

## The Spring 2020 ICC Opinions are out



***This Trade Finance Newsletter provides an overview of the ICC Opinions approved by the ICC Banking Commission Spring 2020.***

The Banking Commission of the International Chamber of Commerce (ICC), usually meet twice each year with a full agenda. One of the key items on the agenda is to discuss and approve the latest Draft ICC Opinions. The ICC has a fixed process for handling the Draft Opinions. At the end of the process is the ICC meeting, where the Draft ICC Opinions are discussed – and approved. This spring the intention was to have the meeting in Dubai. However, due to covid-19 the meeting was postponed. Needless to say, the re-scheduling of the Dubai meeting had many consequences. One of those was that the process around the Draft ICC Opinions was “disrupted”. For that reason the approval process that normally would be done at the ICC meeting, was done via e-mail comments from the ICC National Committees. This process is now concluded, and the Final ICC Opinions have been circulated.

In addition to the Draft ICC Opinions originally circulated to the ICC National Committees a new ICC Opinion was added; namely TA902. The reason for adding this ICC Opinion (although it arrived after the official deadline) is that it refers to a covid-19 clause in a bill of Lading presented under an LC.

The below provides an overview of the ICC Opinions approved by the ICC Banking Commission Spring 2020:

**TA898rev: Incomplete wording in Attestation. Goods description missing on B/L**

The query includes two discrepancies:

- 1: IRREVOCABLE ATTESTATION: WORDING INCOMPLETE, NOT SHOWING “.... O U R OBLIGATIONS...”
- 2: B/L: GOODS DESCRIPTION MISSING

And for both the question is if the discrepancy is valid.

For discrepancy 1, the requirement in the documentary credit was:

An ICC Opinion is a formal Opinion given by the Banking Commission the ICC (International Chamber of Commerce), based on a specific question (termed “Query”).

The ICC Opinions are therefore the official interpretation of the relevant rules (UCP 600, URDG 758 etc.) and are considered international standard banking practice, and guide Trade Finance customers and staff on how to apply the ICC rules.

Quote

+A DULY SIGNED, IRREVOCABLE ATTESTATION CERTIFYING THAT YOU HAVE DULY PERFORMED ALL YOUR OBLIGATIONS CONCERNING THE SALE AND THE SHIPMENT OF GOODS REFERRED TO IN INVOICE(S) NR ... DATED .. (COPIES ENCLOSED) AND IN THE CONTRACT / PRO FORMA INVOICE/ORDER NR.. DATED.././...AND THAT YOU HAVE NOT RECEIVED THE CORRESPONDING PAYMENT WHICH FELL DUE ON.././..,

Unquote

The presented attestation included the following wording:

Quote

We have duly performed all obligations concerning the sale and shipment of goods referred to in invoices XXX and in proforma invoices XXX. And we have not received the corresponding payments which fell due in [date]

Unquote

For discrepancy 1 the answer from the ICC is that according to the beneficiary's Attestation, the beneficiary is providing the necessary information by stating "We". In this context, the word "we" can only represent the beneficiary. The discrepancy is not valid.

For discrepancy 2, the documentary credit included the following requirements:

Quote

Description of Goods: FROZEN PRODUCTS

Documents required): COPY OF BILL OF LADING CONSIGNED TO OR ENDORSED TO COMPANY Y [THE APPLICANT] AND SHOWING TRANSPORT OF FROZEN PRODUCTS TO PORT OF COTONOU, BENIN

Unquote

The presented bill of lading indicated the goods description "1375 cartons STC Maquereau L" and further indicated: "Cargo is stowed in a refrigerated container set at the shipper's requested carrying temperature of -20 degrees Celsius".

The confirming bank further explained its refusal by saying that "ACCORDING TO THE REQUIREMENT IN FIELD 46A, POS. 3, B/L HAS TO SHOW THE TRANSPORT OF 'FROZEN PRODUCTS'. A TRANSPORT OF GOODS IN A REFRIGERATED CONTAINER DOES NOT ACTUALLY IMPLY THAT THE PRODUCTS ARE FROZEN."

The answer from the ICC, is that the bill of lading did contain a goods description and the discrepancy is, therefore, not valid.

Also, the confirming bank mentioned that the bill of lading should have showed "transport of frozen products". However, the bill of lading stated that the goods were stowed in a refrigerated container set at a temperature of -20 degrees Celsius, this is a clear indication that the products were frozen.

### **TA899rev: CMR in 1 copy**

The query deals with a documentary credit with the following documents required:

#### *Quote*

- Manually signed commercial invoice in 1 original.
- CMR in 1 copy issued to the name of XYZ (the applicant).
- Certificate of origin in duplicate.
- Packing list in 1 original and 1 copy.
- Photocopy of original ATR.
- Beneficiary's declaration stating that 1 original CMR (original for sender/shipper) and original of ATR certificate have been sent together with the goods.

#### *Unquote*

The question relates to the "CMR in 1 copy" and if that is to be understood so that a copy or an original CMR must be presented under the documentary credit.

The answer from the ICC is that since the documentary credit also included disposal instructions for "1 original CMR (original for sender/shipper) and original of ATR certificate" a copy of the CMR should be presented under the documentary credit and the presented CMR should not be examined based on UCP 600 article 24 (Road, Rail or Inland Waterway Transport Documents ), but instead based on UCP 600 articles 14 (f) and 14(d).

### **TA900rev: SWIFT guarantee presented in original or copy?**

The scenario in the query is a documentary credit that calls for the presentation of a performance guarantee. The guarantee presented under the documentary credit was a paper based MT760, and the presentation was refused on the grounds that "Copy of the MT760 presented, instead of an original." The question was if that was a correct refusal.

The answer from the ICC is that it would not be possible to present the original MT760 guarantee in a paper form as it had already been issued previously by electronic means (i.e., via an authenticated SWIFT message). The paper version that was presented is a physical representation of the original and should be treated accordingly. The discrepancy is therefore not valid.

### **TA901rev: Reimbursement instructions**

The query deals with this reimbursement clause in a documentary credit:

#### *Quote*

"UPON RECEIPT OF CREDIT COMPLYING DOCUMENTS AT OUR ABOVE ADDRESS, WE WILL COVER YOU ACCORDING TO YOUR INSTRUCTIONS, VALUE 5 NEW YORK/GENEVA BANK BUSINESS DAYS."

#### *Unquote*

The documents were received by the issuing bank 27/9-2019, and the question is when is the latest payment date?

The opinion of the nominated bank (the presenter) is that payment must be effected 4/10-2019. I.e. 5 business days within receipt of complying documents.

The opinion of the issuing bank is that payment must be made 10/10-2019. I.e. 5 business days after having determined that the documents presented were complying.

The answer from the ICC is that since the issuing bank has a maximum of five banking days following the date of presentation in which to determine whether the documents comply, the “5 business days” start when the issuing bank has examined the documents and found them complying. Therefore the latest payment date is 10/10-2019.

#### **TA902: COVID-19 clause in Bill of Lading**

A bill of lading presented under a documentary credit subject to UCP 600 include the following “COVID-19 clause”:

Quote

*“Following the exceptional measures adopted by various governments in relation to the outbreak of COVID-19 virus and the operational constraints resulting thereof, the Merchants are hereby notified that the carriage of cargo may be disrupted or delayed. Cargo may not be loaded on the intended vessel and may be on forwarded to the port of destination on any alternative vessel at Carrier’s sole discretion.*

*Furthermore in case of disruption of ports’ operations, the cargo may be discharged in an alternative port without notice and – subject to availability – be on forwarded to the original intended port of destination. Carrier reserve its rights to accomplish the bill of lading in any alternative port. All additional costs, including but not limited to storage, demurrage, plugging, monitoring at the alternative discharge port or extra on forwarding costs, shall be on Merchant’s account and payable before delivery and the carrier shall have no liability whatsoever for any loss or damage resulting thereof.”*

Unquote

The questions raised relate to the implications such clause has from the document examination perspective.

The view of the ICC is that such clause is considered terms and conditions and a bank is not to examine the terms and conditions of carriage whether they appear on the face or the reverse of the bill of lading.

However, a presented bill of lading indicating a different port of loading or port of discharge than the port(s) stated in the documentary credit, would be deemed discrepant for that reason.

The above is an overview of the ICC Opinions approved by the ICC Banking Commission Spring 2020. I hope this is helpful to you, and will help avoid discrepancies and refusals. In any case, if you have Trade Finance related questions, do not hesitate to reach out to your local Trade Finance department

**Kim Sindberg**

Executive Adviser to Nordea and Technical Advisor to the ICC Banking Commission