

Draft Opinions of the ICC Banking Commission

Attached is the new draft Opinion, TA925, for discussion during the July 2022 Banking Commission meeting which will be held virtually.

In accordance with the agreed procedure, comments are to be sent to the secretariat **NO LATER** than 2 weeks prior to the Commission meeting. National Committees are therefore requested to send any comments, **as a word document attachment only**, by:

28 June 2022, end of business day (CET). Comments received after this date may not be considered.

To: Tomasch Kubiak: Tomasch.KUBIAK@iccwbo.org

Please also copy your comments to:

David Meynell: davidmeynell@aol.com

Glenn Ransier: glenn.ransier@wellsfargo.com

Kim Sindberg: kim@kimsindberg.com

Gary Collyer: gary@collyerconsulting.com

In the event you have no comments to any or all of the draft Opinions, we would still appreciate receiving a response giving your agreement. This will provide us with a more complete consensus of feedback from National Committees.

Dana Milena Enss
Policy Manager
ICC Germany
Internationale Handelskammer
International Chamber of Commerce
Wilhelmstraße 43 G
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Germany

12 May 2022

Document 470/TA.925

Dear Dana,

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

QUOTE

We, as beneficiary, received an advice of a letter of credit from the confirming bank in which they stated that they had added their confirmation.

The documents presented under the credit have been taken up by the confirming bank on 27.01.2022.

According to the credit, payment is due 5 working days after the date of a SWIFT message to the issuing bank.

On 03.02.2022, the confirming bank informed us that they have received a refusal of the documents from the issuing bank, mentioning the following discrepancy:

GROSS WEIGHT ON CERTIFICATE OF ORIGIN NOT AS PER THAT ON B/L
AND PACKING LIST

We have checked the mentioned discrepancy and found that the issuing bank was correct. The certificate of origin reads total gross weight of 15,330 kgs while the packing lists and air waybill show total gross weight of 15,303 kgs.

Nevertheless, we requested payment from the confirming bank as our documents have been taken up without any reserve.

The answer of the confirming bank was as follows:

“It is correct that we overlooked a discrepancy and have taken up the documents. But within the grace period the issuing bank refused to accept the documents and we also pointed out to you the discrepancy within the grace period. You have also confirmed that the discrepancy noted by the opening bank is correct. So it is a fact that discrepant documents have been presented.

Kindly note that according to Article 8 of the UCP 600 a confirming bank is only obliged for payment provided that the stipulated documents constitute a complying presentation.

We are therefore surprised that you demand the outstanding payment and will revert to the matter upon receipt of issuing banks acceptance advice.”

We have answered that we are surprised about their interpretation of the UCP 600. We referred to sub-article 15 (b) and again asked for payment.

We received an answer from the confirming bank that they are not lawyers, but they assume that acceptance of documents can be revised if, “shortly after”, it is found that the documents were discrepant.

They offered payment under reserve or payment after acceptance of documents by the issuing bank.

Our question:

Could we insist on payment under the confirmation, without reserve, or is the confirming bank allowed to revise their acceptance of the documents?

UNQUOTE

ANALYSIS

The pertinent UCP 600 references are as follows:

Sub-article 14 (a) “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.”

Sub-article 15 (b) “When a confirming bank determines that a presentation is complying, it must honour or negotiate and forward the documents to the issuing bank”.

Sub-article 8 (a) (i) (a) “Provided that the stipulated documents are presented to the confirming bank or to any other nominated bank and that they constitute a complying presentation, the confirming bank must:

i. honour, if the credit is available by

a) sight payment, deferred payment or acceptance with the confirming bank; ...

As indicated in the message from the confirming bank to the beneficiary, the confirming bank had “taken up the documents”. At the same time it would have sent a SWIFT message to the issuing bank for reimbursement (as required by the credit) and forwarded the documents to the issuing bank.

At this point in time, the confirming bank became obligated to effect payment for the presentation of the beneficiary value 5 banking days after the date of its SWIFT message. This obligation to pay was irrespective of whether the issuing bank agreed that the documents represented a complying presentation or that a refusal notice was sent detailing one or more discrepancies that had not been identified by the confirming bank.

The query indicates that the confirming bank made reference to a grace period. There is no such period mentioned or allowed under the UCP 600. It is assumed that the confirming bank is referring to the period between the sending of the SWIFT message and the date that payment would be due to the beneficiary. This is not a grace period. This is simply the period of time that the issuing bank requires in order to provide the reimbursement for a complying presentation made to the confirming bank.

The confirming bank determined that a complying presentation had been made. Under the UCP 600, that determination is binding on the confirming bank and it must honour. The fact that the beneficiary, upon notification of the refusal made by the issuing bank,

subsequently agreed that the documents were indeed discrepant does not change the position of the confirming bank that the documents complied.

In the context of the discrepancy, and as further elaborated by the beneficiary, a rebuttal could be made to the issuing bank, under ISBP 745 paragraph A23, that the figures “30” in the gross weight on the Certificate of Origin have clearly been transposed and should be understood to be “03”.

CONCLUSION

The confirming bank is required to effect payment without any requirement for a reserve from the beneficiary.

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission’s Technical Advisers based on the facts under “QUOTE” above. They do not necessarily reflect the opinion of the ICC Banking Commission until the Banking Commission renders its approval or disapproval of these opinion(s) at the next scheduled meeting.

The reply given is not to be construed as being other than solely for the benefit of guidance and there should be no legal imputation associated with the reply offered.

If this query relates to a matter currently under consideration by the courts, the ICC Banking Commission will refrain from considering it for adoption as an opinion.

Neither the ICC nor any of its employees, nor any member of the Banking Commission, including the Chairman, Vice-Chairmen or Technical Advisers shall be liable to any person for any loss or damage arising out of any act or omission in connection with the rendered opinion(s).

Yours Sincerely,

A handwritten signature in dark ink, appearing to be 'TK' with a long horizontal stroke extending to the left.

Tomasch Kubiak
Policy Manager Banking Commission
International Chamber of Commerce