

Transferable Credits

- UCP600 Article 48 and Beyond -

Issue 1

The issuing bank of a documentary credit is authorized to pay, incur a deferred payment undertaking accept or negotiate and the advising bank is specified as the transferring bank

Can the advising bank nevertheless transfer the credit?

Answer 1

- It is in the interest of the issuing bank that they retain control over the transfer where the credit is restricted to them.
- The advising bank should refuse the 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

Issue 2

Can a credit specify more than one transferring bank?

Answer 2

- Sub-article 38(b) of UCP600 contains no prohibition against naming more than one transferring bank, if the issuing bank is willing to do so.
- There is nothing to prevent it from being incorporated into the terms and conditions of the credit, provided that the applicant, issuing bank, confirming bank, if any, transferring bank agree to such a transfer
- ICC discourages the issuance of such credits.

Issue 3

The credit was to be transferred by a bank that was not specifically nominated, but the transferring bank is the banker of the first beneficiary.

Would the transfer be considered proper?

Answer 3

- Only the bank that is specifically authorized, as defined in sub-article 38(b) of UCP600, may effect a transfer under the credit.
- Any transfer effected by a bank that was not so authorized would not be considered effective for the purpose of UCP600 and, in particular article 38.
- In such a situation no party will be able claim any protection afforded under article 38 of UCP600.

Issue 4

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 4

- In a freely negotiable credit, the issuing bank must specify the bank that is authorized to transfer the credit.
- The fact that a credit has been advised through a particular bank does not imply that it is the authorized transferring bank.

Issue 5

Is an authorized transferring bank under an obligation to transfer a credit as designated?

Answer 5

- In terms of sub-article 38)a) 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 6

A documentary credit has been transferred to a second beneficiary and documents presented by that second beneficiary to the transferring bank is found to be in complying presentation, but the issuing bank does not fulfill 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 6

- If the transferring bank has not added its confirmation to the transferred credit, it has no obligation to effect payment.
- If it has confirmed 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.

Issue 7

The transferring bank considers that the documents received from the second beneficiary are a complying. It then provides an undertaking to pay at maturity, but the issuing bank refuses the documents as they contain discrepancies

What is the right way for the transferring bank to act in this situation?

What would be the way to waive these risks?

Answer 7

- 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 credit 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.

Issue 8

A documentary credit has 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 38(g) of UCP600?

Answer 8

- 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 12(a) of UCP600, rather than the bank's position under article 38.
- Sub-article 38(a) is there to demonstrate that, whilst a bank may be nominated to transfer, but it is under no obligation to do so.

Issue 9

A transferable documentary credit provided for presentation in addition to others, 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.
- Masters declaration confirming that he has received one full set of copy documents for deliver to applicants.

The transferring bank refused to transfer the documentary credit stating the following:

- 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 documentary credit.
- 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 interpretation?

Answer 9

- Sub –article 48(a) 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 first or second beneficiary to fulfill 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.

Issue 10

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 10

- An instruction relating to the advising of amendments to any second beneficiary covers all amendments unless otherwise specified at the time of transfer and agreed by the transferring bank.

Issue 11

Does the first beneficiary have the absolute right to determine whether the transferring bank will transfer an amendment to the second beneficiary?

Answer 11

- The first beneficiary has the right to determine whether or not amendments are advised to the second beneficiary(ies).
- The position needs to be declared at the time a request for transfer is submitted to the transferring bank.
- The right of the first beneficiary to refuse to allow amendment(s) to be advised to any second beneficiary(ies) 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.

Issue 12

If the second beneficiary comes to know about 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 12

- 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 amendment thereto that are issued.*

Issue 13

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

Answer 13

- When a documentary 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 documentary 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 or 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 interest of the first beneficiary and check with the transferring bank with regard to any possible requirement for submission of documents.

Issue 14

Bank B, when transferring the credit, failed to increase 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), whilst 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:

- Insufficient insurance cover
- Description of goods not as per the documentary credit

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 14

- 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 drafts in substitution for those of the second beneficiary did not change the acceptability of the initial presentation by the second beneficiary.
- The disposal of the documents (including the substituted invoices and drafts) should only have incurred 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 38(i), and if necessary, utilized 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 documentary credit is confirmed or not by the advising bank / nominated bank?

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

Issue 15

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

Answer 15

- Sub-article 38(h) 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 as the bank may lose the protection afforded to it in terms of sub-article 38(i).
- It is not a practice supported by ICC.

Issue 16

According to sub-article 38(g) the amount, unit price, expiry date presentation period, shipment 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 (i.e. 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 16

- 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 subject to the approval and instigation by the applicant of the original credit.

Issue 17

In regard to the substitution of invoices 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 the documents be considered inconsistent with the invoice and therefore be considered a discrepancy?

Answer 17

- The shipper on the documents 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 UCP600 sub-article 14(j).

Issue 18

How long does the first beneficiary have to present documents for substitution?

Is it within five banking days?

If documents are presented after five banking days, is the bank liable to present only the second beneficiary's documents to the issuing bank?

Answer 18

- Sub-article 38 (i) refers to substitution of documents 'on first demand' and whilst not specifically defined in UCP600 as to a particular number of days, first demand must mean first demand as made by the nominated bank.
- To allow the first beneficiary *five banking 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 for 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 transferable credits, right control needs to be exercised until settlement is achieved.
- The first beneficiary in making the transfer request will curtail the presentation period by a certain number of days which would be indicative of the period available to the first beneficiary to submit substitute documents.