

ICC Banking Commission

Technical Advisory Briefing No. 2 Subject: Meaning of 'without delay' in UCP 600

5 April 2022

ISSUE

How should the phrase *without delay* be interpreted in the context in which it is mentioned in UCP 600?

INTRODUCTION

Whilst the phrase is used in 4 articles of the UCP 600, no formal definition exists. In practice, relatively few problems have arisen despite the lack of a definition but, in reaction to a number of requests, it is considered appropriate that guidance now be given.

ANALYSIS

UCP 600

The UCP 600 articles in which the phrase appears are:

- Sub-article 8 (d), "If a bank is authorized or requested by the issuing bank to confirm a credit but is not prepared to do so, it must inform the issuing bank *without delay* and may advise the credit without confirmation."
- Sub-article 9 (e), "If a bank is requested to advise a credit or amendment but elects not to do so, it must so inform, *without delay*, the bank from which the credit, amendment or advice has been received."
- Sub-article 9 (f), "If a bank is requested to advise a credit or amendment but cannot satisfy itself as to the apparent authenticity of the credit, the amendment or the advice, it must so inform, *without delay*, the bank from which the instructions appear to have been received. If the advising bank or second advising bank elects nonetheless to advise the credit or amendment, it must inform the beneficiary or second advising bank that it has not been able to satisfy itself as to the apparent authenticity of the credit, the amendment or the advice."
- Sub-article 10 (b), "An issuing bank is irrevocably bound by an amendment as of the time it issues the amendment. A confirming bank may extend its confirmation to an amendment and will be irrevocably bound as of the time it advises the amendment. A confirming bank may, however, choose to advise an amendment without extending its confirmation and, if so, it must inform the issuing bank *without delay* and inform the beneficiary in its advice."
- Sub-article 11 (a), "An authenticated teletransmission of a credit or amendment will be deemed to be the operative credit or amendment, and any subsequent mail confirmation shall be disregarded. If a teletransmission states 'full details to follow' (or words of similar effect), or states that the mail confirmation is to be the operative credit or amendment, then the teletransmission will not be deemed to be the operative credit or amendment. The issuing bank must then issue the operative credit or amendment *without delay* in terms not inconsistent with the teletransmission."
- Sub-article 11 (b), "A preliminary advice of the issuance of a credit or amendment ("pre-advice") shall only be sent if the issuing bank is prepared to issue the operative credit or amendment. An issuing bank that sends a pre-advice is irrevocably committed to issue the operative credit or amendment, *without delay*, in terms not inconsistent with the pre-advice."

ICC Opinions

A number of ICC Opinions have addressed whether the action of a bank could be considered to have been completed *without delay*. The most recent are highlighted below:

TA909rev – Extracted from 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: “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.”

R905 (TA891rev) – Queried whether 12 days can be considered as not being *without delay* or is outside the scope of UCP 600. It was concluded that in accordance with international standard banking practice, the issuing bank should return all documents to the presenter, *without delay*, in one lot or as otherwise directed. Whether 12 days represents a protracted delay is outside the scope of UCP 600.

Legal interpretation

It is worth making reference to a UK Commercial Court judgement in *Fortis Bank and Stemcor UK Limited v Indian Overseas Bank* [2010] and the appeal in 2011 in respect of a documentary credit subject to UCP 600.

The question was whether or not the issuing bank, having sent a notice that documents would be returned in accordance with article 16, were obligated to return the documents with reasonable promptness.

The Court of Appeal held that standard international banking and trading practices require an obligation to act in accordance with such notices and where an issuing bank elects to return documents, under sub-article 16 (c) (iii) (c), it is required to do so promptly and *without delay*. Additionally, when acting in accordance with sub-article 16 (e), it is required to do so with reasonable promptness.

The Court of Appeal also stated that whilst there was no express obligation on the issuing bank to return the documents promptly and *without delay* upon giving notice, such an obligation was implicit in the wording of article 16 and was in line with international practice. Once the issuing bank had elected to refuse the documents, it breached this obligation by failing to return the documents for a substantial period of time and was therefore precluded under sub-article 16 (f) from relying on the discrepancies.

The Court of Appeal did not consider that the obligation to return documents “promptly” or “within a reasonable time” would cause uncertainty although the exact meaning of these terms was likely to be tested in due course. In this case, the Court of Appeal’s conclusion that the documents were not returned reasonably promptly was fairly straightforward given that in November 2008 the issuing bank had either issued its refusal notices, or had received instructions to return the documents to the presenter, and the documents were not returned until February 2009.

IMPLICATION FOR REPLACING *WITHOUT DELAY* WITH A SPECIFIED PERIOD OF TIME

Using one of the above UCP 600 references as an example, UCP 600 sub-article 9 (e) states “If a bank is requested to advise a credit or amendment but elects not to do so, it must so inform, *without delay*, the bank from which the credit, amendment or advice has been received.”

To remove *without delay* and insert a specific period of time would require the rule to additionally state an outcome for a failure to comply i.e., a form of penalty.

Clearly, an advising bank or second advising bank cannot be forced to advise a credit or amendment, whether or not a specific period of time is mentioned, and it certainly would not be for the UCP 600 to impose any form of penalty. Therefore, no action could be attached for failure to comply and the insertion of a period of time would have no impact other than to raise unwarranted debate if the time period was exceeded.

SUMMARY

Without delay is a recognised term within UCP 600, but is deliberately not defined due to the fact that, as stated in various ICC Opinions, the precise interpretation of this term would depend upon the circumstances of each case. As mentioned above, the incorporation of a specific timeline would require an indication of the consequence (i.e., penalty) for failure to comply, in order for it to have any effect.

It is clear that whilst the term *without delay* does not signify an immediate action, or that an action is to be completed 'at once', it does imply a degree of urgency and attention that the concerned bank should apply.

Under international standard banking practice, reference in the UCP 600 to *without delay* means that the concerned bank must complete an action *as soon as practicable* for that activity and with due consideration to any given circumstance(s).

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