



International Chamber of Commerce

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Department of Policy and Business Practices

Transferable credits and the UCP 500

Commission on Banking Technique and Practice, 30 October 2002

Introduction

At the April 2002 Banking Commission a first draft of a paper on Transferable Credits was presented and discussed. This paper brought together and represented a summary of the main Banking Commission Opinions on the subject of application of Article 48 and Transferable Credits in general. Article 48 being one of the Articles that had received the most queries over the last few years. The paper did not seek to provide answers as to specific transferable letter of credit practice nor to issues that had not been previously agreed by the Commission.

During the discussion at the meeting, a number of the comments sought to change the viewpoint that had been expressed in past (agreed) opinions. In addition, there was a feeling that the document should in some way look at issues of practice. It was outlined, that the intention of the paper is to create a document that brings together a selection of the opinions that have a direct bearing on day to day issues relating to transferable credits. A number of the opinions that have been given are specific to certain circumstances or of an obscure nature and had not been included. This does not undermine the status of opinions not included, details of which can be found in ICC Publication No. 632, which is a compilation of opinions given since the introduction of UCP 500.

It was agreed that issues relating to practice would need to be the subject of a separate paper and input from National Committees. From a number of the questions that have been posed, it is clear that there is some confusion with regard to some of the provisions of Article 48. In addition, it would seem that there are parties who are issuing, or seeking to have issued, transferable credits which do, or would, contain conditions which go beyond those provided for in Article 48.

Each of the issues and responses have been highlighted under the respective or appropriate sub-Article for ease of reference. Where there is a published opinion, the respective "R" number is annotated after the answer.

Article 48 - transferable credit

a. A transferable Credit is a Credit under which the Beneficiary (First Beneficiary) may request the bank authorised to pay, incur a deferred payment undertaking, accept or negotiate (the "Transferring Bank"), or in the case of a freely negotiable Credit, the bank specifically authorised in the Credit as a Transferring Bank, to make the Credit available in whole or in part to one or more other Beneficiary(ies) (Second Beneficiary(ies)).

Issue(s) :

Issue 1: Credits are occasionally issued whereby the issuing bank is the bank authorised to pay, incur a deferred payment undertaking, accept or negotiate, but it specifies the advising bank as the transferring bank. Can this advising bank nevertheless transfer the credit?

Answer: The advising bank should refuse to transfer unless the availability is changed to the extent that they become a nominated bank. Otherwise, the only bank that is able to effect a transfer thereunder is the issuing bank. It is in the interests of the issuing bank that they retain control over the handling of the transfer where the credit is restricted to them. (Opinion R.246)

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Issue 2 : Can a credit specify more than one transferring bank?

Answer: This sub-Article was written to impose a reasonable level of control on the transferring of a credit without significantly changing operational practice. Requiring that a single bank be nominated as the transferring bank, even in a freely negotiable letter of credit, provides a certain amount of protection. However, this sub-Article contains no prohibition against naming more than one transferring bank if the issuing bank is willing to do so. Providing that the applicant, issuing bank, confirming bank, beneficiary, and transferring bank agree to such a transfer, there is nothing to prevent it from being incorporated into the terms and conditions of the credit. However, the ICC discourages the issuance of such transactions. (Opinion R.244)

Issue 3 : If the credit were to be transferred by a bank that was not specifically nominated, but that bank were the bankers of the first beneficiary, would the transfer be considered proper?

Answer : Only the bank that is specifically authorised, as defined in sub-Article 48(a), may effect a transfer under the credit. Any transfer effected by a bank that was not so authorised, would not be considered effective for the purposes of UCP 500 and, in particular, Article 48. (Opinion R.246)

Issue 4: Where a credit is issued as being available with any bank (freely negotiable) can it be assumed that the bank through whom the credit has been advised is the designated transferring bank?

Answer : In a freely negotiable credit, the issuing bank must specify the bank that is authorised to transfer the credit. The fact that a credit has been advised through a particular bank does not imply that it is the authorised transferring bank. (Opinion R.246)

b. A Credit can be transferred only if it is expressly designated as "transferable" by the Issuing Bank. Terms such as "divisible", "fractionable", "assignable", and "transmissible" do not render the Credit transferable. If such terms are used they shall be disregarded.

Issue(s) :

None

c. The Transferring Bank shall be under no obligation to effect such transfer except to the extent and in the manner expressly consented to by such bank.

Issue(s) :

Issue 1: Is an authorised transferring bank under an obligation to transfer a credit so designated?

Answer : The fact that a credit may be stated to be transferable, does not bind the nominated transferring bank or the issuing bank to effecting any transfer.

Issue 2: A bank receives a transferable credit, in the capacity of advising bank only, and is requested by the beneficiary to transfer the credit. The bank states that it cannot transfer the credit. The beneficiary contacts the issuing bank in order to amend the availability, but the issuing bank states that there is no need to make the credit available at the counters of the advising bank for that bank to transfer the credit. Is that correct?

Answer : A bank that is nominated to transfer a credit is under no obligation to effect a transfer and is able to indicate under what conditions they would be willing to consider effecting such transfer. This

would include, but not be limited to, the availability of the credit, the parties involved, the underlying terms of settlement, the documents that are to be presented and the manner of their issuance. (Opinion R.483)

Issue 3: A documentary credit has been transferred to a second beneficiary and documents presented by that second beneficiary to the transferring bank. Documents have been found in compliance, but the issuing bank does not fulfil its payment obligation due to internal problems (i.e. it is bankrupt, there are economic or political difficulties to honour, etc.) What are the liabilities of the transferring bank? Is the transferring bank obliged to pay the second beneficiary in such a situation if it does not receive the funds from the issuing bank?

Answer: A transferring bank, when issuing its advice of transfer to the second beneficiary, signifies whether they have confirmed the credit or not. The type of advice is dependent on the instructions in the original credit as to whether or not the credit was to be confirmed and whether the advising and nominated transferring bank agreed to such a request. If the transferring bank has not added its confirmation to the transferred credit, it has no obligation to effect payment. If it has confirmed then it must honour the drawing of the first and second beneficiary, notwithstanding the position of the issuing bank and its ability to provide reimbursement. In any case, the documents belong to the second beneficiary until the presentation is honoured. (Opinion R.482)

Issue 4: The transferring bank considers that documents received from the second beneficiary are in full compliance with the L/C terms. It then provides an undertaking to pay at maturity, but the issuing bank finds that the document(s) contain discrepancy(ies). What is the right way for the transferring bank to act in this situation? What would be the way to waive these risks?

Answer: If the transferring bank has provided an undertaking to pay the beneficiary at maturity, it has presumably added its confirmation to the credit or made some other arrangement with the beneficiary. This is a documentary risk that any bank, which adds its confirmation, takes. In the event of a dispute as to the acceptability of the documents presented (under a transferred credit which is confirmed), it is to be resolved between the issuing bank and the transferring bank, without the involvement of the first or second beneficiary. (Opinion R.482)

Issue 5: It is usual to see documentary credits that have been transferred bearing the following reimbursement clause: 'The transferring bank will pay to the second beneficiary only when funds are received from the issuing bank'. Do you consider this clause to be good international standard banking practice? Do you consider that the transferring bank is acting in accordance with sub-Article 48(c) of UCP 500?

Answer: This type of clause will typically be seen on credits for which the transferring bank has not added its confirmation. It is more a statement highlighting the position of the transferring bank as a nominated bank in line with sub-Article 10(c) of UCP 500, rather than the bank's position under Article 48. Sub-Article 48(c) is there to demonstrate that whilst a bank may be nominated to transfer, it is under no obligation to do so. (Opinion R.482)

Issue 6: A transferable L/C provided for presentation, in addition to others, of the following: Beneficiary's certificate stating that Original Mills Test certificates have been sent directly to the applicant by DHL courier service within 5 working days from shipment; Master's declaration confirming that he has received one full set of copy documents for delivery to applicants. The transferring bank refused to transfer the L/C stating the following reasons: 'the certificate as required, has to be issued by the first beneficiary and not by the second beneficiary. If this certificate is issued by the second beneficiary it will be considered as discrepant, as not issued by the nominated party in the L/C. For the declaration, the second beneficiary will hand over to the master his own invoices which will be different from those which will be presented to the issuing bank, as their

invoices will be replaced by those of the first beneficiary'. Is the transferring bank correct in its interpretations?

Answer : Sub-Article 48(c) states that the transferring bank is under no obligation to effect a transfer except to the extent and in the manner it expressly consents. If a transferring bank does not feel comfortable in transferring a credit, due to the requirement of the first or second beneficiary to fulfil certain conditions, they are within their rights not to do so. If the credit were to be transferred, the requirements listed under "Issue" would need to be completed by the second beneficiary that may not be the intention of the first beneficiary. Conditions such as those quoted require the first beneficiary to look at the possible implications once the credit has been transferred and, if necessary, to seek an amendment to the original credit to either delete or modify the condition(s) prior to any transfer being effected. (Opinion R.456)

d. At the time of making a request for transfer and prior to transfer of the Credit, the First Beneficiary must irrevocably instruct the Transferring Bank whether or not he retains the right to refuse to allow the Transferring Bank to advise amendments to the Second Beneficiary(ies). If the Transferring Bank consents to the transfer under these conditions, it must, at the time of transfer, advise the Second Beneficiary(ies) of the First Beneficiary's instructions regarding amendments.

Issue(s):

Issue 1: A first beneficiary has irrevocably instructed the transferring bank that they do not require prior indication of amendments prior to the transferring bank advising same to the second beneficiary, would this include an amendment to increase the value of the original credit i.e. are there exceptions?

Answer : An instruction relating to the advising of amendments to any second beneficiary(ies) covers all amendments unless otherwise specified at the time of transfer and agreed by the transferring bank. (Opinion R.482)

Issue 2: Does the first beneficiary have the absolute right to determine whether the transferring bank will transfer an amendment to the second beneficiary(ies)?

Answer: The first beneficiary has the right to determine whether or not amendments are advised to the second beneficiary(ies). This position needs to be declared at the time a request to transfer is submitted to the transferring bank. For example, an amendment to the expiry date of the original credit may need to be passed on to a second beneficiary(ies) but not to the full extent of the amendment that has been received. The right of the first beneficiary to refuse to allow amendment(s) to be advised to any second beneficiary(ies) (as allowed in sub-Article 48(d)) does not preclude the first beneficiary from requesting that an amendment be made to the transferred credit of any second beneficiary(ies) at a later stage. (Opinion R.485)

Issue 3: If we assume the transferring bank has no right to enforce the advising of an amendment to a second beneficiary, then can the transferring bank press the first beneficiary to reject or refuse to allow its acceptance of an amendment?

Answer : The transferring bank can request, but cannot insist due to the wording of sub-Article 9(d)(iii). Sub-Article 9(d)(iii) states that the terms of the original credit including any subsequent amendment(s) remains in force for the beneficiary until such time as he communicates his acceptance or rejection of an amendment. If a request is received to cancel the original credit or a reduction in the value that would affect the value of a transferred credit, no agreement of the first beneficiary can be acted upon until such time as the agreement of the second beneficiary(ies) is received. (Opinion R.485)

Issue 4: If the second beneficiary comes to know of the existence of an amendment, can it request the assistance from the transferring bank to obtain a similar amendment? Is the transferring bank obliged to protect the interest of the second beneficiary?

Answer: A second beneficiary may approach the transferring bank, but the transferring bank cannot insist that the first beneficiary amend a transferred credit. A transferring bank is only obliged to protect the interest of the second beneficiary to the extent of the advice of the credit and any amendments thereto that are issued. (Opinion R.485)

e. If a Credit is transferred to more than one Second Beneficiary(ies), refusal of an amendment by one or more Second Beneficiary(ies) does not invalidate the acceptance(s) by the other Second Beneficiary(ies) with respect to whom the Credit will be amended accordingly. With respect to the Second Beneficiary(ies) who rejected the amendment, the Credit will remain unamended.

Issue(s):

< p>None.

f. Transferring Bank charges in respect of transfers including commissions, fees, costs or expenses are payable by the First Beneficiary, unless otherwise agreed. If the Transferring Bank agrees to transfer the Credit it shall be under no obligation to effect the transfer until such charges are paid.

Issue(s):

None.

g. Unless otherwise stated in the Credit, a transferable Credit can be transferred once only. Consequently, the Credit cannot be transferred at the request of the Second Beneficiary to any subsequent Third Beneficiary. For the purpose of this Article, a retransfer to the First Beneficiary does not constitute a prohibited transfer. Fractions of a transferable Credit (not exceeding in the aggregate the amount of the Credit) can be transferred separately, provided partial shipments/drawings are not prohibited, and the aggregate of such transfers will be considered as constituting only one transfer of the Credit.

Issue(s):

Issue 1: In light of the content of sub-Articles 48(a) and (g) a transferable credit can be transferred to a second beneficiary and upon his refusal to accept the transfer or his request to re-transfer again in the name of the first beneficiary, the credit can be re-transferred to the first beneficiary. Our point of concern is whether after the re-transfer of that credit favouring the first beneficiary, the same credit can now be transferred to another second beneficiary or not?

Answer: The credit can be transferred to any new second beneficiary(ies) to the value available under the original credit, including the value of any amount re-transferred to the original. The new transfer also being subject to the provisions of Article 48. If the transferred portion of a credit expires unutilised, the first beneficiary may request the transferring bank to transfer the unutilised portion to a new second beneficiary as long as the original credit has not expired. The transferring bank, however, should obtain explicit confirmation from the original second beneficiary that he has not utilised, or will not utilise, the available balance under the transferred credit and request that the original advice of the transferred credit be returned. Alternatively, if the transferred credit was advised to the original second beneficiary through another designated advising bank, the transferring bank may request the advising bank to notify the transferring bank that the transferred credit expired without utilisation (or that it expired with a residual balance). However, the transferring bank does not have any obligation to

accept such instructions from the first beneficiary and would only consent to such instructions if it were willing to do so under its own terms. (Opinion R.486)

h. The Credit can be transferred only on the terms and conditions specified in the original Credit, with the exception of:

- the amount of the Credit,
- any unit price stated therein,
- the expiry date,
- the last date for presentation of documents in accordance with Article 43,
- the period for shipment, any or all of which may be reduced or curtailed.

The percentage for which insurance cover must be effected may be increased in such a way as to provide the amount of cover stipulated in the original Credit, or these Articles. In addition, the name of the First Beneficiary can be substituted for that of the Applicant, but if the name of the Applicant is specifically required by the original Credit to appear in any document(s) other than the invoice, such requirement must be fulfilled.

Issue(s):

Issue 1: We request our customers open an irrevocable L/C on us and we in turn open a back-to-back L/C on the overseas supplier. We have now come across Article 48 of UCP 500, which also envisages a similar arrangement. In this context we require your clarification in respect to this article and the merchanting trade that we are involved in.

General comment : Back-to-back L/C's are not covered by the UCP.

(a) When a L/C is transferred for a value less than the original credit, does the second beneficiary to whom the L/C is now transferred have the right to negotiate the documents with the first applicant directly, by-passing the first beneficiary?

Answer : When a letter of credit is transferred, there is a risk that the second beneficiary may choose to "by-pass" the first beneficiary and present his documents directly to the issuing bank. Most banks, when transferring a letter of credit, will incorporate into the advice that the documents are to be sent to their specific address. Additionally, where the credit is confirmed, the second beneficiary would be placing this confirmation at risk by presenting directly to the issuing bank. An issuing bank that receives documents directly from a second beneficiary or their negotiating bank should look to protect the interests of the first beneficiary and check with the transferring bank with regard to any possible requirement for substitution of documents. (Opinion R.488)

(b) If the original L/C is opened for an interest free deferred payment period of up to 360 days while the transferred L/C is required to state first 60 days interest free with the balance of interest for account of the applicant (first beneficiary), is such a condition acceptable under UCP?

Answer: Sub-Article 48(h) provides details of the terms and conditions which may be reduced or curtailed when issuing a transferred credit, namely: the amount of the credit, any unit price stated therein, the expiry date, the last date for presentation of documents in accordance with Article 43, the period for shipment and any insurance coverage increase. Any other alterations or changes are not specifically authorised within the UCP, and if requested by the first beneficiary to be incorporated in the transferred credit, is a matter for agreement by the transferring bank. (Opinion R.488)

(c) Can a transferable L/C be transferred to an overseas supplier or does it have to be within the national boundaries of the first beneficiary?

Answer : Unless the credit states otherwise, a transferred credit may be issued in favour of a (second) beneficiary outside the national boundaries of the first beneficiary. (Opinion R.488)

Issue 2: Recently, our company, as a second beneficiary received a transferable credit. When I checked the L/C, I found that there were a number of differences from the original L/C. I know that according to UCP 500 sub-Article 48(h), the L/C can be transferred only on the terms and conditions specified in the original L/C except that: the amount, the expiry date, the last date for presentation of documents in accordance with Article 43 and the period for shipment may be reduced or curtailed. However, the L/C not only changed the above terms but also changed others. For example, the original L/C allowed for partial shipment, but the L/C prohibited this. Even the expiry date was longer than that in the original L/C. The original L/C allowed the first beneficiary to add additional conditions except for any alteration in the amount. My first question is: Is this L/C valid or not? Must I ask the first beneficiary to have the original L/C changed to reflect the changes in the transferred L/C? The second question is in accordance with the L/C, the date of negotiation is prior to the expiry of the L/C but the date of payment is beyond the expiry date, i.e. the negotiation date is 20 August, the expiry date is 1 September and the payment date is 10 September. With such conditions, should we still receive the money smoothly?

Answer : The terms of the original credit are not in line with the usual way in which you would see a transferable credit structured. By allowing the credit to be transferred incorporating changes to all the terms and conditions, with the exception of an increase in the amount, the issuing bank has, effectively, replaced the content of sub-Article 48(h). By the issuance of such a credit, the issuing bank is bound by the changes requested by the first beneficiary subject to the condition of sub-Article 48(c) which reads "The Transferring Bank shall be under no obligation to effect such transfer except to the extent and in the manner expressly consented to by such bank." If the transferring bank transfers the credit incorporating changes, in line with the provision in the original credit, the transferring bank (and the issuing bank) will be bound by the terms of that transfer. There would be no requirement for the applicant to be requested to amend the original letter of credit. In the event a bank was willing to issue such a credit it would be well advised to have a copy of that transferred credit remitted to it at the time of transfer. This will ensure that the documents presented conform to the transferred credit and to any unchanged conditions of the original L/C.

The fact that documents are negotiated within the expiry date, but the maturity of the draft and/or documents falls on a date beyond the expiry date, is a perfectly normal occurrence in letter of credit operations, and the issuing bank is bound to pay on the basis of conforming documents having been presented.(Opinion R.487)

Issue 3: I would like to know if there have been any rulings/clarifications/guidelines regarding negotiation of second beneficiary's documents which pertain to the transferring bank's responsibility/liability. Once a L/C has been transferred, does the transferee (second beneficiary) enjoy the same protection under UCP 500 as the first beneficiary? Also, is the transferred L/C covered by all sections of UCP 500 except those stipulated in Article 48? If not, please list which articles that do not apply.

Answer : The second beneficiary will receive a letter of credit on the same terms and conditions as the first beneficiary, with the exception of any changes the first beneficiary may request in accordance with sub-Article 48(h). The second beneficiary must act in accordance with the terms of the transferred letter of credit and all the relevant Articles of UCP 500 (except Article 48 - it must also be remembered that some of the Articles are specific only to banks). (Opinion R.270)

Issue 4: Our company performs pre-shipment inspection. We have been approached by our clients to find out if we could adapt to terms and conditions of a transferable L/C. Our operational procedure for a country applying foreign exchange policy is as follows:

Step 1. We inspect goods before shipment in the country of supply.

Step 2. We classify the goods as per the importing countries tariff book and give an opinion of the dutiable value of the goods inspected.

Step 3. We issue a report of findings (based on Step 1 and Step 2) which allows the importer to clear his goods in the country of import.

Step 4. We affix a security label on the seller's final invoice. This label attests our inspection and mentions the amount of the invoice.

A problem arises under a 'transferable L/C', considered as a single transaction as per Article 48 of UCP, where only some exceptions, as per sub- Article 48(h) of the terms and conditions of the credit, are applicable. We need to know if the security label clause could be deleted when the seller transfers this type of credit. Our mandate does not oblige us to issue a label to the supplier but only to the seller.

Answer : The requirement for pre-shipment inspection is one that a beneficiary of the original credit would find extremely difficult to have removed. The problem lies in the fact that as an inspection agency you will only affix your label to the final invoice (i.e. the one issued by the original beneficiary and which will subsequently be substituted for that of the transferee). A bank requested to transfer a letter of credit must do so incorporating all the terms and conditions contained in the original credit (with the exception of the information contained in sub-Article 48(h) of UCP 500, which may be curtailed). This provides a clear problem for the transferee, since he will be unable to satisfy the terms of the transferred credit due to your being unable to attach a security label to their invoice. This is an issue for the issuing bank and/or the transferring bank and/or first beneficiary.

To overcome this problem, the following could be considered or occur:

a) The issuing bank could issue its transferable letter of credit stating words to the effect that "In the event that this credit is transferred, the second beneficiary may present an invoice issued by the first beneficiary bearing the security label of X inspection agency even though the amounts shown therein may differ from that of the second beneficiary's invoice".

b) The transferring bank has the option to decline the transfer if it is not satisfied with the manner in which the transferred credit may have to be "manipulated" to achieve a valid presentation by the second beneficiary.

c) The first beneficiary would be required to inform the second beneficiary of his "profit" by way of handing him his invoice to achieve the result under option a) above. (Opinion R.296)

Issue 5: Bank B, when transferring the credit, failed to increase sufficient insurance coverage to cover the 110% of the first beneficiary's invoice. Bank C in Country X received the documents and found them to be in order in terms of the transferred credit and negotiated the documents and forwarded them to the transferring bank for payment. Bank B (the transferring bank), while substituting the draft and invoices, received discrepant invoices and draft (merchandise description on invoice did not conform to the credit). Bank B forwarded the documents to the issuing bank for payment and the issuing bank refused payment for the following discrepancies:

1. insufficient insurance cover
2. description of goods not as per L/C.

The issuing bank returned the documents by next mail to the transferring bank.

What is the liability of the transferring bank in this case? Can the transferring bank be compelled to reimburse the second beneficiary's bank even though it had a conditional payment clause on the credit or has the transferring bank no risk or liability at all as regards the documents?

Answer: The documents, as received by Bank B, would appear to have met the terms of the transferred credit. The presentation of non-conforming invoices and draft in substitution for those of the second beneficiary did not change the acceptability of the initial presentation. The disposal of the documents (including the substituted invoices and draft) should only have occurred with the agreement of the first and second beneficiaries. On the basis that the second beneficiary's documents conformed to the transferred credit, Bank B should have acted in accordance with the provisions of

sub-Article 48(i), and, if necessary, utilised the second beneficiary's documents as good tender under the credit.

What is the risk and liability on the part of the transferring bank irrespective of whether the L/C is confirmed or not by the advising/nominated bank?

Answer : The main risk and liability on the part of the transferring bank is the transposing of information from the original credit and transfer application form provided by the first beneficiary into the text of the transferred credit.

i. The First Beneficiary has the right to substitute his own invoice(s) (and Draft(s)) for those of the Second Beneficiary(ies), for amounts not in excess of the original amount stipulated in the Credit and for the original unit prices if stipulated in the Credit, and upon such substitution of invoice(s) (and Draft(s)) the First Beneficiary can draw under the Credit for the difference, if any, between his invoice(s) and the Second Beneficiary's(ies') invoice(s).

When a Credit has been transferred and the First Beneficiary is to supply his own invoice(s) (and Draft(s)) in exchange for the Second Beneficiary's(ies') invoice(s) (and Draft(s)) but fails to do so on first demand, the Transferring Bank has the right to deliver to the Issuing Bank the documents received under the transferred Credit, including the Second Beneficiary's(ies') invoice(s) (and Draft(s)) without further responsibility to the First Beneficiary.

Issue(s):

Issue 1: Which are the documents the transferor is allowed to substitute while drawing the difference in amount, other than the draft and invoices?

Answer: Sub-Article 48(i) refers to the substitution of invoices and draft(s). While a bank may determine under its own internal policies to permit the substitution of further documents, this is at its own risk. It is not a practice supported by UCP. (Opinion R.375)

Issue 2: Under a transferred L/C, the first beneficiary has the right to substitute his own invoice(s) (and draft(s)) for those of the second beneficiary(ies) (sub-Article 48(i) refers). However, we observe that some of the remaining document(s) of the second beneficiary may also show the value of goods. These documents may include, but are not limited to: Export licence (showing FOB value in local currency), Certificate of Origin, Inspection Certificate, Packing List, Transport Documents, Cargo Receipt, etc. Unless the original L/C has explicitly prohibited the other documents to show the value of drawing/goods, the presentation made by the second beneficiary is perfectly clean. Unfortunately, after substitution of documents, documents will appear on their face to be inconsistent with one another (other documents showing value which differs from first beneficiary's invoice).

Strictly speaking, it appears to be a discrepancy. Nevertheless, one may believe that under a transferable L/C, the original L/C opening bank should be well aware that some of the documents may be prepared by the second beneficiary who is ignorant of the original value. Therefore, it should be practically reasonable and acceptable. This is particularly reasonable for the case of the export licence. An export licence often shows the FOB value in local currency which will be inconsistent with the invoice value of the first beneficiary after substitution of the invoice occurs. We are of the opinion that once the presenting bank/negotiating bank can prove that the documents other than the invoice and/or draft are in fact showing a value same as the invoice of the second beneficiary, the inconsistency should not be considered as a discrepancy. The opening bank will be bound to pay if all the other terms and conditions of the L/C are complied with. Such proof can be provided by the presenting/negotiating bank stipulating so in its covering schedule or be provided subsequently, i.e. after the receipt of dishonour notice from the opening bank. For both cases, we believe that the opening bank must accept the explanation and will be bound to pay the presentation.

Answer : When an issuing bank agrees to issue a transferable credit it must appreciate that some of the information appearing on certain documents may not agree with that shown on the invoices, due to the substitution of the second beneficiary's invoices. For instance, the invoice number of the first beneficiary may be different from an invoice number (that of the second beneficiary) which may appear on say, a certificate of origin. If amounts are shown on documents other than the invoice (and draft(s) if any) and these differ from that on the substituted invoice, the issuing bank will still be bound to effect settlement if the documents are otherwise in conformity with the credit terms and conditions. The issue of amounts being shown on documents other than the invoice, is more for the first beneficiary who may not wish the original purchase price to be made known to the applicant. There would be no discrepancy for the reasons outlined above. The negotiating bank would not be required to produce any proof of values that may have appeared in the second beneficiary(ies) invoice(s). (Opinion R.489)

Issue 3: In the SWIFT MT720, which is used for the transfer of a credit, the applicant of the credit does not appear. Therefore, the second beneficiary can only make out the invoice with the first beneficiary as the consignee. In this case, can the issuing bank point out the first beneficiary as the consignee in the invoice as a discrepancy? Until when does the first beneficiary have to substitute the invoice and the draft?

Answer : The MT720 contains field 50 with the heading "First Beneficiary". This is on the basis that in most circumstances the first beneficiary elects to substitute documents. If the first beneficiary did not seek any involvement in the transaction (following the request to transfer), the name of the applicant under the original credit would be inserted. If the first beneficiary elects to substitute his invoices and draft(s), if any, for those of the second beneficiary and fails to do so on first demand, the nominated bank may forward the documents - including invoices issued by the second beneficiary addressed to the first beneficiary - and the issuing bank must accept them as a valid document under their credit. Sub-Article 48(i) refers to the substitution of documents occurring on first demand. (Opinion R.374)

Issue 4: According to sub-Article 48(h), the amount, unit price, expiry date, presentation period, and shipping date can be decreased or curtailed and the percentage of insurance cover can be increased up to the insurance cover amount of the original credit (that is, other terms and conditions cannot be amended). The restriction of negotiation to the transferring bank and the designation of the applicant as the notify party in the bill of lading need to be amended in the credit. Are such amendments possible and what is the scope of other amendments which are possible?

Answer : If the first beneficiary requires that the second beneficiary and the applicant be kept unaware of each other's involvement in the transaction, the original credit will need to be amended in all places where such divulgence of information could occur. The issuance of amendments to delete documents and/or clauses is subject to the approval and instigation by the applicant of the original credit. (Opinion R.374)

Issue 5: In regard to the substitution of invoice and draft by the first beneficiary, the second beneficiary is named as the shipper in the bill of lading, insurance policy, certificate of origin and beneficiary certificate. Would these documents be considered inconsistent with the invoice and therefore be considered a discrepancy?

Answer: The shipper on the documents you have mentioned would only be the first beneficiary if the original credit so specified, or if the transferring bank allowed such a condition in the transfer of the credit. Unless the credit stated otherwise, the shipper on certain documents being different to the issuer of the invoice would not be a discrepancy. Also refer to UCP 500 Article 31(iii). (Opinion R.374)

Issue 6: How long does the first beneficiary have to present documents? Within seven business days? If documents are presented after seven business days, is the bank liable to present only the second beneficiary's documents to the issuing bank?



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Answer : Sub-Article 48(i) refers to substitution of documents on "first demand" and whilst not specifically defined within UCP 500 as to a particular number of days, first demand must mean first demand as requested by the nominated bank. To allow the first beneficiary seven business days in which to substitute may not, in a number of countries, be defined as first demand. It must be remembered that whilst this period is being allowed for substitution, the transferee is entitled to settlement. In approaching the first beneficiary for substitute documents, the date of expectation of receipt of those documents should be expressed. Failure by the first beneficiary to provide timely substitution would allow the nominated bank to forward the documents received from the second beneficiary without any further commitment to the first beneficiary for any difference in value. As with all transferable credits, tight control needs to be exercised until settlement is achieved. (Opinion R.270)

j. The First Beneficiary may request that payment or negotiation be effected to the Second Beneficiary(ies) at the place to which the Credit has been transferred up to and including the expiry date of the Credit, unless the original Credit expressly states that it may not be made available for payment or negotiation at a place other than that stipulated in the Credit. This is without prejudice to the First Beneficiary's right to substitute subsequently his own invoice(s) (and Draft(s)) for those of the Second Beneficiary(ies) and to claim any difference due to him.

Issue(s):

None.

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