

ICC Banking Commission

Technical Advisory Briefing No. 4

Subject: Documents presented by a nominated or confirming bank under UCP 600 and lost in transit

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ISSUE

Although quite rare, it can occur that documents presented under a documentary credit by a nominated or confirming bank are lost in transit.

Please note this Briefing Paper does not address documents that are simply delayed in reaching their destination.

INTRODUCTION

As stated in article 5, banks deal with documents and not with goods, services or performance to which the documents may relate. As such, the sending and receiving of paper documents is at the core of documentary credit practice. In most cases, there is no issue, and the documents will arrive at their intended destination.

In accordance with articles 7 and 8, the issuing bank must honour and the confirming bank must honour or negotiate upon receipt of a complying presentation.

There are two aspects to 'lost' documents:

1. The UCP position with regard to the liability or responsibility of the issuing bank and confirming bank; and,
2. The situation when documents are lost in transit but a nominated bank had determined that the documents represented a complying presentation, irrespective of whether that bank honoured or negotiated that presentation.

ANALYSIS

1. The UCP position

Loss of documents is addressed in article 35 'Disclaimer on Transmission and Translation', wherein the first paragraph states "A bank assumes no liability or responsibility for the consequences arising out of delay, loss in transit, mutilation or other errors arising in the transmission of any messages or delivery of letters or documents, when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit, or when the bank may have taken the initiative in the choice of the delivery service in the absence of such instructions in the credit."

It is important to note that the protection afforded by article 35 only extends to circumstances where the nominated bank or confirming bank has sent the documents to the issuing bank according to the requirements stated in the documentary credit, i.e., by the stated method (courier, registered mail, in one or two mailings) and by any stated carrier (a named courier company or other service) and to the place indicated in the credit. If no method or carrier is stated, then the mailing option is that of the nominated bank or confirming bank.

Despite a contrary view offered by some practitioners, this was not a new requirement added to the UCP 600. In fact, it goes as far back as article 12 of the very first UCP (UCP 82), which stated: “*Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of cables or telegrams, letters and/or documents, or for delay, mutilation or other errors in the transmission of cables or telegrams*”.

The UCP 290 updated the text to incorporate a reference to ‘*telex*’, which was a common communication method at that time. The UCP 400 took a more generic view and referred to “*any telecommunication*” rather than list out the various options for sending a message. The content in the UCP 500 remained largely unchanged, with the UCP 600 making a specific reference to loss of documents ‘*in transit*’.

If a nominated bank or confirming bank deviates from the mailing requirements in a documentary credit, by utilising a different method of sending the documents or by the use of a different courier company, it must recognise that it does so at its own risk should the documents be lost in transit.

Whilst not the subject of this Briefing Paper, it is worth highlighting that, if a documentary credit is available with, and expires at the counters of, the issuing bank, it is the responsibility of the beneficiary or the presenter to ensure that the documents are received by the issuing bank no later than the expiry date and/or the latest date for presentation of the documents. This structure is not covered by article 35.

2. Nominated bank determines a complying presentation has been made but documents lost in transit

The second paragraph of article 35 indicates that an issuing bank remains liable to honour, and a confirming bank remains liable to honour or negotiate, when a nominated bank has examined the documents and determined that they comply (whether or not the nominated bank has honoured or negotiated), but the documents are lost in transit between the nominated bank and the issuing bank or confirming bank, or between the confirming bank and the issuing bank.

It should be noted that this does not apply to a presentation that is discrepant or was not examined by a nominated bank. The essence of the approach stated in article 35 is that it is not considered appropriate that an issuing bank or confirming bank can walk away from their undertaking to the beneficiary and/or to the bank that acted upon its nomination to honour or negotiate by virtue of a complying presentation being lost in transit. If that were the case, it is highly unlikely that a nominated bank would be prepared to act upon its nomination before being certain that documents had actually arrived at the counters of the issuing bank or confirming bank. Furthermore, a bank authorised or requested to add confirmation under such circumstances would most likely decline such authorisation or request.

As mentioned in the *Commentary on UCP 600 (ICC Publication No. 680)*, all of this needs to be put into some perspective with the number of sets of documents that are sent daily between banks on a global basis against those that are lost in transit. In comparative terms, this involves minuscule percentages. The rule in article 35 merely outlines the impact and consequences of documents that are lost in transit.

If documents are lost in transit, an issuing bank or confirming bank cannot insist upon replacements of *original* documents being presented to them, e.g., replacement (or duplicate) original bills of lading. However, they would be entitled to make their own determination as to whether or not the documents complied at the time the presentation was originally mailed by the nominated bank, to the issuing bank or confirming bank, by requesting *copies* of all the stipulated documents.

Again, it was not the UCP 600 that was the catalyst for this position being taken. In ICC Opinion R429 (TA495), issued in respect of a documentary credit that was issued subject to the UCP 500, it was highlighted that "(I)f the bank which sends conforming documents to the issuing bank is a nominated bank, then the issuing bank is liable to pay if documents are lost in transit." This was qualified by stating that such circumstances "would be subject to the documents being sent in the manner prescribed in the credit, i.e., where the credit states registered mail, the documents are to be sent by that means and not by courier."

This Opinion concluded with a comment that was emphasised earlier in this Briefing Paper i.e., "The risk of sending the documents by a method not requested by the credit rests with the nominated bank and not the beneficiary."

ICC Opinion R651 (TA639rev) also made reference to such circumstances and, in fact, additionally referred to a previous ICC Opinion on the subject – R548 (TA566rev). In Opinion R548, it was concluded that an issuing bank would be obligated to honour any compliant presentation that had been lost in transit. It was made clear that reimbursement obligations are not subject to the actual receipt of the documents, even where a reimbursement instruction states "Upon receipt of full set of documents in conformity with the L/C terms, we will effect payment as per your instruction" or similar.

It was also mentioned that a presentation can be '*re-created*' with copies of all the documents that were originally presented. The examination period would begin upon presentation of the copies to the issuing bank or confirming bank.

For the purpose of the UCP 600, and the circumstance described above, the copies of the documents are to be examined as if they had been presented in the manner required by the documentary credit, e.g., 1 original and 2 copies of commercial invoice, and any signatures on a document are to be treated as being in accordance with the requirements of article 3.

Not all nominated banks or confirming banks retain copies of documents, but it is noted in Opinion R561 that such practice may ease problems in the event that documents are lost in transit and it is agreed that the complying presentation needs to be '*re-created*'. It does need to be understood that this is additional work, is entirely optional, and may not necessarily be justified for such a rare occurrence.

SUMMARY

The purpose of the UCP is to establish rules and they are not an indication of the operational procedures that would be recommended in the event of documents being lost in transit. To an extent, this was addressed in ICC Opinion R651 in which it was stated that it is the responsibility of the concerned parties to find a solution.

One such solution could be to revert to the former common practice of a credit requiring the sending of documents in two mailings (where a credit required more than one original transport document). However, such an approach increases cost and banks should carefully evaluate the suitability of including such a condition bearing in mind that such events are relatively rare. They should also recognise that if the credit requires two mailings, determination of a complying presentation is to be made based on the documents contained in the first mailing, with the date of receipt of that mailing commencing the examination period as mentioned in sub-article 14 (b).

The appropriate approach is to initiate a dialogue between the concerned banks in order to arrive at an equitable resolution.

Although not the subject of this Briefing Paper, and in order to take account of events such as those experienced during the COVID-19 pandemic, it is recommended that practitioners

take note of the 'Guidance paper on the impact of COVID-19 on trade finance transactions issued subject to ICC rules'¹ in respect of documents that are delayed or unable to be delivered according to the requirements of the credit.

This briefing is educational only

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¹ <https://iccwbo.org/publication/guidance-paper-on-the-impact-of-covid-19-on-trade-finance-transactions-issued-subject-to-icc-rules/>