

UCP 600 Exclusions in perspective

By Kim Christensen

Introduction

One of the main topics being discussed in the LC community since the implementation date of the UCP 600 is the so-called “exclusions” – i.e. a clause in an LC stating that a certain provision of the UCP 600 is not applicable for the specific LC.

The purpose of this article is *not* to discuss the various exclusions that some (inventive) bank are including, but it is to analyze how these are being evaluated from a practical perspective of the ICC. The basis will be the “Opinions” approved at the 2007 fall meeting in the ICC Banking Commission¹. In this meeting this issue was addressed in several opinions – and a general statement was given².

This statement reads:

General Comment – It should be noted that a number of exclusions that are being made in credits ... are provisions that essentially existed in UCP 500. Banks should keep any exclusions (if at all needed) to a minimum recognising that it is often not as simple as merely making a statement in the credit that article X or sub-article Y is deleted or is not to apply. Very often there is a need for a new condition to be inserted into the credit to cover the void that the exclusion leaves. As stated in ISBP publication 681 paragraph 2 the applicant bears the risk of ambiguity in its instructions to issue the credit or an amendment thereto.

The Opinions given by the ICC is a vital element of the so-called “*international standard banking practice*” (As is part of the definition of “*Complying Presentation*” found in UCP 600 article 2 § 5) – therefore it is important that they are solid, usable and practical – following a clear line from other Opinions, ISBP UCP 600 etc. In my view these opinions should also clearly support good banking practice and discourage bad banking practice.



In that light it is also important to see if the ICC view on the exclusions follows a firm line and if they support what is considered good banking practice.

¹ 24 and 25 October 2007 in Paris

² Document 470/TA.638rev (UCP 600)

Paris meeting exclusions

As mentioned – the opinions discussed – and approved at the meeting in the ICC Banking Commission end October 2007 included a number of cases related to UCP 600 articles being excluded.

As mentioned above – one of the Opinions would include a general statement – basically saying two things:

1. That exclusions should be avoided, and
2. That the specific LC should address how the issue that the excluded provision covered should then be handled.

The Opinions would address the following exclusions issues:

TA.632rev (UCP 600)
UCP 600 sub-article 38(k)
(Presentation of documents by or on behalf of a second beneficiary must be made to the transferring bank)

UCP 600 article 38 (k) reads:

“Presentation of documents by or on behalf of a second beneficiary must be made to the transferring bank.”

This case is in fact a bit different from the other ones discussed in this article. The outset is that the specific LC does not include an exclusion of article 38(k) – but still the transferring bank may – under certain conditions – effectively exclude UCP 600 sub-article 38(k) – and the issuing bank would be obliged to follow that decision.

TA.638rev (UCP 600) – I
UCP 600 sub-article 14(l)
(Issuer of transport documents)

UCP 600 article 14 (l) reads:

“A transport document may be issued by any party other than a carrier, owner, master or charterer provided that the transport document meets the requirements of articles 19, 20, 21, 22, 23, or 24 of these rules.”

The scenario in this Opinion is that the LC simply excludes sub-article 14 (l) – without replacing it with something else.

Basically what the Opinion is saying is that the transport documents will be accepted as long as it complies with the relevant transport article. E.g. if the LC calls for a bill of lading article 20 will apply – and if the bill of lading is signed in accordance with UCP 600 sub-article 20(a)(i) it is acceptable. In other words if the bill of lading presented is a carrier type document it is acceptable.

This means that excluding sub-article 14(l) without replacing it with something else has no effect whatsoever.

TA.638rev (UCP 600) – II
UCP 600 sub-article 28(h) and (i)
(Risks to be excluded and exclusion clauses)

UCP 600 article 28 (h) reads:

“When a credit requires insurance against “all risks” and an insurance document is presented containing any “all risks” notation or clause, whether or not bearing the heading “all risks”, the insurance document will be accepted without regard to any risks stated to be excluded.”

UCP 600 article 28 (i) reads:

“An insurance document may contain reference to any exclusion clause.”

The scenario in this Opinion is that the LC simply excludes sub-articles 28 (h) and (i) – without replacing it with something else.

The position in the opinion is that excluding sub-article 28(i) creates the opposite result than found in the UCP 600 – i.e. from the face of the documents no exclusion clause may appear.

When it comes to sub-article 28(h) the conclusion is not that clear – but the best interpretation is that the opposite will apply – i.e. if the LC calls for “all risks” insurance cover and excludes sub-article 28(h) the document presented may show no risks excluded. In other words excluding this sub-article creates the opposite result than found in the UCP 600.

TA.638rev (UCP 600) – III
UCP 600 sub-article 16(c)(iii)(d)
(Procedure for refusals to honour or negotiate)

UCP 600 article Sub-article 16 (c) (iii) (d) reads:

“that the bank is acting in accordance with instructions previously received from the presenter. “

The scenario in this Opinion is that the LC simply excludes sub-article 16(c)(iii)(d) – without replacing it with something else.

The conclusion in the opinion is not that clear – but the best interpretation is that the opposite will apply – i.e. if that option “d” can not be used when refusing the documents, hence excluding this sub-article creates the opposite result than found in the UCP 600.

TA.638rev (UCP 600) – IV
UCP 600 sub-article 14(f) and 14(k)
(Examination of a document other than a transport document, insurance document or commercial invoice)

UCP 600 article Sub-article 14 (f) reads:

“If a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, banks will accept the document as presented if its content appears to fulfil the function of the required document and otherwise complies with sub-article 14 (d). “

UCP 600 article Sub-article 14 (k) reads:

“The shipper or consignor of the goods indicated on any document need not be the beneficiary of the credit. “

The scenario in this Opinion is that the LC simply excludes sub-articles 14 (f) and (k) – without replacing it with something else.

On sub-article 14(f) the Opinion concludes that excluding this sub-article (most likely) makes the LC ambiguous – leaving the nominated bank in the dark without any guidance as to how to examine documents that are not invoices, transport documents and insurance documents. In other words the Opinion does not provide any guidance.

On sub-article 14(k) the Opinion is very clear stating that the exclusion of that sub-article means that that shipper or consignor on the transport document presented must be the beneficiary mentioned in the LC. In other words excluding this sub-article creates the opposite result than found in the UCP 600.

TA.639rev (UCP 600)
UCP 600 article 35 § 2
(Documents lost in transit)

UCP 600 article Sub-article 35 § 2 reads:

“If a nominated bank determines that a presentation is complying and forwards the documents to the issuing bank or confirming bank, whether or not the nominated bank has honoured or negotiated, an issuing bank or confirming bank must honour or negotiate, or reimburse that nominated bank, even when the documents have been lost in transit between the nominated bank and the issuing bank or confirming bank, or between the confirming bank and the issuing bank. “

This case is (unfortunately) different from the ones otherwise being discussed here – as the scenario is that this paragraph is indeed replaced with something else in the specific LC. The LC wording is the following:

“The issuing bank shall be entitled to require the nominated bank to send copies of all the documents presented under the credit and which the nominated bank has determined to be a complying presentation, were the documents thus determined to be complying lost in transit after being sent by the nominated bank. The issuing bank should be entitled to examine the copies of the documents to determine if they comply with the terms of the credit (except for the question of originality) and to refuse reimbursement to the nominated bank should the issuing bank determine that the documents do not comply with the terms of the credit. Article 35, to the extent it is

inconsistent with the foregoing is expressly excluded. “

The (logical) conclusion in the Opinion is that in case documents are lost in transit the wording in the LC applies, meaning that the nominated bank must be able to provide copy documents – and payment from the issuing bank is subject to them examining the copy documents – ascertaining that they did in fact constitute a complying presentation.

Following the line

The good question is if there is a firm line in the way that the ICC is dealing with these UCP 600 exclusions simply saying that a certain sub-article does not apply – not replacing the excluded UCP 600 text with anything else.

An overview looks as follows:

UCP 600 sub-article excluded	Result
UCP 600 sub-article 14(l)	No effect.
UCP 600 sub-article 28(h)	The opposite than the UCP 600 sub-article.
UCP 600 sub-article 28(i)	The opposite than the UCP 600 sub-article.
UCP 600 sub-article 16(c)(iii)(d)	The opposite than the UCP 600 sub-article.
UCP 600 sub-article 14(f)	Excluding this sub-article makes the LC ambiguous.
UCP 600 sub-article 14(k)	The opposite than the UCP 600 sub-article.

From the examples given above, the wind can basically blow in three directions.

1. It can have no affect what so ever;
2. The result can be the opposite from what is stated in the UCP 600;
3. It can make the LC ambiguous.

One can argue whether or not the positions given make sense – and to some extent the above does in fact makes sense. The unfortunate thing is that the ICC is trying to discourage these “clean” exclusions (LCs excluding an article without setting anything in its place), as such is “bad banking practice”. From that perspective the above “interpretations” are not helpful at all – as an advising/nominated/confirming bank must make the same interpretations when other UCP 600 sub-articles are excluded – and such “interpretations” may easily prove wrong – or more correctly different from what a majority of the ICC Banking Commission consider the correct interpretation.

For the purpose of aiming at clear and unambiguous LCs and supporting good banking practice it would have been much more helpful to take a much firmer stand; like saying that excluding a UCP 600 sub-article without putting anything in its place has no meaning whatsoever and will be disregarded.

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It seems however that this opportunity is missed already, and for the next many years the advising banks have to interpret any inventive exclusion inserted into an LC. One can only hope that the advising banks have the nerve to refuse to advise the LC until a clarification is received from the issuing bank.

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