

Banking Commission

Final consolidated Opinions of the Banking Commission, April 2023

Attached are the following Opinions as distributed in February 2023

470/TA927rev2 (pending members decision)

470/TA930rev

Note that Accordingly to the decision taken by members during the 18 April 2023 ICC Official opinion session, **470/TA927rev2** is pending a decision from members with three given choices a following steps:

- Accepted
- Accepted with reserve (specifying the reserve)
- Inviting initiator for withdrawal pending a potential ISBP revision which would also address this topic

ICC National Committees will have until **27 June 2023 COB** in order to express their preference. Decision will be final by **11 July 2023** during the next official opinion session.

Ms. Li Yuanzi
Policy Manager,
ICC China Banking Commission
ICC China
No. 2 Huapichang Hutong,
Xicheng District
Beijing
China

26 April 2023

Document 470/TA.927rev2

Dear Ms. Li Yuanzi,

Thank you for your query regarding UCP 600 and ISBP 745. Please find below the opinion of the ICC Banking Commission Technical Advisers.

QUOTE

A documentary credit, subject to UCP 600 and URR 725, was issued available with any bank by negotiation. Description of goods field specified as follows:

QUOTE

COOKING RANGE AND ITS SPARE PARTS AS PER PURCHASE ORDER NO. XXX DATED 05-MAY-2021. FOB ANY PORT IN CHINA.

UNQUOTE

Among other documents, "SIGNED COMMERCIAL INVOICES IN 3 ORIGINAL AND 3 COPIES" were required.

On 10 September 2021, the nominated bank received a set of documents under the above credit, which they determined as complying and forwarded to the issuing bank without negotiation. Extracted details as shown in the invoice are as follows: (xxx refers to specific numbers)

Commodity	Item No.	Quantity	Carton	Unit Price	Amount
Cooking range	ABC	xxx	xxx	xxx	xxx
Spare parts	123	xxx	xxx	xxx	xxx
Spare parts (f.o.c)	321	xxx	xxx	Free of Charge	

On 16 September 2021, a refusal notice was received from the issuing bank, citing a discrepancy: INVOICE EVIDENCE FREE OF CHARGE GOODS NOT ALLOWED AS PER L/C. The nominated bank objected to this refusal.

On 20 September 2021, the nominated bank received the issuing bank's authorization to claim reimbursement from the reimbursing bank. The message also indicated the deduction of a discrepancy fee of USD100. In order to accelerate payment for the beneficiary, the nominated bank claimed as instructed. However, the nominated bank subsequently argued with the issuing bank by sending messages insisting that the discrepancy was invalid and requesting a refund of the discrepancy fee. The discrepancy fee was never refunded.

1. Preliminary Analysis and Opinion from Nominated Bank :

In its first reply, the issuing bank's main arguments were that "FREE OF CHARGE GOODS NOT ALLOWED AS PER LC TERMS" and "FOC GOODS CAN BE SHIPPED ONLY IF LC PERMITS".

The nominated bank considered that neither field 45A stipulated the price of the spare parts nor did it include any prohibitive clause on the price, and argued that spare parts could, therefore, be invoiced for a specific value or be free of charge. In either case, no L/C terms were violated.

In its subsequent replies, the issuing bank maintained that the discrepancy was valid quoting ISBP 745 paragraph C12 (b).

However, the nominated bank considered that this paragraph did not apply to this case, based on the following reasons:

ISBP 745 paragraph C12 (b) does not prohibit an invoice indicating goods to be free of charge under any circumstances. The intention of this paragraph is not to discuss the question as to whether goods that are free of charge are acceptable or not. It focuses on whether over-shipped goods could be accepted or not even if they are stated to be free of charge.

In this case, field 45A stipulates 'SPARE PARTS' without specifying any quantity, so it is unable to conclude that the spare parts shown are "ADDITIONAL" goods as specified in ISBP 745 paragraph C12 (b). Moreover, as the credit does not stipulate the price of the spare parts, it is up to the beneficiary and the applicant, rather than the banks, to decide whether spare parts are to be free of charge or not.

The issuing bank disagreed with the nominated bank's arguments and considered such interpretation "INCORRECT PERSPECTIVE TO PARA C12". In addition, the issuing bank stated that it was standard banking practice that unless permitted in the credit, shipment of free of cost goods would not be allowed even though shipped goods were part of field 45A.

The nominated bank strongly disagreed to the issuing bank's interpretation and argued that the issuing bank's alleged standard banking practice had never been acknowledged by UCP, ISBP or ICC official Opinions.

2. Our Questions are:

We would appreciate an official Opinion to the following questions:

1) Was the discrepancy raised by the issuing bank valid? Absent any stipulation on the price and quantity in the credit, is it acceptable for the beneficiary to indicate goods that are free of charge on an invoice?

2) Is it correct to interpret ISBP 745 paragraph C12 (b) as "it means to prohibit an invoice indicating goods stated to be free of charge under any circumstances unless allowed by the L/C"?

UNQUOTE

ANALYSIS

Documents were presented under a credit subject to UCP 600 and refused by the issuing bank on the basis that the invoice included free of charge goods. Four days later, the issuing bank provided the nominated bank with an authorisation to claim reimbursement but with deduction of a discrepancy fee of USD100.

The discrepancy fee was disputed by the nominated bank but, in the interests of time, they proceeded with the reimbursement process whilst separately raising an objection to the fee.

In order to have an awareness of the nuances of this issue, it is essential to examine the evolution of the content of ISBP 745 paragraph C12 (b):

- ISBP 645 - paragraph 68 (b) "[An invoice must not show:] merchandise not called for in the credit (including samples, advertising materials, etc.) even if stated to be free of charge."
- ISBP 681 - paragraph 64 (b) "[An invoice must not show:] merchandise not called for in the credit (including samples, advertising materials, etc.) even if stated to be free of charge."

If a similar presentation had been made under a credit where either ISBP 645 or ISBP 681 were applicable, it can certainly be agreed that the spare parts were actually "called for" within the goods description of the credit, which would infer that such a presentation would have been considered as compliant.

However, ISBP 745 paragraph C12 (b) reflects an expanded practice and states:

- "[An invoice is not to indicate:] goods, services or performance not called for in the credit. This applies even when the invoice includes additional quantities of goods, services or performance as required by the credit or samples and advertising material and are stated to be free of charge."

The text is now focussed on the unacceptability of three data elements that may appear in an invoice i.e., data relating to:

- (1) goods, services or performance not called for in the credit;
- (2) additional quantities of goods, services or performance as required by the credit; and
- (3) samples or advertising material.

An invoice will not be acceptable under (1), (2) and (3) even if such items are stated to be free of charge. It should be noted that "additional quantities of goods, services or performance" is not confined to circumstances where a quantity or pricing of one or more individual items is included in the credit. "Additional quantities" applies in the general sense of a quantity that is in excess of that which is required to be shipped and paid for under the credit.

The key issue in this query is that the goods description in the invoice displays three separate rows, "Cooking range" (goods required by the credit), "spare parts" (goods required by the credit) and "spare parts (f.o.c)" (spare parts that can be considered as an additional quantity to those covered within the value of the credit and for which are stated to be free of charge).

To explain further, the credit was issued for a specific amount; that amount reflected the cost of Cooking Range **AND** Spare Parts (emphasis added). Therefore, the credit amount included an amount in respect of the spare parts, even if the credit did not split the amount between the cost of the cooking range and spare parts. The credit made no reference to "free of charge" spare parts. At this point, if only cooking range and spare parts are shipped for, or within, the credit amount (subject to any applicable tolerance), there is no issue.

However, and as stated above, the description "Spare parts (f.o.c)" can be considered as an additional quantity of goods to those required by the credit. Any counter-argument based on a reference to any agreement of the commercial parties or the contract or the lack of pricing in the credit would be incorrect as banks deal with the examination of documents on their face.

The position under ISBP 745 paragraph C12 (b) is that no free of charge goods are acceptable unless the credit states otherwise.

From a separate grammatical context, it cannot be ignored that the text "f.o.c" has been surrounded by parentheses, i.e. "(" and ")". Parentheses are always used in pairs in order to allow the provision of *additional* or *supplemental* information that clarifies or illustrates the related wording. Accordingly, parentheses are used to insert a word, phrase, or clause into a sentence to add additional, extra, subordinate or clarifying information.

Based on these criterion, "(f.o.c)" must be interpreted as inferring an "additional" quantity which, as stated above, is not acceptable under ISBP 745 paragraph C12 (b).

CONCLUSION

1. The discrepancy is valid. Unless allowed by the terms and conditions of a credit, an invoice should not indicate goods that are free of charge.
2. Yes, this is correct.

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 blue ink, appearing to be 'TK' with a stylized flourish.

Tomasch Kubiak
Policy Manager Banking Commission
International Chamber of Commerce

Mr. Leon Yip
International Policy Coordinator
ICC United Kingdom
1st Floor, 1-3 Staple Inn,
London WC1V 7QH
United Kingdom

20 April 2023

Document 470/TA.930rev

Dear Mr. Yip,

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

QUOTE

On 29 August 2022 a documentary credit, denominated in USD and subject to UCP 600 was issued. It was available with any bank by negotiation and contained the following sanctions clause:

QUOTE

BREACHES OF LOCAL AND INTERNATIONAL ANTI-MONEY LAUNDERING OR ECONOMIC SANCTIONS LAWS AND REGULATIONS ADMINISTERED BY, INCLUDING BUT NOT LIMITED TO CHINA, UNITED NATIONS, UNITED STATES, ARE NOT ACCEPTABLE. OUR BANK MAY REJECT ANY TRANSACTION IN VIOLATION OF ANY OF THESE LAWS AND REGULATIONS WITHOUT ANY LIABILITY ON OUR PART.

UNQUOTE

On 30 September 2022, the nominated bank received a presentation of documents under the credit (which included drafts drawn on the issuing bank) that they determined to be complying and forwarded to the issuing bank.

On 17 October 2022, the nominated bank received a SWIFT message from the issuing bank confirming "THAT DOCUMENTS HAVE BEEN ACCEPTED...DUE ON 2022-12-20" in line with the terms of the credit.

On 13 December 2022, the nominated bank received a SWIFT message from the issuing bank stating: "WE REGRET TO INFORM YOU THAT WE CAN NOT EFFECT PAYMENT UNDER THE SUBJECT L/C BECAUSE OF LOCAL AND INTERNATIONAL LAWS AND REGULATION AND ECONOMIC TRADE SANCTIONS."

The nominated bank has subsequently established independently that the applicant appears to have been placed on the US OFAC list on 17 November 2022. Although this has not been explicitly stated by the issuing bank as the basis for not being able to effect the payment, it has been inferred as such.

After further correspondence with the issuing bank's branch and head office, additional information about the sanctions or prevailing laws has not been forthcoming.

The issuing bank has, however, offered to settle the transaction in CNY or alternatively asked the nominated bank to speak with the beneficiary about arranging a direct payment, both of which the nominated bank has rejected, stating in response that the issuing bank's obligations under the credit and the accepted draft are independent from any obligation between the issuing bank and applicant. Therefore, the nominated bank has provided both the branch in question, and the head office with a clear demand letter for payment.

Initially, messages from the issuing bank referred to the fact they were *still* not able to make payment and that they "will continue to pay attention about this matter", suggesting that they understood that reimbursement obligations remain in place under the LC. However, their latest message states:

QUOTE

According to the article 1 of the Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 ("UCP600"), UCP600 are rules that apply to any documentary credit ("credit") when the text of the credit expressly indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded by the credit, which means all parties are bound by UCP600 as well as stipulations and conditions in the specific L/C; and L/C stipulations and conditions prevail instead of UCP600 in this case. The L/C in this case clearly states that breaches of local and international anti-money laundering of economic sanctions laws and regulations administered by, including but not limited to China, United Nations, United States, are not acceptable. Our bank may reject any transaction in violation of any of these laws and regulations without any liability on our part in 47A.

[The nominated bank] and the beneficiary did not raise any questions when receiving the L/C and presented the documents under the L/C, which means all parties accepted the stipulations and conditions in the L/C and thus are bound by the L/C conditions. As the applicant is under sanction currently, [the issuing bank] may reject any transaction under the L/C without any liability according to above stipulations and conditions of the L/C, which prevail in this case. Therefore, we can not effect the payment under the LC.

UNQUOTE

Given the above, the nominated bank would appreciate an ICC opinion on the following:

1. Is the above sanctions clause considered a non-documentary condition under UCP 600 sub-article 14 (h)? If that is the case, does the ICC consider that this clause can be disregarded and has no effect on the underlying obligations of the issuing bank and does not absolve the issuing bank of their obligation to honour the credit following a discovery of the applicant's sanctions status after acceptance of documents by the issuing bank as they have posited above?
2. In accordance with UCP 600 article 4, does the ICC consider that the issuing bank's obligations under the documentary credit and accepted bill of exchange are independent from their underlying agreement with the applicant and the issuing bank is thus bound to honour their obligation under UCP 600 sub-article 7 (c)?
3. Does the ICC consider that:

- a) unless the issuing bank can provide evidence that there are economic sanctions on the applicant under which they are prohibited under mandatory local or international law that is applicable to them from making payment to the nominated bank, then they should honour immediately;
- b) if it is proven that the issuing bank is unable to pay due to mandatory law/regulation applicable to them and/or in reliance on the sanctions clause, then their obligation to pay the nominated bank remain valid until such time they are able to make payment; and
- c) given the issuing bank has suggested settlement in CNY, this would stand to contradict the position of the local laws preventing payment and this suggests that they recognise their obligation to settle this commitment independent of any sanctions or local laws applicable to the applicant?

UNQUOTE

ANALYSIS

A credit subject to UCP 600, and denominated in USD, was issued available with any bank by negotiation and contained the sanctions clause as quoted in the query.

Documents were presented by the nominated bank. Subsequently, the issuing bank accepted the presentation and confirmed the due date.

Prior to maturity, the nominated bank was informed by the issuing bank that they were unable to effect payment under the credit due to “local and international laws and regulation and economic trade sanctions.”

Despite the apparent sanctions breach, the issuing bank offered to settle the transaction in CNY. As an alternative, they also suggested that the nominated bank could liaise with the beneficiary for the purpose of arranging a direct payment. Both suggestions were rejected by the nominated bank and a further demand for payment was made. In response, the issuing bank stated that, as the applicant was under sanction, they could not effect payment.

The issue of sanctions clauses in documentary credits (and other instruments) has been addressed in several ICC resources, most specifically in the Guidance Paper on the Use of Sanctions Clauses in Trade Finance-related Instruments Subject to ICC Rules (2014) and the subsequent Addendum dated May 2020. Paragraph 1.4 of the Guidance Paper highlights that where sanctions laws and regulations are determined to be applicable to a credit, they are considered as being mandatory and, depending on the exact nature of the law/regulation, may override the ICC rules applicable to that credit and, more generally, the underlying contract terms as well.

More recently, this issue has been addressed in ICC Opinion TA.920rev, wherein it is stated that the Banking Commission cannot comment on specific sanctions or regulations and their application in respect of the involved parties, and that any delay in, or refusal to pay due to a sanctions clause is outside of the UCP 600. It was further stated that, unless mandatory law or regulation prohibits the issuing bank from honouring, it must do so if a complying presentation is made.

The Addendum to the Sanctions Guidance Paper, Introduction 2nd paragraph, states that sanctions clauses are non-documentary conditions for the purposes of the UCP and the URDG and recommends that banks should refrain from issuing trade finance-related instruments that include sanctions clauses that purport to impose restrictions beyond, or conflict with, the applicable statutory or regulatory requirements.

Non-documentary conditions are addressed in UCP 600 sub-article 14 (h) wherein it is stated that if a credit contains a condition without stipulating the document to indicate compliance with the condition, banks will deem such condition as not stated and will disregard it. However, the scope of this sub-article is in respect of determining if the presented documents constitute a complying presentation. The legality or enforceability of sanctions clauses may also involve considerations of mandatory law/regulations which may override the credit and the UCP.

It is stated in ICC Opinion TA.920rev that, "In accordance with UCP 600 sub-article 7 (b), an issuing bank is irrevocably bound to honour as of the time it issues a credit. Sub-article 7 (a) includes that provided the stipulated documents are presented to the issuing bank and that they constitute a complying presentation, then the issuing bank must honour. Any delay or refusal to pay, due to a sanctions clause, is outside the scope of the UCP 600. Likewise, unless mandatory law or regulation prohibits the issuing bank from honouring it must do so if a complying presentation is made."

UCP 600 sub-article 4 (a) includes the following wording: "A credit by its nature is a separate transaction from the sale or other contract on which it may be based."

Once a complying presentation has been made, an issuing bank is obligated to honour. If they are prohibited to do so due to a sanctions breach, it would be standard banking practice and prudent to provide any evidence to the nominated bank, to the extent that this does not violate mandatory law.

CONCLUSION

1. Although a sanctions clause is considered as a non-documentary condition, the Addendum to the Sanctions Guidance Paper recommends that banks should refrain from issuing trade finance-related instruments that include sanctions clauses that purport to impose restrictions beyond, or conflict with, the applicable statutory or regulatory requirements.

2. Whilst a credit is separate from the underlying contract, thereby meaning that an issuing bank must honour a complying presentation, any delay in, or refusal to pay due to following a mandatory law/regulation (re-affirmed by a sanctions clause or not) is outside of the UCP 600.

3a). Whether or not an issuing bank is obligated to honour in the event of no evidence being provided, is a matter outside the scope of the UCP 600. However, as stated in ICC Opinion R906/TA884rev, it is expected that a bank should provide a reference to the applicable law or sanction regulation, and the document(s) and /or data in the presentation to which it relates.

3b). At what point in time the issuing bank would be allowed to honour based on a sanctions breach, is a matter outside the scope of the UCP 600 and will depend on the nature of the applicable law(s)/regulation(s).

3c) This is a matter outside the scope of the UCP 600 and cannot be answered by the ICC Banking Commission as it depends on the nature of the applicable law(s)/regulation(s).

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission based on the facts under "QUOTE" above.

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,

Tomasch Kubiak

A handwritten signature in blue ink, appearing to be 'TK' with a stylized flourish extending to the right.

Policy Manager Banking Commission
International Chamber of Commerce