

Ms Dorothee Heinze
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ICC United Kingdom
12 Grosvenor Place
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United Kingdom

9 December 2014

Subject: Document 470/TA.812rev

Dear Ms Heinze,

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

QUOTE

We kindly ask for an official opinion of the ICC Banking Commission in respect of the requirement for a possible refund under a price fluctuation clause in a documentary credit as described below. Whilst the underlying principle is generic in nature, it is confirmed that this is an actual transaction which is not subject to legal action. The credit concerned relates to oil, is stated to be subject to UCP 600, and contains the following clause.

11.BENEFICIARY MAY DRAW UNDER THIS LETTER OF CREDIT AGAINST
PROVISIONAL INVOICE BASED ON PRICE QUOTATION ON NOR DATE. IN THE
EVENT THAT THE NOR DATE IS NON QUOTATION DATE, THE PREVIOUS
AVAILABLE QUOTE SHALL BE USED. BALANCE PAYMENT TO BE EFFECTED
UNDER THIS LC AGAINST PRESENTATION OF FINAL INVOICE WHETHER THE
AMOUNT OWED IS IN BENEFICIARYS FAVOUR OR IN THE APPLICANTS
FAVOUR.

Whilst it is by no means unknown for price escalation/de-escalation clauses such as this to appear in oil credits, our understanding is that historically any adjusting balance has been settled outside the credit. However, the claim has now been made that in the event of a problem the issuing bank (for this purpose including any confirming bank) has an obligation to settle the adjusting balance within the terms of the credit. We have considered this scenario in relation to both the requirement for an additional payment and a refund and concluded that it is the beneficiary's, not the bank's, responsibility to initiate any claim in respect of the adjusting balance.

If a further payment is requested, we believe it is the beneficiary's responsibility to make a new presentation claiming this with such presentation being required to comply with the terms and conditions of the credit in exactly the same way as any other presentation. Of

necessity this means that the wording of the credit must facilitate such a presentation but, again, that is no different from any other presentation.

Conversely, if a refund is sought, we believe that this is outside the scope of Articles 7 and 8 of UCP 600 which only envisage payment, acceptance or negotiation in the beneficiary's favour but do not envisage a refund to the applicant. Consequently, we would regard any such refund as being outside the scope of the credit and subject either to other contractual arrangements between the parties or the general principles of applicable law.

In these circumstances, we are writing to request an official opinion of the Banking Commission either confirming our analysis or alternatively setting out the Banking Commission's position on the issue outlined above.

ANALYSIS

As defined in UCP 600 article 2, the purpose of a credit is to honour a complying presentation. As further defined in UCP 600 article 2, honour means to pay at sight, to incur a deferred payment undertaking and pay at maturity, or to accept a draft and pay at maturity.

The concept of the credit in question is that a drawing will initially be made under the credit against presentation by the beneficiary of a provisional invoice subject to specific pricing restrictions.

At a future date, within the validity of the credit, a 'balance payment' drawing may be made under the credit against presentation of a final invoice. The balance payment may be in favour of the beneficiary or the applicant. In normal circumstances, the final invoice is for a higher amount, and payment for the additional 'balance' (i.e. the difference between the provisional invoice and the final invoice) is subsequently made to the beneficiary.

In the absence of any conflicting information, presentation of both the provisional invoice and the final invoice is to be made by the beneficiary. In order to cater for a circumstance whereby payment is to be made in favour of the applicant due to the final invoice being for a lower amount than the provisional invoice, the credit should include a mechanism as to how this should be handled.

Such an arrangement is not envisaged nor covered by UCP 600. However the inclusion of this clause in a credit indicates a modification of UCP 600 and must be considered as an integral part of the terms and conditions of the credit. Absence of a clause clarifying the impact of such modification on UCP 600 is bad banking practice. Both the issuing and confirming banks should have ensured that a condition was included in the credit outlining how any potential payments to the applicant should be handled. Any assumption by either bank that only payments in favour of the beneficiary would be feasible is incorrect based on the wording of this specific clause.

CONCLUSION

A credit subject to UCP 600 constitutes a definite undertaking of the issuing bank to honour a complying presentation. This particular credit allows payment of a complying presentation of the final invoice to be made to either the beneficiary or the applicant. As such, the credit should have included an explanation of how this is to be handled.

As mentioned in ISBP 745 'Preliminary considerations', many of the problems that arise at the document examination stage could be avoided through careful attention to detail in the issuance of the credit.

If the beneficiary is to effect negative balance payment, this is to be handled outside the credit as payment obligations of the beneficiary are not covered under the scope of UCP 600.

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,



Thierry Senechal
Policy Manager
Banking Commission