

Corporate Clients

## top@doc Newsletter

“Third party documents not acceptable”: Are the rules of UCP 600 and those of ISBP 745 contradictory regarding the question of how banks have to comply with this documentary credit condition?



**In contrast to the publication “International Standard Banking Practice for the Examination of Documents under UCP 600” (ISBP 745), the “ICC Uniform Customs and Practice for Documentary Credits UCP 600” do not contain any specific provision on how to deal with such a documentary credit clause. The question is, however, if and in what way the interpretation under ISBP 745, paragraph A 19 (d) possibly contradicts the rules of UCP 600 article 1. In the current issue of top@doc we want to answer this question and to explain how such a credit condition should be treated according to the International Chamber of Commerce (ICC) and in the opinion of Commerzbank.**

A formulation such as “third party documents not acceptable” should generally be avoided in a credit since it is not clear what is meant – what is understood by the term “third party”? This term is neither specified in UCP 600, nor does a definition exist that is generally used in international banking practice. Under a credit containing such a clause, it is therefore not clear beyond doubt to all parties involved who is permitted to issue a certain document and who is not.

The ICC has addressed this issue in paragraph A 19 (d) of its publication 745 “International Standard Banking Practice”: It points out that such a formulation should not be used if

its meaning is not further explained in the credit itself. If this formulation is still found in a credit, it is considered to have no meaning by the ICC and should hence be disregarded.

Initially, this seems to be a clear and unambiguous rule that can be easily implemented. By the following example, however, we want to show that disagreements may still arise in this connection:

A credit issued by Careful Bank in favour of WellDone PLC contains, among others, the clause “third party documents not acceptable” in field 47, “additional conditions”. To draw under the credit, WellDone PLC submits documents to Free and Easy Bank which functions as the nominated bank. On checking the documents, Free and Easy Bank notices that the packing list has not been issued by WellDone Ltd itself, but rather by a company named ShipAll Ltd.

Pursuant to UCP 600, article 14 f, a document other than a commercial invoice, a transport document or an insurance document will be accepted by banks as presented. This is on condition that the credit does not further stipulate by whom the document is to be issued or its data content, and the content appears to fulfil the function of the requested document and otherwise complies with article 14 d UCP.

In our example, the credit conditions stipulate merely the presentation of a “packing list in one original and three copies”.

The document check by Free and Easy Bank shows that the packing list is drawn up in accordance with the provisions of UCP – in particular, the document complies with articles 14 d and 14 f of UCP. As the packing list also complies with the credit conditions, it is considered by Free and Easy Bank to be compliant. The clause “third party documents not acceptable” does not make any difference, since ISBP paragraph A 19 (d) stipulates that the clause may be disregarded, as already explained above. The fact that the packing list has not been issued by WellDone PLC, but rather by ShipAll Ltd., does not constitute a discrepancy.

So, Free and Easy Bank takes up the documents and forwards them to Careful Bank.

A few days later, it receives the following SWIFT message: “Careful Bank refuses documents due to the following discrepancy: Third party packing list not acceptable”.

Free and Easy Bank is convinced that this rejection of documents is not justified and informs Careful Bank accordingly, making reference to ISBP paragraph A19 (d).

Careful Bank then replies that ISBP paragraph A19 (d), which states that the clause in question may be disregarded, contradicts UCP article 1 which stipulates that the UCP rules are binding on all parties thereto, unless expressly modified or excluded by the credit. In the controversial case, Careful Bank argues that the general rule of UCP 600, article 14 f, from which it can be derived that any person or company may issue the packing list, is annulled by the explicit credit condition “third party documents not acceptable”.

Careful Bank adds that even the “Preliminary Considerations” of ISBP themselves state that the purpose of ISBP is to highlight how UCP 600 are to be interpreted – but only to the extent that the conditions of the relevant credit do not expressly modify or exclude an applicable UCP article.

Which viewpoint is correct? Does the clause “third party documents not acceptable” constitute a modification or an exclusion of the rules set out in UCP 600 and is the clause to be considered as valid? Or is the rule of ISBP to be applied, according to which such a credit condition may be disregarded by banks? Is there possibly even a conflict between UCP 600 and ISBP?

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The ICC itself adopted a position on this issue on the occasion of its meeting in May 2018.

- The ICC clarifies that ISBP 745 paragraph A 19 (d) neither modifies nor excludes any article within UCP 600.
- It further emphasizes that unclear credit conditions such as “third party documents not acceptable” should not be used, unless a clear indication is given what actual requirements are meant. If clauses of this type are nonetheless used, without further explanations given, they are to be disregarded by the banks.

In its analysis of the facts, the ICC states that amendments or exclusions of individual articles of UCP 600 must be clarified clearly and unambiguously, and that a formulation such as “third party documents not acceptable” is not sufficient here.

The ICC further points out in its opinion that an advising or nominated bank should follow the procedure according to ISBP Paragraph A 19 (d), and that the applicant and the issuing bank bear the risk that is involved in the use of unclear credit terms.

For our example, this means that, in the opinion of both Commerzbank and the ICC, the decision by Free and Easy Bank to take up the presented packing list unreserved is correct. The rejection of documents by Careful Bank is not justified.