

ICC Banking Commission

Technical Advisory Briefing No. 6 Subject: ICC Guidance Papers

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ISSUE

On occasion, the ICC Banking Commission releases Guidance Papers on subjects considered to be of key importance to practitioners. Whilst these have proven to be of great benefit, they are sometimes overlooked or are no longer easily accessible.

INTRODUCTION

With this in mind, a number of the most relevant Guidance Papers have been re-sited on the ICC website:

- Use of Drafts under Documentary Credits
- Simple Documentary Credit format
- Recommendations in respect of the requirements for an 'On Board' Notation
- Notes on the Principle of Strict Compliance

Practitioners are also reminded of the Guidance Paper relating to the use of sanctions clauses in trade finance-related instruments subject to ICC rules.

In order to provide clarity, a summary of each is provided within the Analysis below.

ANALYSIS

Use of Drafts under Documentary Credits

A major outcome of the UCP consultation on a possible revision of "UCP 600" (finalised in 2017) was the identification of a need for a greater understanding of documentary credit practices in the market. As such, it was agreed by the then Executive Committee of the Banking Commission that more comprehensive guidance should be provided.

One feature of this consultation revealed that a number of ICC National Committees and practitioners questioned whether drafts should be required for presentation under any documentary credit. Furthermore, it was highlighted that sight drafts do not provide any benefit to a nominated bank or issuing bank.

Accordingly, a guidance paper was released on 8 January 2019 on this subject.

It was concluded that, in most circumstances, a UCP 600 documentary credit need not require a draft to be presented together with the stipulated documents.

The guidance paper highlighted the following:

1. It is recommended that the habit of requiring a draft for a documentary credit available at sight be curtailed, particularly sight drafts drawn on an issuing bank,

confirming bank, or a bank nominated to pay, unless required for a specific commercial, regulatory or legal reason.

2. UCP 600 article 2 allows for negotiation to occur under a documentary credit available by negotiation with or without a presentation of a draft. It is recommended that the habit of requiring a sight draft for a documentary credit available by negotiation be reviewed and that negotiating banks be encouraged to rely, not on negotiable instruments' law, but instead on specific agreements with beneficiaries evidencing negotiation and their respective recourse and other rights and remedies.
3. It is recommended that banks issue usance documentary credits available by deferred payment as an alternative to availability by acceptance of a draft, unless there is a specific commercial, regulatory or legal reason to create a banker's acceptance.
4. All banks should review their UCP 600 documentary credit application forms, whether in paper format and/or online, to indicate that a draft is not a standard requirement of the issuing bank and to indicate their requirements for another form of demand.

Simple Documentary Credit format

When drafting International Standard Banking Practice for the Examination of Documents under UCP 600 (ISBP 745), it was recognised that a more methodical approach to the drafting of credits and/or amendments would act as a positive factor in avoiding many of the problems that can arise when examining documents.

Enhanced attention to detail, and reflection as to whether or not all requirements are actually necessary, will provide benefit to all involved parties.

With this in mind, in December 2019, the ICC Banking Commission released 'Guidance Notes for Documentary Credit Formats', which offers clear and transparent recommendations.

The paper highlights that a simple documentary credit is a value-added option in well-established relationships between an applicant and a beneficiary. As such, it provides guidance in respect of the optimal approach required in order to achieve a straightforward, uncomplicated, documentary credit format.

Recommendations in respect of the requirements for an 'On Board' Notation

At the ICC Banking Commission meeting held in Dubai in March 2009, it was agreed that the UCP 600 Drafting Group would prepare a document outlining the requirements for an 'on board' notation in respect of transport documents presented for examination under articles 19, 20, 21 or 22 of UCP 600. This was released on 22 April 2010 and also served as further guidance for determining International Standard Banking Practice for the Examination of Documents under Documentary Credits.

The content of the paper addresses Bills of Lading, Sea Waybills, Multimodal and Combined Transport Documents, and Charter Party Bills of Lading, and provides practical guidance on how on board notations are to be handled. This guidance was then adapted for incorporation into ISBP 745. The paper also includes a flowchart which provides additional value.

Notes on the Principle of Strict Compliance

It was noted that the issue of 'strict compliance' had continually surfaced with respect to the examination of documents presented under documentary credits and that several discussions have been generated on Internet forums and in trade finance journals in respect of the interpretation and application of this doctrine. This had also been reflected in the challenging discussions behind numerous ICC Official Opinions.

As such, a paper was released on 24 May 2016 with the following sections:

- Introduction
- Relevant ICC Rules and Practices
- DOCDEX Decisions and ICC Official Opinions
- Legal Perspective: Interpretation in The Courts
- Expert Perspective: Reference Books
- Conclusion: Is There a Defined Approach?

The paper concluded that there is no defined approach to strict compliance. As pointed out by [the late] Professor James Byrne, UCP has never included a definition of this term; it is a legal principle derived from contract law that has been applied by courts to documentary credits. The fact that UCP remains silent means that interpretation has been left to the courts.

ISBP, particularly the latest version ISBP 745, has made a significant impact in lessening the exactitude of the doctrine of strict compliance. In fact, it is arguable whether or not strict compliance even exists any more. A review of the General Principles section of ISBP 745 highlights numerous aspects of the document examination process that reduce the need for a literal application.

In conclusion, no merit was seen in attempting a definition of this multifaceted subject. Developments in the past have proved that, as time goes by, it is customs and practice that will provide the required clarity. And once such customs and practice have become commonplace, they will form part of a future revision of ISBP.

Consolidated ICC guidance on the use of sanctions clauses in trade finance-related instruments subject to ICC rules

The ICC Banking Commission originally issued a Guidance Paper on the use of Sanctions Clauses in 2010 which was updated in 2014. The paper deals with the use of clauses in relation to trade, economic or financial sanctions or embargos in trade finance instruments (documentary and standby letters of credit, demand guarantees and counter-guarantees) that are subject to the rules drafted by the ICC Banking Commission.

The issue of sanctions being applied upon a documentary credit transaction has surfaced on a number of occasions over the years. As stated in the paper, the use of sanction clauses had become a problematic issue in that they lead to uncertainty as to their application and could potentially defeat the independent nature of such instruments. The purpose of the Guidance Paper was to highlight this issue and recommend best practices in that respect.

Owing to recent resurgence in the use of sanctions clauses in documentary credits, the ICC decided to again address this issue and released an Addendum to the Guidance Paper in May 2020.

The key messages are stated as:

1. Sanctions clauses should not be used routinely.
2. Any clause should be drafted in clear terms according to the sample clause.

The ICC re-states the recommendation that sanctions clauses should not be used under normal circumstances. However, if one is to be used, then such a clause should be drafted

in clear terms, restrictively, to limit the reference only to mandatory law applicable to the bank, as according to the following sample clause:

“[notwithstanding anything to the contrary in the applicable ICC Rules or in this undertaking,] We disclaim liability for delay, non-return of documents, non-payment, or other action or inaction compelled by restrictive measures, counter-measures or sanctions laws or regulations mandatorily applicable to us or to [our correspondent banks in] the relevant transaction.”

SUMMARY

The full text of the above Guidance Papers can be located as follows:

Use of Drafts under Documentary Credits

Simple Documentary Credit format

Recommendations in respect of the requirements for an ‘On Board’ Notation

Notes on the Principle of Strict Compliance

<https://iccwbo.org/publication/set-of-guidance-papers-on-recommended-principles-and-usages-around-ucp-600/>

Consolidated ICC guidance on the use of sanctions clauses in trade finance-related instruments subject to ICC rules

<https://iccwbo.org/publication/consolidated-icc-guidance-on-the-use-of-sanctions-clauses-in-trade-finance-related-instruments-subject-to-icc-rules/>

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