



Trade Finance Newsletter #9

The Spring 2021 ICC Opinions are out

This Trade Finance Newsletter provides an overview of the ICC Opinions approved by the ICC Banking Commission Spring 2021.

An ICC Opinion is a formal Opinion given by the Banking Commission of 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.

The Banking Commission of the International Chamber of Commerce (ICC), usually meet twice each year. Also for the Spring 2021 meeting (held 30 and 31 March 2021) the structure of the meeting was adjusted to comply with covid-19 restrictions, i.e. the meeting was held online. For this meeting there was a dedicated slot allocated for the ICC Technical Advisors to present the new Draft Opinions and for the ICC National Committees to offer their comments. Following that online meeting, the Final ICC Opinions were circulated beginning April 2021.

The below provides an overview of the ICC Opinions approved by the ICC Banking Commission Spring 2021:

TA909rev: First paragraph of Article 35 of UCP 600

This query seek clarification of the two ICC Banking Commission documents:

“Guidance Paper on the impact of COVID-19 on trade finance transactions subject to ICC rules” (released on 6 April 2020) – and in particular, to sections B (iii)-(v) and C (iii)-(v).

Link: <https://iccwbo.org/publication/guidance-paper-on-the-impact-of-covid-19-on-trade-finance-transactions-issued-subject-to-icc-rules/>

And

“The Interpretative Paper on the correct interpretation of the first paragraph of UCP 600 article 35”

Link: <https://iccwbo.org/publication/interpretativepaper-on-the-correct-interpretation-of-the-first-paragraph-of-ucp-600-article-35/>

The issue of transmission of documents has been relevant during the different lockdowns relating to covid-19, as the courier services have been disrupted and it has been difficult, sometimes impossible, to forward the documents relating to Trade Finance transactions between countries.

In the Opinion it was concluded that the UCP 600 article 35 term "transmission" includes failure of transmission for any reason not caused or exacerbated directly or indirectly by the actions of the sender. Such as the inability to forward documentary credit documents to an issuing bank.

It was also stated that the two ICC documents mentioned above refer specifically to the transmission or sending of letters or documents in paper form and not to electronic records

TA910rev: No payment at maturity

The query involves two documentary credits issued and relayed by the advising bank, to a second advising bank (via SWIFT MT710). Subsequently, the documentary credits were received by the beneficiary via their own bank. Both documentary credits were available by negotiation with any bank.

In the sequence of events, the beneficiary made presentations under both documentary credits. The beneficiary's bank forwarded both sets of documents to the Country D office of the issuing bank according to the mailing instructions in the credit.

Case No.1

No refusal notice was sent by the issuing bank. The maturity date was advised to the beneficiary's bank in a SWIFT message that included the following wording:

"Subject to our further authentication and payment from applicant," And "Applicant has agreed for the payment of the A/M bill for USD 112,000/- on maturity dated 2018 July 04, and we will remit payment, ...".

Case No.2

Discrepancies had been identified and a refusal notice had (presumably) been issued. There appears to be no dispute as to the validity of those discrepancies or the content of the refusal notice, and it is assumed that the refusal notice included a status of holding documents pending further instructions from the presenter or that the issuing bank was holding the documents until it received a waiver from the applicant. The query suggest that the documents may have been released to the applicant by the issuing bank.

For these two cases the ICC Opined as follows:

Case No.1 - the issuing bank is obligated to honour.

Case No.2 – the issuing bank is obligated to honour given that it has released the documents to the applicant (without the agreement of the beneficiary's bank).

Likewise it was concluded that the issuing bank is responsible for interest if reimbursement is not provided on the maturity date. The amount and/or percentage rate for such interest is outside the scope of the UCP 600.

TA911

The query was held-over pending further information.

TA912rev: Issuing bank did not honour due to fraud

The query involves a transaction where the nominated bank received (via a SWIFT MT998 message) an advice from the advising bank, indicating that the issuing bank accepted the presentation for USD 582,125.00 and citing the payment maturity date.

Later, the issuing bank apparently learned that the transaction was fraudulent and offered a scheduled settlement.

The questions asked is if the issuing bank is liable to pay (including interest due to delay in payment). Likewise, it is asked what is the responsibility of the advising bank and second advising bank in this case.

The conclusion from the ICC was that the advising bank advised the documentary credit and have no further responsibilities under the credit. However, the issuing bank is obligated to honour.

For the purpose of interest, the issuing bank is responsible for that if reimbursement is not provided on the maturity date. The amount and/or percentage rate for such interest is outside the scope of the UCP 600.

TA913rev: Pre-printed text on insurance document

The query involves a documentary credit issued subject to UCP 600. The credit required (amongst other documents):

“Full set of original Insurance Policy/Certificate in assignable form and endorsed in blank, covering Institute Cargo Clause A for at least 110PCT of invoice value, showing “Claim payable in [Country] in invoice currency” and stating total number of original insurance policy/certificate issued.”

The presented insurance certificate stated in the pre-printed text:

“Claims must be advised with 3 months from the date of discovery of loss/damage.”

The presentation was refused citing the following discrepancy:

“Insurance Cert: showing ‘Claims must be advised within 3 months from the date of discovery of loss/damage’”

The key question asked is if a statement like the one in this case equate to an expiry date for the presentation of any claim?

The consequence of the text in the insurance certificate is that the claim must be advised (lodged) within 3 months from the discovery of loss/damage, and then the claim process itself commences. The time limit refers to the discovery of loss/damage and not to any subsequent actual expiry date of the claim itself. Therefore, ISBP paragraph K9 does not apply. Likewise, the text is part of the general terms and conditions of the insurance certificate and according to ISBP 745 paragraph K22 those are not examined by the banks.

Therefore the quoted discrepancy was not valid.

TA914rev: Injunction against the counter guarantor

The query involves a guarantee subject to URDG 758.

A counter-guarantee was issued by a bank in Country K (the Counter-guarantor), for the amount of EUR 155,000.00 in favour of Bank B in Country I (the Guarantor) requesting same to issue a Warranty Guarantee in favour of a Country I beneficiary.

According to the instructions in the counter-guarantee, the Warranty Guarantee was issued subject to URDG 758. The counter-guarantee did not mention the URDG 758 as the applicable rules. Rather it stated that it was subject to Country I law, with place of jurisdiction the Court of City M, Country I.

Subsequently, the Guarantor received a complying claim, and made a claim under the counter-guarantee.

The Counter-guarantor advised the Guarantor that the applicant had presented a request to the local Court of City U in Country K, for a precautionary order to suspend the payment of the amount claimed under the counter-guarantee, pending a judgment from the same Court.

The key questions asked are if URDG 758 apply to the counter-guarantee and whether or not the refusal of payment made by the counter-guarantor was unfounded.

The conclusion of the ICC is that URDG 758 is applicable to the counter-guarantee. Likewise it is concluded that when a counter-guarantor receives a complying demand it must pay. However, in the event of an injunction, the counter-guarantor must follow the directions of their court.

The above is an overview of the ICC Opinions approved by the ICC Banking Commission Spring 2021. 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.

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