

Opinions on UCP 600

UCP 600 articles 2, 7 and 8; ISBP 745 preliminary consideration (iv)

R785

Beneficiary is permitted to draw under a credit by way of a provisional invoice with a subsequent final invoice indicating whether the balance is due to the beneficiary or the applicant. However, the credit does not provide the conditions or process under which such a payment could be made to the applicant, if applicable

(TA812rev) 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. While the underlying principle is generic in nature, it is confirmed that this is an actual transaction that 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.

While 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 UCP 600 articles 7 and 8 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 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 thereunder against presentation by the beneficiary of a provisional invoice subject to specific pricing restrictions.

At a future date, and 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 payment 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 a 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.