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Commission on Banking Technique and Practice

An ICC Banking Commission Recommendation

Discrepant Documents, Waiver and Notice

The attached paper, “Discrepant Documents, Waiver and Notice” is an educational document created by the ICC Banking Commission meant to help users and document checkers deal with problems that arise under Articles 13 and 14 of UCP 500, which have generated a number of queries to the Commission. The attached paper is based on Banking Commission Opinions that were rendered in answer to these queries.

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Examination of Documents, Waiver of Discrepancies and Notice under UCP 500

Introduction

Articles 13 and 14 of UCP 500 specifically prescribe the actions of an issuing or confirming bank in the examination of documents presented under a letter of credit. The process outlined in the UCP specifically dictates the process of examination of documents, the decision as to whether to take up or refuse the documents, the process of seeking waiver of discrepancies by the issuing bank, providing notice of discrepancies and the reasonable time for the performance of the steps prescribed by the UCP. Since the implementation of the revision of the UCP in 1993, several variations on the performance of the prescribed procedures in the UCP have evolved, many of which are not in accordance with the UCP. The development of these practices outside the scope of the UCP may place the issuing bank at risk for not complying with the terms of the UCP.

Note: This document only addresses the obligations of the issuing bank because they are the only bank authorized to seek waiver from the applicant. Similar obligations may apply to the confirming bank with the exception of the seeking of waiver from the applicant.

Requirements of UCP 500

UCP 500 specifically details the steps to be taken when documents are presented under a letter of credit and the actions that must be taken by the issuing bank. These steps are contained in Articles 13 and 14 of UCP 500 which prescribe in detail the process for examination of documents and determining if there are discrepancies in the documents presented, provide the option for the issuing bank to seek a waiver of the discrepancies from the applicant and the specific process of providing notice of refusal of the documents. In order to completely understand this process UCP Articles 13 and 14 must be read together and not in isolation.

To understand the specific steps outlined in the UCP it is necessary to follow the process of examination of documents specifically as it is prescribed by UCP 500 and examine each step and the individual requirements. This process is charted in Attachment A and each step is referenced within the descriptions detailed below.



UCP Article 13 states:

Standard for Examination of Documents

- a. Banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit. Compliance of the stipulated documents on their face with the terms and conditions of the Credit, shall be determined by international standard banking practice as reflected in these Articles. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit.

Documents not stipulated in the Credit will not be examined by banks. If they receive such documents, they shall return them to the presenter or pass them on without responsibility.

- b. The Issuing Bank, the Confirming Bank, if any, or a Nominated Bank acting on their behalf, shall each have a reasonable time, not to exceed seven banking days following the day of receipt of the documents, to examine the documents and determine whether to take up or refuse the documents and inform the party from which it received the documents accordingly.
- c. If a Credit contains conditions without stating the document(s) to be presented in compliance therewith, banks will deem such conditions as not stated and will disregard them.

UCP Article 14 states:

Discrepant Documents and Notice

- a. When the Issuing Bank authorises another bank to pay, incur a deferred payment undertaking, accept Draft(s), or negotiate against documents which appear on their face to be in compliance with the terms and conditions of the Credit, the Issuing Bank and the Confirming Bank, if any, are bound:
 - i. to reimburse the Nominated Bank which has paid, incurred a deferred payment undertaking, accepted Draft(s), or negotiated,
 - ii. to take up the documents.
- b. Upon receipt of the documents the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, must determine on the basis of the documents alone whether or not they appear on their face to be in



compliance with the terms and conditions of the Credit. If the documents appear on their face not to be in compliance with the terms and conditions of the Credit, such banks may refuse to take up the documents.

- c If the Issuing Bank determines that the documents appear on their face not to be in compliance with the terms and conditions of the Credit, it may in its sole judgement approach the Applicant for a waiver of the discrepancy(ies). This does not, however, extend the period mentioned in sub-Article 13 (b).
- d
 - i. If the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, decides to refuse the documents, it must give notice to that effect by telecommunication or, if that is not possible, by other expeditious means, without delay but no later than the close of the seventh banking day following the day of receipt of the documents. Such notice shall be given to the bank from which it received the documents, or to the Beneficiary, if it received the documents directly from him.
 - ii. Such notice must state all discrepancies in respect of which the bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presenter.
 - iii. The Issuing Bank and/or Confirming Bank, if any, shall then be entitled to claim from the remitting bank refund, with interest, of any reimbursement which has been made to that bank.
- e If the Issuing Bank and/or Confirming Bank, if any, fails to act in accordance with the provisions of this Article and/or fails to hold the documents at the disposal of, or return them to the presenter, the Issuing Bank and/or Confirming Bank, if any, shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the Credit.
- f If the remitting bank draws the attention of the Issuing Bank and/or Confirming Bank, if any, to any discrepancy(ies) in the document(s) or advises such banks that it has paid, incurred a deferred payment undertaking, accepted Draft(s) or negotiated under reserve or against an indemnity in respect of such discrepancy(ies), the Issuing Bank and/or Confirming Bank, if any, shall not be thereby relieved from any of their obligations under any provision of this Article. Such reserve or indemnity concerns only the relations between the remitting bank and the party towards whom the reserve was made, or from whom, or on whose behalf, the indemnity was obtained.

Examine Documents (Step 1)

The first step in the process when documents are presented is the examination of documents.



Reasonable time not to exceed seven banking days

Sub-Article 13 (b) states that the issuing bank has a reasonable time not to exceed seven banking days following the day of receipt of the documents to examine and then determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly. Specifically this sub-Article establishes three standards: 1) Documents must be examined within a reasonable time, 2) Reasonable time may not exceed seven Banking Days and 3) Notice of Refusal must be sent within that reasonable time.

Reasonable time is a concept that is not specifically defined within the UCP other than the establishment of an outside limit by reference to “not to exceed seven banking days”.

“Reasonable time” is not automatically the seven banking day outside limit provided by the UCP. Specific circumstances within an issuing bank or the number or type of required documents presented may require that it takes the entire seven day period to examine the documents, make a decision whether to take up or refuse the documents, and inform the presenter accordingly. This period is not automatically allowed for each presentation of documents and the expectation is that in most cases the reasonable time will be less than seven banking days following the day of receipt of the documents. Additionally, in some jurisdictions legal decisions and/or practice have defined reasonable time as less than seven banking days.

Documents Comply or Do Not Comply (Step 2)

The second step in the process, once documents have been examined, is for the issuing bank to determine whether or not they appear on their face to be in compliance with the terms and conditions of the credit.

Documents Comply

If the issuing bank determines that the documents comply with the terms and conditions of the credit it is obligated to take up the documents and effect settlement.

Documents do not Comply

If the issuing bank determines that the documents do not comply with the credit it is not obligated to take up the documents and effect settlement.

Decide to Refuse or Seek Waiver (Step 3)

If the issuing bank determines that the documents do not comply it has two options. First, it may refuse the documents and provide notice of refusal. Second it may seek the applicant’s waiver of the discrepancies.



Give Notice of Refusal

If the issuing bank decides to refuse the documents it must provide a notice in accordance with UCP sub-Articles 14 (d) (i) and (ii). This must be a single notice.

Requirements of a notice of refusal

UCP sub-Article 14 (d) (i) prescribes the process if the bank decides to refuse the documents. It states that the bank must give notice to that effect by telecommunication or other expeditious means without delay but no later than the close of the seventh banking day following the day of receipt of the documents. Sub-Article 14 d(ii) requires that the notice of refusal must give notice to that effect and must state all discrepancies in respect of which the bank is refusing the documents. In addition the notice must state whether the bank is holding the documents at the disposal of or, returning them to, the presenter.

Seek Applicant Waiver

UCP sub-Article 14 (c) gives the issuing bank the option, in its sole judgment, to approach the applicant for a waiver of the discrepancies. It should be noted that there is no requirement on the part of the issuing bank to seek a waiver and any decision to do so is completely within its discretion. Should the issuing bank decide to seek a waiver it must still comply with the UCP's requirements in sub-Article 13 (b). The issuing bank is not bound by an applicant's decision to waive the discrepancies.

Note: When issuing banks have deferred giving notice of refusal they usually impose conditions on the applicant that prescribe the amount of time they have to make their decision to waive the discrepancies and provide this information to the issuing bank. In order to avoid a refusal of documents by the issuing bank, any applicant waiver should be provided to the issuing bank within the time frame established by the issuing bank.

(Depending on Receipt of Waiver) Take up or Refuse and Give Notice (Step 4)

Determine if the issuing bank will waive the discrepancies

If, within the time period prescribed by the issuing bank, the applicant has not provided its waiver of discrepancies the issuing bank must make a decision as to whether it will take up or refuse the documents. The fact that the issuing bank could waive the discrepancies despite not receiving a waiver from the applicant is often overlooked. Having placed the applicant on notice of discrepancies, and then waiving them, an issuing bank should consider the possible implications with regard to its reimbursement agreement with the applicant.



If the issuing bank waives the discrepancies - take up the documents

If the issuing bank decides on its own to waive the discrepancies it must take up the documents. The decision to take up non-complying documents does not amend the credit or bind the issuing bank to honour subsequent drawings with the same discrepancies under that or other credits.

If the issuing bank rejects the documents - refuse and give notice

If the issuing bank decides to refuse the documents it must send a notice of refusal in accordance with UCP sub-Articles 14 (d) (i) and (ii).

If Waiver Received, Bank determines whether or not it will accept the Applicant Waiver (Step 5)

Determine if the issuing bank will waive the discrepancies

If the applicant conveys its waiver of discrepancies the issuing bank must then make its decision as to whether it will agree to accept the documents. The mere fact that an applicant waives the discrepancies does not obligate the issuing bank to waive the discrepancies, whether or not the issuing bank requested such waiver. Local law may have a bearing where an issuing bank has requested a waiver from the applicant, and having received same declines to act in accordance therewith.

If the issuing bank agrees to accept the Applicant's waiver of the discrepancies – take up the Documents

If the issuing bank determines that it will agree to accept the documents it must take up the documents despite the discrepancies it may have found.

If the issuing bank rejects the Applicant's waiver - refuse and give notice

If the issuing bank receives the applicant's waiver and decides to reject the documents despite the waiver it must refuse the documents and send notice to that effect in accordance with UCP sub-Articles 14 (d) (i) and (ii).

Performance under the Rules

When the issuing bank performs under the rules there is no risk for the bank under UCP providing that it conforms specifically to the steps outlined for examination, waiver and notice.

Conclusion

UCP 500 prescribes the process for examination, seeking waiver and providing notice of refusal. Issuing banks should follow these rules or understand the risks they may be taking when they deviate from the rules.



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