identified as such.

CONCLUSION

Question 1

The signature form as described in the enquiry complies with the requirements stated in UCP 600 sub-article 20 (a) (i) in relation to the identification of the carrier and the manner in which the bill of lading is to be signed.

Question 2

A document issued in the manner described under analysis will be acceptable.

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission’s Group of Experts and Officers 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.



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Yours sincerely,

A handwritten signature in black ink, appearing to read 'Thierry Senechal', with a horizontal line underneath the name.

Thierry Senechal
Senior Policy Manager
Banking Commission



Ms. Yeliz Geriř
ICC Trkiye Milli Komitesi - ICC Turkey
Mdr - Executive Director
Dumlupınar Bulvarı No:252
(Eskiřehir Yolu 9. Km)
06530 ANKARA
Turkey

24 August 2011

Subject: Document 470/TA.751

Dear Ms. Geriř,

Thank you for your query regarding UCP 600. Please find below the opinion of the ICC Banking Commission Group of Experts and Officers.

QUOTE

We received the following query from one of our member banks.

Topic : Transhipment vs. Charter Party Bill of Lading

A credit was issued and included the following conditions:

43T – Transhipment

ALLOWED

44E – Port of Loading

VENTSPILS

44F – Port of Discharge

YALOVA, TURKEY

47A – Additional Conditions

* Charter party bill of lading is acceptable.

Transhipment was effected. Two separate sets of charter party bills of lading, evidencing successive shipments on two different vessels by splitting the shipment route stated in the credit into two segments, were presented. The related fields of these two charter party bills of lading are shown for your review:



Charter Party B/L No:1

| | |
|---------------------------------------------------------------------------------------|----------------------------------------------|
| Vessel ANTRACYTH | Port of Loading VENTSPILS / LATVIA |
| Port of Discharge ANTWERP OR ROTTERDAM FOR TRANSHIPMENT ON MT CHEMICAL STAR | |

Charter Party B/L No: YAL -01

| | |
|--------------------------------------------|-------------------------------------|
| Vessel CHEMICAL STAR | Port of Loading ROTTERDAM |
| Port of Discharge YALOVA, TURKEY | |

Two full sets of charter party bills of lading were presented at the same time and each set gave the same details in respect of the consignee, notify party, goods description, weight etc. Both sets also included the phrase “Freight payable as per charter party dated 11.05.2011”.

Although UCP 600 sub-article 20 (c) (i) clearly states that a bill of lading may indicate that the goods will or may be transhipped, provided that the entire carriage is covered by one and the same bill of lading, there is no such concept or rule in UCP 600 article 22 for charter party bills of lading. Therefore, we would like to have an official opinion of the ICC Banking Commission as to;

- a) whether these charter party bills of lading are acceptable or not, and
- b) if they are not acceptable, on what grounds can they be refused?

ANALYSIS

UCP 600 article 22 neither contemplates nor prohibits transhipment. It is fair to say that article 22 does not contain rules relating to transhipment due to the rarity of such an event, where charter party bills of lading are involved.

That UCP 600 sub-articles 20 (c) (i) and (ii) contain rules regarding the occurrence of transhipment where a bill of lading is the transport document, does not mean that those same rules are to be applied to a charter party bill of lading.

By specifically allowing for transhipment to occur, the applicant and issuing bank will be aware that two or more vessels may or will be involved in the carriage of the goods to their destination. On this basis, and the absence of specific rules in article 22, it is the



responsibility of the applicant and the issuing bank to ensure that the terms and conditions of the credit indicate precisely how transshipment is to be described or reflected in one or more full sets of charter party bills of lading that may be presented.

In a shipment that is subject to a charter party, it may not be a requirement that one original charter party bill of lading must be presented to facilitate the unloading of the goods from the arriving vessel, and loading on the following vessel, where transshipment is occurring under the same charter party contract. This aspect of charter party transactions is reflected in this query by the fact that two full sets of charter party bills of lading were presented to the bank.

Absent instructions in the credit as to how transshipment is to be evidenced on a charter party bill of lading, the beneficiary will be at liberty to present a single full set of charter party bills of lading that may or may not indicate the details relating to transshipment or, as in this case, two separate full sets of charter party bills of lading that collectively evidence shipment of the goods from the port of loading stated in the credit to the port of discharge stated in the credit.

CONCLUSION

The charter party bills of lading are acceptable.

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission's Group of Experts and Officers 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.

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Yours sincerely,

A handwritten signature in black ink, appearing to read 'Thierry Senechal', with a stylized flourish at the end.

Thierry Senechal
Senior Policy Manager
Banking Commission



Mr. Marcelle Reijneker
ICC Nederland
Bezuidenhoutseweg 12
2594 AV DEN HAAG
The Netherlands

22 August 2011

Subject: Document 470/TA752

Dear Mr. Reijneker,

Thank you for your query regarding UCP 600. Please find below the opinion of the ICC Banking Commission Group of Experts and Officers.

QUOTE

A. Background in connection with first query:

1. We (“the Beneficiary”) are the beneficiaries under a confirmed documentary credit “subject to the Uniform Customs and Practices for Documentary Credits (2007 revision) International Chamber of Commerce Brochure no. 600” (“UCP 600”). We kindly request an official Opinion of the ICC Banking Commission on the following facts and questions.
2. The irrevocable documentary credit was issued on 8 October 2010 by a bank in country L (“the L/C”). As quoted above, the L/C is subject to UCP 600.
3. That same day, 8 October 2010, a Western European bank (“the Confirming Bank”) added its confirmation to the L/C.
4. On 17 March 2011 (within the validity period of the L/C), the Beneficiary presented documents complying with the L/C.
5. On 21 March 2011 the Council of the European Union issued Council Implementing Regulation no. xxx/2011, which added, among others, the issuing bank to a list of persons and entities subject to restrictive measures under Council Regulation no. xxx/2011 (“the Sanction List”).

6. Article 5 of the Council Regulation applies certain sanctions to those on its Sanction List namely the freezing of their funds within the EU (Section 5 (1)) and prohibiting the making available of funds for their benefit (Section 5 (2)). Article 9 of this Regulation explicitly allows financial institutions in the European Union to credit frozen accounts, pay interest on those accounts and make payments to those accounts under obligations which arose before the date on which the person or entity has been included on the Sanction List.
7. On 3 May 2011, the Confirming Bank informed the Beneficiary that because the issuing bank was subject to EU sanctions the Confirming Bank did not feel obligated to effect payment under its confirmation of the L/C. The Confirming Bank thus refused to honour or even negotiate and forward the presented documents to the issuing bank and instead returned them to us.
8. **Query 1: Does the mere fact that the issuing bank was added to the EU Sanction List after presentation of the documents excuse the Confirming Bank from its obligations under UCP 600 sub-article 15 (b) and article 8?**
 - 8.1 The Beneficiary notes that neither of the Council Regulations appears to prohibit receipt of funds from any person or entity on the Sanctions List (under pre-existing obligation such as L/C or otherwise) or seeking reimbursement from anyone on the Sanction List.
 - 8.2 The Beneficiary further notes that just because a confirming bank may have practical difficulty obtaining reimbursement from an issuing bank should not be any justification for a confirming bank not to perform its independent and direct obligations to a beneficiary.
- B. **Additional background in connection with a further query.**
9. On 26 March 2010, well prior to the Confirming Bank's confirmation, the ICC Banking Commission issued a "Guidance Paper on the Use of Sanctions Clauses for Trade Related Products ... subject to ICC Rules (doc. no. 470/1129). Among other things, this Guidance Paper:
 - (a) notes that so called sanctions clauses, purportedly giving the confirming/issuing banks discretion whether or not to honour, undermine the independent nature of L/C's and their irrevocability (Sections 2.4 and 2.6); and
 - (b) condemned the use of sanction clauses (Sections 4.1 – 4.3).
10. Contrary to that ICC Banking Commission Guideline, the Confirming Bank added a clause to its confirmation mentioned in paragraph 3 above, using a translated text identical to that given as an example in Section 3.3 of the ICC Banking Commission Guidance Paper (with the addition of Country N in the last



sentence). At the same time, under the UCP the Confirming Bank was, among other things, undertaking to be “irrevocably bound to honour” the credit.

11. In its refusal to honour the presented documents, the Confirming Bank also referred to this “sanctions clause”.

12. QUERY 2: Does adding such a “sanction clause” to the confirmation relieve the Confirming Bank of its obligation under UCP 600 sub-article 15 (b) and article 8?

UNQUOTE

We kindly ask your opinion regarding the above stated matter.

ANALYSIS / CONCLUSION

In accordance with UCP600 article 8 it is agreed that a confirming bank must pay, accept, incur a deferred payment undertaking or negotiate a complying presentation. However, there may well be circumstances, under applicable law, where the confirming bank can seek or gain a release from that undertaking. These circumstances, and the relationship between the beneficiary and issuing bank that arise pursuant thereto, are outside the scope of UCP600.

Sanctions, applied as international law (UNSCRs) and local implementing laws, or government regulations covering AML, Counter Terrorist Financing measures or the None Proliferation of Weapons of Mass Destruction requirements are laws that override the UCP in all cases, and thus have to be understood in that context.

The enforceability of sanctions is a question to be decided by courts, national regulators or administrative agencies and is not an issue that can be addressed by rules of banking practice. Where sanctions are applicable, banks are compelled to comply with them in accordance with the applicable national law or regulation in the jurisdictions in which they operate.

International rules of practice do not address how sanctions should be treated or their consequences under the rules.

Query 1:

8.1 The sanctions effectively freeze all assets in the sanctioned person's name, and as such no disbursements are allowed. The regulations allow for persons to apply for a licence to complete a transaction, i.e. move funds to or from frozen accounts for the

purposes of completing or discharging an obligation that was in existence before the sanction date. These licences are only granted in exceptional cases by the regulatory authority delegated to manage sanctions on behalf of a jurisdiction. Experience shows that such licences for ordinary transactions are not usually granted.

8.2 The sanction is a matter of law, and as such overrides the UCP in any jurisdiction where the bank involved is regulated. If the sanction freezes assets, prohibits payments on behalf of a sanctioned person and generally requires banks to determine whether a transaction is caught by the sanction regulation, the bank will, unless otherwise instructed by the regulator, refuse to pay or complete or in any way facilitate the furtherance of the transaction. The independence of a Documentary Credit is irrelevant in the application of sanctions law; the sanction is always superior.

Query 2:

9 (a) 2.4 advises banks to be cautious in the wording of a "sanctions clause" such that it brings into doubt the obligation under UCP in the normal course of business. The key issue that was being addressed was the attempt by some bank clauses to shift the responsibility of compliance with sanctions onto a nominated bank that itself may not be subject to the same sanctions applying to the issuing bank. The nominated bank is not, nor should it be, expected to determine what sanctions laws the issuing bank is subject to. A nominated bank should only apply those sanctions regulations to which it is subject to, directly or indirectly. 2.6 amplified this point, in that a confirming bank can only take on the credit risk of the issuer not the legal and operational risk. 2.7 and 8 explain this and suggest that the confirming bank assess its confirmation risk to include the possibility of a sanctions intervention.

9 (b) The example is just that, an example of a sanctions clause commonly seen, the guidance is just that, guidance. Some banks legal advisers insist on a sanctions clause being incorporated into their credits and guarantees to act as a notice to counter parties that they will act in accordance with those sanctions that they consider they are subject to, regardless of the location of the transaction.

10. The guideline is just that, it is not a rule or mandatory requirement. As noted in 9 (b) above, some legal advisers insist on such clauses being incorporated as a way of notifying the counter party that the confirming bank follows a sanctions adherence policy. A sanction is law and overrides the UCP and related obligations.

11. This notification including the reference to the "sanctions clause" is probably included at the request of the legal advisers.



The addition of a sanctions clause per se does not remove the obligation of the confirming bank to perform under the credit if the presentation is compliant. Sanctions law to which the bank is subject overrules the UCP and the obligation of the confirming bank. The confirming bank is obliged to apply the law, i.e. the sanction, and therefore act in accordance with the sanctions regulation and ignore the UCP and any obligation that may have occurred in the normal course of business.

As stated before, sanctions are legal requirements; the UCP is a contractual requirement. The legal requirement will always override the contractual requirement.

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission's Group of Experts and Officers 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.

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Yours sincerely,

A handwritten signature in black ink, appearing to read 'Thierry Senechal', with a horizontal line underneath.

Thierry Senechal
Senior Policy Manager
Banking Commission



Mr. Ashok Ummat
Executive Director
ICC India
Federation House, Tansen Marg
New Delhi 110 001
India

24 August 2011

Subject: Document 470/TA.753 (UCP 500)

Dear Mr. Ummat,

Thank you for your query regarding UCP 500. Please find below the opinion of the ICC Banking Commission Group of Experts and Officers.

QUOTE

Sub: Query under UCP 500

We request an official opinion of the ICC Banking Commission on the following issue:

Letter of Credit No. 123 ("LC") was issued by Bank X favouring ABC Ltd and was subject to UCP 500 (1993 Revision). As per the terms of the LC, the last date of shipment was 30.06.1995 and last date for negotiation was 15.07.1995.

Within the time specified under the LC, ABC Ltd submitted relevant documents to Bank X, through their bank (Bank Y), on various dates as per table below for negotiation/payment. However, Bank X refused to make any payments under the LC as it found certain discrepancies in the documents which were pointed out to Bank Y vide their telex messages as per table below:



| Sr. No. | Date of submission of documents by Bank Y to Bank X | Date of Telex message sent by Bank X to Bank Y intimating discrepancies |
|---------|-----------------------------------------------------|-------------------------------------------------------------------------|
| 1 | 17.06.1995 | 27.06.1995 |
| 2 | 17.06.1995 | 27.06.1995 |
| 3 | 17.06.1995 | 27.06.1995 |
| 4 | 21.06.1995 | 27.06.1995 |
| 5 | 22.06.1995 | 27.06.1995 |
| 6 | 27.06.1995 | 03.07.1995 |
| 7 | 01.07.1995 | 05.07.1995 |
| 8 | 10.07.1995 | 17.07.1995 |
| 9 | 10.07.1995 | 17.07.1995 |

In this regard, please also note the following relevant dates:

- 15.07.1995: Last date for negotiation of documents;
- 27.06.1995: Rejection message was issued by Bank X in respect of documents mentioned at serial Nos. 1, 2 & 3 above, after the seven day period specified under UCP 500;
- 18.07.1995: Bank X, after the last date of negotiation of the documents and after rejecting the documents submitted by ABC Ltd, wrote a letter to the opener of the LC seeking waiver / acceptance of discrepancies in the documents;
- 21.07.1995: The opener of the LC expressly waived all the discrepancies pointed out by Bank X and requested them to make payment to ABC Ltd.

However, no payment till date has been made by Bank X on the grounds that waiver from the opener of the LC was obtained by the Bank after the last date for negotiation of documents.

In view of the above factual narration, we have the following clarifications to seek from you with respect to the true interpretation of the terms of UCP 500:

- a. If Bank X is liable to make payment for the reason of 3 refusal messages issued beyond the prescribed 7 days (for serial numbers 1, 2 & 3);



- b. Whether Bank X, on receipt of documents within the expiry of the LC, has the right to reject the same, after the expiry of the LC although within the seven days period provided under UCP 500 sub-article 13 (b)? and;

whether the seven day period as provided in sub-article 13 (b) continues to run even after the expiry of the LC?
- c. Whether Bank X can seek a waiver of the discrepancies from the opener of the LC, under UCP 500 sub-article 14 (c), even after the expiry of the LC?
- d. Whether Bank X can seek a waiver of discrepancies from the opener of the LC under UCP 500 sub-article 14 (c) even after rejecting the documents submitted by the beneficiary, under sub-article 14 (b)?
- e. Whether seeking a waiver of discrepancies from the opener of the LC under sub-article 14 (c), after rejecting the documents under sub-article 14 (b), amounts to the rejection being void?
- f. Whether an acceptance by the opener of the LC, of the discrepancies in the documents, after the expiry of the LC is binding on the issuing bank to make payment under the LC?

and

Whether an acceptance of the discrepancies by the opener of the LC, after the expiry date, especially when the acceptance of the discrepancies is sought after the expiry date, is binding on the issuing bank to make payment under the LC?

We request you to kindly provide us with your opinion on the aforementioned queries. We confirm that no court proceeding is pending or planned in respect of the query, as aforementioned.

ANALYSIS

UCP 500 sub-article 13 (b) states:

The Issuing Bank, the Confirming Bank, if any, or a Nominated Bank acting on their behalf, shall each have a reasonable time, not to exceed seven banking days following the day of receipt of the documents, to examine the documents and determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly.

UCP 500 sub-articles 14 (b), (c), (d) (i), (d) (ii) and (e), respectively, state:



- b Upon receipt of the documents the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, must determine on the basis of the documents alone whether or not they appear on their face to be in compliance with the terms and conditions of the Credit. If the documents appear on their face not to be in compliance with the terms and conditions of the Credit, such banks may refuse to take up the documents.
- c If the Issuing Bank determines that the documents appear on their face not to be in compliance with the terms and conditions of the Credit, it may in its sole judgment approach the Applicant for a waiver of the discrepancy(ies). This does not, however, extend the period mentioned in sub-Article 13 (b).
- d
 - i. If the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, decides to refuse the documents, it must give notice to that effect by telecommunication or, if that is not possible, by other expeditious means, without delay but no later than the close of the seventh banking day following the day of receipt of the documents. Such notice shall be given to the bank from which it received the documents, or to the Beneficiary, if it received the documents directly from him.
 - ii. Such notice must state all discrepancies in respect of which the bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presenter.
- e If the Issuing Bank and/or Confirming Bank, if any, fails to act in accordance with the provisions of this Article and/or fails to hold the documents at the disposal of, or return them to the presenter, the Issuing Bank and/or Confirming Bank, if any, shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the Credit.

The query, in a number of places, refers to the expiry date being the last date for negotiation. In this context the stated expiry date is to be considered as the last date for presentation of documents, as outlined in UCP 500 sub-articles 42 (a) and (b) which state:

- a All Credits must stipulate an expiry date and a place for presentation of documents for payment, acceptance, or with the exception of freely negotiable Credits, a place for presentation of documents for negotiation. An expiry date stipulated for payment, acceptance or negotiation will be construed to express an expiry date for presentation of documents.
- b Except as provided in sub-Article 44(a), documents must be presented on or before such expiry date.”

If the issuing bank decides to refuse the presented documents, UCP 500 sub-article 14 (b) requires that it must give notice to that effect by telecommunication or, if that is not



possible, by other expeditious means, without delay but no later than the close of the seventh banking day following the day of receipt of the documents.

“A banking day” in the context of sub-article 14 (b) means a day on which the issuing or nominated bank is regularly open to conduct letter of credit transactions; this would include a full or half day. (See ICC Opinion R.536).

From the information given in the table shown above, documents presented under serial numbers 1, 2 & 3 may or may not have been refused in time, i.e., within a reasonable time not exceeding seven banking days following the day of receipt of the documents. It is not clear from the query as to whether the “Date of submission” refers to the date Bank Y sent the documents to Bank X or the date that Bank X received the documents. The answer will also depend upon which days, within the period commencing on the day following the day of receipt of the documents until the date of the refusal notice, were “banking days” in the context of the meaning given above.

The reasonable time, not exceeding seven banking days following the day of receipt of the documents, is not curtailed by an expiry date that may occur following the date of presentation but within that period. Certainly, in many situations the examination of the documents by an issuing bank, and any refusal thereof, would take place after the expiry date (i.e., when documents were presented to a nominated bank close to or on the expiry date of the credit).

Following a decision to refuse the documents, UCP 500 sub-article 14 (c) permits an issuing bank, in their sole judgment, to approach the applicant for a waiver. Such an approach can only be made once the documents have been examined, whether this is prior to or after the expiry date of the credit. A decision to approach an applicant would only occur if the issuing bank was willing to hold the refused documents, at the disposal of the presenter, as would be stated in its notice of refusal.

In previous ICC Opinions, given under UCP 500 transactions, (namely R.254, 267, 268, 327) it is clearly stated that receipt of a waiver from the applicant is not binding on an issuing bank. This position prevails regardless of whether the waiver is received within the period of seven banking days, within the expiry date of the credit, or after the expiry date of the credit.

CONCLUSION

Answers to the questions posed:

- a) In respect of serial numbers 1-3, if the issuing bank did not send a notice of refusal according to UCP 500 sub-article 14 (e) by the close of the seventh banking day following the day of receipt of the documents, it will be precluded from claiming that the documents are not in compliance with the terms and conditions of the credit, and therefore liable to pay the documents value.



- b) Yes. The issuing bank, in the context of UCP 500 sub-articles 13 (b) and 14 (d), can refuse documents after the expiry date of the credit. The reasonable time not exceeding seven banking days following the day of receipt of the documents may continue after the expiry date of the credit depending upon the timing of the presentation in relation to the expiry date.
- c) Yes. UCP 500 sub-article 14 (c) does not restrict the timing for an issuing bank to seek waiver from the applicant to such a request being made within the expiry date of the credit.
- d) Yes, A waiver would only be sought if the documents were found to be discrepant. The issuing bank could seek waiver after the documents were already refused by it as per UCP 500 sub-articles 14 (b) and (d) so as to accommodate final settlement under the L/C.
- e) No. UCP 500 sub-article 14 (c) grants the issuing bank the right to decide whether or not to seek waiver from the applicant.
- f) No. A waiver given by the applicant to the issuing bank is not binding upon the issuing bank, regardless of whether the waiver was sought by the issuing bank or not, or whether it was received within the expiry date of the credit or after.

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission's Group of Experts and Officers 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.

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Yours sincerely,

A handwritten signature in black ink, appearing to read 'Thierry Senechal', with a horizontal line underneath.

Thierry Senechal
Senior Policy Manager
Banking Commission



Ing. Kateřina Petřů
Event manager
ICC Czech Republic
Mezinárodní obchodní komora
v České republice
Thunovská 12, 118 00
Praha 1 – Malá Strana
Czech Republic

29 August 2011

Subject: Document 470/TA.754

Dear Ms. Petřů,

Thank you for your query regarding UCP 600. Please find below the opinion of the ICC Banking Commission Group of Experts and Officers.

QUOTE

We would like to seek an official opinion of the ICC Banking Commission on the following matters regarding a credit issued subject to UCP 600.

We received, advised and later (after an amendment was issued) confirmed a credit with the following conditions:

Currency Code, Amount: EUR 51003.00

Tolerance (+/-) 2/2

Beneficiary: ABC ADDRESS (street, post code, city)

Description of Goods and/or Services: ABC SPRAY 100ML AS PER PROFORMA INVOICE NO. 123 TOTAL DAP [PLACE OF DELIVERY] EUR 51003.00

Documents required included:

+ SIGNED COMMERCIAL INVOICE IN TRIPLICATE ISSUED TO (name and address of applicant)



+ CMR EVIDENCING GOODS CONSIGNED TO (name and address of applicant)
MARKED FREIGHT PREPAID AND NOTIFY (name and address of applicant),
SHOWING EXPEDITOR AS BENEFICIARY ...

The credit, as amended, provided for reimbursement against credit conforming documents by means of a SWIFT message sent directly to the issuing bank, without any condition as to the form, content or timing of the claim. Documents with discrepancies were subject to a deduction of a discrepancy fee that was indicated in the credit as a flat amount.

On 21 July 2011, we received documents that we considered to be complying. Hence, we paid the beneficiary and claimed reimbursement by SWIFT value 26 July 2011 (being the third banking day following the date of our claim).

The presentation included:

An invoice with the following goods description: ABC spray 100ml as per proforma invoice No. 123 quantity 27,181 pcs, price/pcs 1.874 EUR, total price 50,937 EUR Total DAP [Place of delivery] 50,937 EUR; and

CMR issued on a Country C / English form with field 1 expressly headed in English as "Sender (name, address, country)" containing beneficiary's rubber stamp (showing its name, street, post code and city same as those stated in field "Beneficiary" of the credit) and with field 22 expressly headed in English as "Signature and stamp of the sender" containing the same rubber stamp as field 1 and a signature.

According to the tracking tool of the courier company the issuing bank received the documents, before noon, on 25 July 2011.

No reimbursement was received on the value date of the claim. Only two days later, i.e., on 28 July 2011, we received a SWIFT message from the issuing bank stating the following (exact quotation of the relevant part):

Quote Document value: EUR 50937,00

We refuse the above document for the following discrepancies: 1. Invoice evidences multiplication of quantity $27181 \text{ pcs} \times 1,874 = 50937$ instead of 50937.194 2. CMR does not evidence 'expeditor' as beneficiary as required by the credit. We hold documents pending receipt either applicant's waiver or your prior instructions.
Unquote

We replied on the next day stating that we considered both alleged discrepancies to be invalid. We considered the difference as mere rounding, which



was not disallowed by the credit (credit contained no applicable provisions regarding rounding), UCP 600 or international standard banking practice. Moreover, we turned the issuing bank's attention to ICC Publication No. 681, paragraph 24, considering the referred multiplication as a detailed mathematical calculation and, therefore, subject to this paragraph. We also stated that even if such multiplication were not to be considered "detailed", we saw no indication in the credit or UCP and no such existing international standard banking practice that a formula of "number of units x unit price equals total amount" represents the only standard and turned the issuing bank's attention to the fact that 50937 (total amount) divided by 27181 (number of units) makes 1,87399286, which can be rounded off to 1,874 (unit price shown on the invoice).

With respect to the CMR, we presume that the words 'shipper', 'sender', 'consignor' or 'expeditor' represent equivalent expressions of the same and the CMR showed beneficiary's stamp in the field headed as "Sender". We saw no conflict with the term "showing expeditor as beneficiary".

We received no reply from the issuing bank. However, value date 3 August 2011 we received proceeds subject to the deduction of a discrepancy fee (a slightly higher amount than that stated in the credit).

We kindly seek your opinion on the following matters:

1. Is there any basis for refusal of the documents for the reasons stated in the issuing bank's refusal advice? In the analysis, please, take into consideration our reasoning as outlined above.
2. Notwithstanding the fact that the refusal advice was sent on the third banking day after the issuing bank's receipt of documents, i.e., within the time limit as required by UCP 600 sub-article 16 (d), and regardless whether the refusal was valid or not, was the issuing bank allowed under UCP 600 to suspend reimbursement pending completion of its examination of documents without due notice sent to us latest on the value date of our claim? (N.B. if we face such a situation, in the role of issuing bank, and are unable to receive or accept a waiver in due time, we always send a refusal notice on the value date of the claim at the latest.)
3. Does the disposal information stated in the refusal advice meet the requirements of UCP 600 sub-article 16 (c) (iii)?

ANALYSIS

1) Discrepancy: "Invoice evidences multiplication of quantity 27181 pcs x 1,874 = 50937 instead of 50937.194".



UCP 600 sub-article 18 (c) states: “The description of the goods, services or performance in a commercial invoice must correspond with that appearing in the credit.”

ISBP, Publication No. 681, paragraph 24 states: “Detailed mathematical calculations in documents will not be checked by banks. Banks are only obliged to check total values against the credit and other required documents.”

Although paragraph 24 refers to ‘detailed mathematical calculations’, defining what is or is not ‘detailed’ will depend on the content and manner of issuance of the document. In this particular case, checking the multiplication of a total quantity with a single unit price of a single line item should not be considered to be a detailed mathematical calculation. .

The notice of refusal implies that EUR50,937.194 should have been the correct invoice amount. It would be unreasonable to expect an invoice to be calculated to three decimal places for an amount shown in EUR, when it operates to two decimal places. The rounding down from EUR50,937.19 to an invoice value of EUR50,937.00 would be acceptable.

It should also be noted that multiplying the quantity by the unit price is not the only means of concluding a mathematical calculation to ensure that the data is correct. In this particular case, dividing the total amount by the quantity would give you a unit price that can be checked against that stated in the credit. The result of this is 1.87399286 which when rounded up would be 1.874 – the unit price stated in the credit.

Discrepancy: “CMR does not evidence ‘expeditor’ as beneficiary as required by the credit”.

The credit required the CMR to show “EXPEDITOR AS BENEFICIARY”. The confirming bank interpreted this term as a requirement for the CMR to show the beneficiary of the credit as the Sender. Box 1 on a CMR, which can be generically described as the field containing the shipper details, can bear varying pre-printed field labels and these include ‘Sender’ and ‘Expéditeur’. In the context of the credit, Box 1 was to be completed with the details of the beneficiary and the CMR need not specifically mention the word “Expeditor”.

2) UCP 600 sub-article 7 (c) includes “An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank.”

By effecting payment upon receipt of such SWIFT reimbursement claim the issuing bank would have fulfilled their obligation under sub-article 7 (c).

By the information contained in the query, the confirming bank sent their SWIFT reimbursement claim on 21 July 2011 determining 26 July 2011 as the value date. Saturday and Sunday being non-working days in the country of the issuing bank. The documents were received by the issuing bank on 25 July 2011 and their notice of refusal was sent on 28 July 2011.

Details as to reimbursement arrangements between a nominated bank and the issuing bank under a credit available at sight are not regulated by the UCP as they are basically a matter of process. It is the responsibility of the issuing bank to ensure that any required notice period is clearly stated in the credit. Otherwise a bank, as in this case, that claims reimbursement from the issuing bank, by a SWIFT message, with a value date that follows the standard processing time of a maximum of three banking days as mentioned in URR 725 sub-article 11 (a) (i) (where a reimbursing bank is involved) can reasonably expect to be reimbursed on that date absent any indication of refusal of the documents.

Issue 2 of the query refers to whether the issuing bank was allowed to suspend reimbursement, pending completion of the examination of the documents, without 'due notice' being sent to the confirming bank, at the latest, on the value date of the claim. A 'due notice' implies a refusal notice issued subject to UCP 600 article 16, and pre-supposes that the examination of documents and the decision to take up or refuse the presentation could be completed within a period commencing on 25 July and ending on 26 July. If the examination was not completed by 26 July, no refusal message could be sent at that time and the bank should have honoured the claim in the interim.

- 3) The refusal notice states:
- refusal of documents;
 - the discrepancies on which the refusal is based; and
 - that documents are held until receipt of either the applicant's waiver or prior instructions from the presenter.

The requirements of sub-article 16 (c) are met. The refusal message applies option (c) (iii) (b) albeit with language slightly different to that used in UCP.



The wording used in the refusal is acceptable as the essential requirements of sub-article 16 (c) have been met i.e., the issuing bank is holding documents, and there is information that the applicant has been approached for a waiver but instructions of the presenter received prior to agreeing to accept the applicant's waiver will be respected.

CONCLUSION

1) Invoice – a bank choosing to complete a mathematical calculation cannot, when there are other recognised ways of doing so (as is the case with the invoice in question), choose the one that they believe gives them a better opportunity to refuse documents. The invoice is acceptable under each of the two methods of calculation.

CMR – Based on the information given under Analysis, there is no discrepancy.

2) Yes. The issuing bank was allowed to send their single notice of refusal after completion of examination of documents but, absent any specific notice period in the credit for the value date to be applied to the claim for reimbursement, the issuing bank should have paid the claim that was received from the confirming bank with the value date requested if the examination of documents could not be completed by the value date. If payment had been made, based on the SWIFT claim, the issuing bank would still be at liberty to seek a refund in the event that the documents were subsequently found to be discrepant for valid reasons.

3) Yes. The status that is given in the refusal notice meets the requirements of sub-article 16 (c) (iii).

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission's Group of Experts and Officers 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, Technical Adviser or any of the Group of Experts 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,

A handwritten signature in black ink, appearing to read 'Thierry Senechal', with a horizontal line underneath.

Thierry Senechal
Senior Policy Manager
Banking Commission