Finance for Development

Banking Commission

Mr. Leon Yip
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London WC1V 7QH
United Kingdom

7 September 2020

Subject: Document 470/TA.909

Dear Mr. Yip,

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

QUOTE

ICC UK is submitting this request for an official Banking Commission opinion in order to seek to clarify interpretation of the first paragraph of Article 35 of UCP 600.

We have studied the Interpretative Paper (the "paper") on the correct Interpretation of the first paragraph of UCP 600 Article 35 carefully but have a number of concerns, namely,

- The preamble to the paper refers to COVID-19 but we do not believe that this is a COVID-19 issue, per se, rather it is an issue which has existed in various forms ever since the 1933 Revision Brochure No. 82. We also note that the paper itself states "applies generically" which we believe supports the argument that this is a generic issue.
- The paper is restricted to letters and documents, but Article 35 also refers to messages.
- Notwithstanding that it is not an official document the wording of the paper implies that it has been approved by the Banking Commission which is not correct.
- The paper is undated, does not bear any identification reference and does not appear to have been posted on the ICC website which makes familiarity with it difficult to achieve.
- Finally, ICC UK has some concern about specific reference to retrospective application as indicated in the penultimate paragraph of the paper since this could potentially be claimed to alter the terms and conditions of an existing credit. Consequently, we feel it would be better to omit such reference.

In summary, ICC UK believes that interpretation of the term "transmission" in the context of Article 35 of UCP 600 is a matter of international standard banking practice which requires the formal approval of the Banking Commission.

In these circumstances, and in order to provide clarification, will you please answer the following questions.

- Is interpretation of the term “transmission” in Article 35 of UCP 600 considered to be a question of international standard banking practice?
- For the purpose of international standard banking practice does “transmission” “in the context of Article 35 of UCP 600 include failure of transmission for any reason not caused or exacerbated directly or indirectly by the actions of the sender?”
- Does failure of transmission for this purpose refer not only to physical letters and documents but also to electronic records and messages?

UNQUOTE

ANALYSIS

The Interpretative Paper on the correct interpretation of the first paragraph of UCP 600 article 35 can be found at: https://iccwbo.org/publication/interpretative-paper-on-the-correct-interpretation-of-the-first-paragraph-of-ucp-600-article-35/

This paper relates to the “Guidance Paper on the impact of COVID-19 on trade finance transactions subject to ICC rules” that the ICC Banking Commission released on 6 April 2020 and, in particular, to sections B (iii)-(v) and C (iii)-(v) of the Guidance Paper. (https://iccwbo.org/publication/guidance-paper-on-the-impact-of-covid-19-on-trade-finance-transactions-issued-subject-to-icc-rules/)

As stated therein, the Guidance Paper is not an official publication of the ICC Banking Commission. It is a paper that the Banking Commission released in relation to the application of its rules consistent with its tradition of clarifying their proper interpretation and application when it determines that there is a need to do so.

Whilst trade practitioners globally had indicated their agreement to the content of sections B (iii)-(v) and C (iii)-(v) of the Guidance Paper, some doubts had been raised from a legal perspective as to whether the inability of a bank to transmit or send letters or documents in paper form between a nominated bank, confirming bank and issuing bank, in the manner required by a documentary credit, due to events such as (*but not limited to*) those experienced during the COVID-19 pandemic, would prevent an application of the principles set out in those sections applying a literal reading of UCP 600 article 35 which, when applicable, qualifies the requirements to forward documents set out in UCP 600 sub-articles 7 (c), 8 (c), 15 (b) and/or 15 (c).

Accordingly, it was decided that in order to provide further clarity, the ICC Banking Commission should issue the abovementioned Interpretative Paper. For the sake of clarity and transparency, the full content of the Interpretative Paper is stated below:

“*Article 35 of UCP 600 provides in its first paragraph:*

"A bank assumes no liability or responsibility for the consequences arising out of delay, loss in transit, mutilation or other errors arising in the transmission of any

messages or delivery of letters or documents, when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit, or when the bank may have taken the initiative in the choice of the delivery service in the absence of such instructions in the credit."

For the avoidance of any doubt, the ICC Banking Commission confirms that, in its true interpretation, article 35 of UCP 600 should be read also to apply to the case where the nominated bank or the confirming bank is not able to transmit or to send letters or documents in paper form (collectively "Documents") in accordance with the requirements stated in the documentary credit because:

− *the courier or postal service provider nominated in the documentary credit does not accept, collect or deliver the Documents, or*

− *where no courier or postal service provider has been nominated in the documentary credit, no such service provider accepts, collects or delivers the Documents at the time the nominated bank or the confirming bank is to send the Documents to the confirming bank or issuing bank,*

provided that, in both cases, the nominated bank or the confirming bank has first made reasonable efforts to (a) find a courier or postal service provider that would accept or collect and thereafter deliver the Documents and (b) obtain the consent of, or instructions from, the issuing bank approving delivery in that manner.

This Interpretative Paper applies generically to all situations involving the application of UCP 600, including to documentary credits that are outstanding at the time of its publication. It does not amend Article 35 of UCP 600, but merely states its correct interpretation.

Where operational problems arise or are anticipated, it is recommended that all banks involved in the documentary credit are encouraged to liaise without delay to seek to agree on a mutually acceptable solution."

All previous versions of article 35 referred to "consequences arising out of delay and/or loss in transit of any messages, letters or documents"; the emphasis being on "delay", i.e., an event that would be conceived to be outside a bank's control.

A prime purpose of the Guidance Paper was to explain that in the event of any future disputes that refer to article 35, and for the benefit of any courts globally, that despite the additional wording that was inserted into the first paragraph of UCP 600 article 35 i.e. "when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit", the interpretation of the word "delay" in the preceding text had not changed, was not intended to be changed, and would prevail for circumstances such as those encountered under COVID-19, i.e. nominated and confirming banks are ready and able to send documents as requested, but it is impossible for them to comply with the mailing instruction due to the unavailability of a courier or postal service that will accept, receive or deliver such documents to their stated destination. In this context, the continued interpretation of the word ‘delay’ will protect banks that have honoured or negotiated but cannot forward the documents as required by sub-articles 7 (c), 8 (c), 15 (b) and 15 (c).

The addition of “when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit” ensures that the emphasis should be, as it always was, on “delay”, essentially intentional delay by the nominated or confirming bank. The additional words were not designed to change the position that had existed in previous versions of the UCP. Indeed, no drafting group could have envisaged the circumstances that are being faced today globally, as opposed to an event that may have been localised and short-lived, such as the Iceland volcanic eruption of 2010. Under today’s circumstances, banks are not deliberately breaching the terms of the credit; they are simply unable to fulfil the credit terms due to the prevailing situation. However, the Guidance Paper did not fully achieve its objective from a legal perspective, hence the release of the Interpretative Paper.

As such, the overall process of transmission of any messages or sending of letters or documents in paper form not only includes the physical transmission or sending, but also encompasses any *inability to transmit or send*.

When considering international standard banking practice, care needs to be taken to differentiate with ISBP 745, which is the International Standard Banking Practice for the Examination of Documents under UCP 600. Whilst ISBP 745 updates and revisions require the approval of the ICC Banking Commission, this is definitively not the case for international standard banking practice which is a far wider construct neither directed nor decreed by ICC rules. As far as UCP 600 is concerned, complying presentations must be in accordance with international standard banking practice, and data in a document must be read in context with international standard banking practice, but ‘international standard banking practice’ itself is not defined, nor can it be within a set of rules.

CONCLUSION

- Is interpretation of the term “transmission” in Article 35 of UCP 600 considered to be a question of international standard banking practice?

  Yes. The term “transmission”, as used in UCP 600 article 35, has been interpreted in line with international standard banking practice

- For the purpose of international standard banking practice does “transmission” “in the context of Article 35 of UCP 600 include failure of transmission for any reason not caused or exacerbated directly or indirectly by the actions of the sender?”

  Yes. The term “transmission”, as used in UCP 600 article 35, includes failure of transmission for any reason not caused or exacerbated directly or indirectly by the actions of the sender.

- Does failure of transmission for this purpose refer not only to physical letters and documents but also to electronic records and messages?

  No. Both the Guidance Paper and the Interpretative Paper refer specifically to the transmission or sending of letters or documents in paper form, and not to electronic records and messages.

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,

David Bischof
Deputy Director, Finance for Development