

COLLECTED DOCDEX DECLSLONS

2009-2012

Decisions by LCC experts on documentary
credits, collections and demand guarantees



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**Decisions by ICC experts on documentary
credits, collections and demand guarantees**



International Chamber of Commerce
The world business organization

Edited by Gary Collyer & Ron Katz

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FOREWORD

The DOCDEX system was established by the International Chamber of Commerce (ICC) in 1997 as a response to the need for a low-cost and rapid method of resolving disputes on letters of credit. ICC was the natural forum to develop such a system, since it had authored the UCP, the universally accepted rules governing letter of credit practice that have been in effect for more than 70 years. Later amendments to the DOCDEX rules in 2002 allowed ICC's expert panels also to decide cases based on ICC's Uniform Rules for Collections (URC) and its Uniform Rules for Demand Guarantees (URDG).

Under the DOCDEX system, a panel of three ICC experts is appointed by ICC's Centre for Expertise to render Decisions based on documents submitted by the disputing parties. The Decisions are normally handed down within a reasonable period of 30-60 days. Though they do not have the force of law and are not binding on the parties unless they choose to make them so, the Decisions can be used as evidence if the parties later decide to go to court. Moreover, if one party is armed with a DOCDEX Decision in its favour, the other party may decide not to go to court at all.

The current volume is the third in the series of the DOCDEX Decisions to be published by ICC. The previous volume, which dates from 2008, was heavily slanted toward Decisions dealing with UCP 500, the version of the rules predating the current UCP 600. The present volume contains more Decisions on UCP 600 and, in keeping with the broad mandate under the DOCDEX rules, there are also cases here dealing with UCP 500, UCP 222 (which dates from 1962), URC 522 and URDG 458. We expect that the next volume to also contain Decisions based on URDG 758, which came into effect in 2010.

With more than 110 cases decided since its inception, DOCDEX has proved its worth over the last 15 years. Practitioners who have taken advantage of the DOCDEX process have found it to be practical, efficient and reasonably priced. Parties to a dispute concerning the quoted sets of ICC rules would do well to look to DOCDEX as a rapid and cost-effective way of settling them.



Gary Collyer
Senior Technical Adviser, ICC Banking Commission
October 2012

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This Decision was withdrawn.	

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DOCDEX Decision No. 278

UCP 500 sub-articles 14(d)(ii), 14(e) and 13(b); article 14

Did the fact that the Respondent delivered the documents to the applicant make it liable to pay an amount in excess of the documentary credit value? Was an instruction regarding delivery of the documents to the applicant clear and precise? Where the drawing under the credit was in excess of the amount permitted by the credit, did the Respondent handle the discrepant documents correctly?

Parties

Initiator: Company A
Respondents: Bank I and Bank P

Summary of representations

07.03.1999

Bank I issued a documentary credit for USD 1,795,314.70 in favour of Company A. The documentary credit was issued subject to UCP 500 (via SWIFT message MT700).

18.03.1999

Bank I sent a telex stating that the documents would be accepted as presented except for value, quantity, description of goods, validity, bill of lading and certificate of origin.

23.03.1999

Bank P (which is not nominated to act under the credit) forwarded the documents to Bank I for the value of USD 2,058,863.70.

The forwarding schedule, in addition to mentioning the amount of the drawing (USD 2,058,863.70), included the following statement: "We therefore ask you to make use of the documents only if you authorise us to avail ourselves of the documentary credit."

Enclosed together with the forwarding schedule was a letter from Company A to Bank I, which included the following: "You are kindly requested to hand out these documents to the receiver [name of applicant], only against your [Bank I's] irrevocable written confirmation to [Bank P] to pay as follows:

1)

- [vessel name] USD 1,258,071.50
- [vessel name] USD 171,320.00
- Additional payment USD 263,549.00
- Total amount maturity August 3rd 1999 USD 1,719,940.50

2)

- [vessel name] USD 169,478.40 at June 19, 1999

3)

- [vessel name] USD 169,444.40 at July 29, 1999
Documents to be hold [sic] as one set included all Original 3/3 Bill of Lading [sic] it can only be handed out against your payment confirmation to us."

01.04.1999

Bank I sent a telex to Bank P, informing Bank P that it had "handed the accepted discrepant docs for USD 1,795,314.70 to applicant". It further noted that "as for the excess amount viz USD 263,549.00 and as per applicant instructions and upon his agreement with beneficiary, this amount to be paid outside L/C by applicant to beneficiary without any responsibility on our part". The telex ends as follows: "AS PER APPLICANT REQUEST PLS CONFIRM TO US BENEF'S APPROVAL OF SAID ARRANGEMENT BY TESTED MSG. TO ENABLE THE APPLICANT TO MARK HIS FILE".

08.04.1999 – 12.02.2004

Various correspondence between Bank I and Bank P/Company A, in which:

- Bank P/Company A maintained the view that the documents were only to be delivered against the full invoice amount – or the presented documents should be returned.
- Bank I maintained the view that it was only obligated as far as the documentary credit amount, i.e., it was not responsible for the excess amount of USD 263,549.00, which was subject to the agreement between Company A and the applicant.
- It appears from the documentation evaluated by the Group of Experts that the goods may have been released to the applicant against a bank guarantee issued by Bank I even before the issuance of the credit. However, this is not confirmed by Bank I.

Issues to be decided

Main issue:

Does the fact that Bank I delivered the documents to the applicant make it liable to pay an amount in excess of the documentary credit value, where such excess amount was reflected in the forwarding schedule from the presenter?

Sub-issues:

Issue 1: Instruction given to Bank I

Can the instruction given to Bank I regarding delivery of the documents to the applicant be considered clear and precise?

Issue 2: The handling of discrepant documents by Bank I

The drawing under the credit was in excess of the amount permitted by the credit, and consequently the documents were discrepant. Did Bank I handle the discrepant documents correctly in accordance with the provisions of UCP 500?

Analysis and decision

Sub-issue 1: Instruction given to Bank I

The instruction to Bank I to only deliver documents against USD 2,058,863.70 is reflected in both the forwarding schedule from Bank P and the letter issued by Company A to Bank I.

The documents enclosed are specified as follows in Bank P's forwarding schedule:

- letter of [Company A] to you;
- 4 sets of docs as per separate specification of documents.

The Group of Experts holds the view that the letter of Company A forms part of the forwarding schedule issued by Bank P. The content of the letter of Company A, together with the content of the forwarding schedule from Bank P, clearly provided instructions that the documents were only to be delivered to the applicant against USD 2,058,863.70.

Conclusion to sub-issue 1: Bank I should have abided by the instructions in the forwarding schedule from Bank P and the letter from Company A in their handling of the documents.

Sub-issue 2: The handling of discrepant documents by Bank I

Bank I was not obligated to pay an amount in excess of the documentary credit amount and had the option to refuse the documents in accordance with UCP 500 article 14 and sub-article 13(b).

UCP 500 sub-article 14 (d) (ii) specifically states: “ ... notice must state all discrepancies in respect of which the bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presenter”.

Bank I did not refuse, but in fact did accept the documents on 1 April 1999. Having done so, Bank I was (according to UCP 500 sub-article 14 (e)) precluded from claiming that the documents were not in compliance with the credit terms and conditions, and therefore was obligated to pay the full amount drawn at the respective maturity dates, i.e., USD 2,058,863.70 – including the excess amount of USD 263,549.00.

Conclusion to sub-issue 2: Since Bank I did not refuse the documents in accordance with UCP 500 article 14 and sub-article 13 (b), it was obligated to pay the full amount drawn at maturity.

Final Decision

Based upon the documentary evidence provided and the above-mentioned analysis, the Group of Experts agrees that Bank I should have followed the instructions given in the forwarding schedule of Bank P and the accompanying letter from Company A. In this respect and in accordance with the provisions of UCP 500, Bank I should have either refused to accept the documents or agreed to accept them on the basis of effecting the full payment of USD 2,058,863.70 upon maturity of the drawings.

Having failed to act in accordance with the instructions of the presenting bank, Bank I was obligated to pay the full amount drawn, including the excess amount of USD 263,549.00.

Conclusion

The conclusion of the DOCDEX Panel is unanimous.

DOCDEX Decision No. 279

This Decision was withdrawn.

DOCDEX Decision No. 280

UCP 600 sub-articles 14 (a) and (c), 16 (a) and (c)

Whether the “Analysis and conclusion” of Banking Commission Opinion TA 657 was effective in the light of the full knowledge of all the details of this dispute; whether the refusal by the Respondent to honour three drawings on the grounds of (1) late presentation and (2) invoice evidencing “payment out of this documentary credit” was a valid refusal

Parties

Initiator: Bank F
Respondent: Bank A
Together: (the “parties”)

Background and transaction

1. On 7 June 2007, the Respondent issued irrevocable documentary credit No 12345 (the “credit”) in the sum of EUR 155,000 on behalf of Company G, Country I (the “applicant”) in favour of Company P in Country N (the “beneficiary”). The credit was available with and confirmed by the Initiator. It was stated to expire on 31 October 2008 in Country N and was available with the Initiator by a combination of sight and deferred payment. The latest shipment date was 31 October 2007, which was subsequently extended to 5 December 2007. The goods were to be shipped from Country N/Country F to Country I. Partial shipments were allowed.
2. The credit was available as follows:
 - i. EUR 23,250 payable at sight against an invoice (representing an advance payment);
 - ii. EUR 93,000 payable at 30 days from the date of the required CMR;
 - iii. EUR 23,250 payable against presentation of “Positive Commissioning Certificate” signed by Company G and end user (Company P), but not later than 30 September 2008;
 - iv. EUR 15,500 at 12 months after CMR date.
3. The credit required presentation of the following documents:
 - i. signed commercial invoice in triplicate;
 - ii. packing list in duplicate;
 - iii. International Consignment Note CMR evidencing freight payable at destination, despatch to the Applicant.
4. Detailed transaction steps
 - i. 21 June 2007– an invoice for EUR 23,250 was presented to the Initiator and was paid by the Respondent on 26th June 2007;
 - ii. 19 October 2007 – the Initiator received a commercial invoice for EUR 48,000, a packing list and an international consignment note CMR. Payment was effected by the Respondent on 12 November 2007;
 - iii. 30 November 2007 – the Initiator received a commercial invoice for EUR 45,000, a packing list and an international consignment note CMR, which were refused by the Respondent on the grounds of non-conformity. An official opinion was sought in this connection from the ICC Commission on Banking Technique and Practice, in respect of the non-conformity of the presented CMR, which non-conformity was supported.
 - iv. 30 May 2008 – the Initiator received three invoices amounting to EUR 23,250, EUR 7,500 and EUR 8,000 respectively. The documents were sent to the Respondent on 3 June 2008, and on 9 June 2008 the Initiator received a notice of refusal claiming non-conformity of the documents on the basis of the following discrepancies:
 - Late presentation;
 - Invoice evidencing “payment out of this documentary credit”.

Issues

The Initiator seeks a DOCDEX decision to decide:

1. Whether the drafted "Analysis and conclusion" of Opinion TA.657 is effective in the light of the full knowledge of all the details of the dispute;
2. The validity of the refusal by the Respondent to honour drawings in the sum of EUR 23,250, EUR 8,000 and EUR 7500 on the grounds of the following discrepancies:
 - late presentation;
 - invoice evidencing "payment out of this documentary credit".

Initiator's claim

In its request dated 15 October 2008, the Initiator asserted the following:

1. In its notice of refusal the Respondent did not claim that the "Positive Commissioning Certificate" had not been presented and, as a result of the said omission, it is deemed to have agreed that the document was not required in case payment was claimed after the date of 30 September 2008.
2. The requirement contained in Field 48 of the SWIFT MT700 regarding presentation of documents within 15 days after the date of the CMR can only be linked to the documents listed in Field 46A and can only relate to the deferred payment of EUR 93,000. Accordingly, the first discrepancy is not valid.
3. In the invoices amounting to EUR 23,250, EUR 7,500 and EUR 8,000, the beneficiary included the words: "Out of this documentary credit", which were interpreted by the Respondent as indicating that the amount was claimed outside the credit. The Initiator asserts that this is not the case and should be interpreted as indicating that the amount was claimed under the credit and that, accordingly, the discrepancy is not valid.

Respondent's reply

In its response dated 11 November 2008, the Respondent claimed the following:

1. The advance payment of EUR 23,250 was paid by the Respondent on 26 June 2007 against presentation of an invoice after receipt of the authorization of the applicant, which was required because the invoice contained the words: "Out of this documentary credit".
2. The amount of EUR 48,000 was paid by the Respondent 30 days from the date of the CMR after receipt of the authorization of the applicant, as the invoice contained the words: "Out of this documentary credit", and the CMR did not bear the seal of Company P under Field 22.
3. The Respondent refused to pay the balance of EUR 45,000 because the relative invoice contained the words: "Out of this documentary credit" and the CMR stated under Field 16, a carrier (Company S) different from that shown under Field 23 (Company C) "that didn't result to be Company S's agent" and bore amendments that had not been countersigned and did not show the weight indication. These discrepancies were not waived by the applicant.
4. The Respondent refused to pay the sum of EUR 23,250 payable against "Positive Commissioning Certificate signed by Company G and end user (Company P) but not later than 30 September 2008" because the relative invoice contained the words: "Out of this documentary credit". This discrepancy was not waived by the applicant.
5. The Respondent refused to pay the sum of EUR 15,500 payable 12 months from the CMR date because the relative invoice contained the words: "Out of this documentary credit". This discrepancy was not waived by the applicant.
6. Furthermore the Respondent asserted the following:
 - The words "out of this documentary credit" meant that the invoices were not applicable to the credit. There could therefore be no logical argument which might suggest that they could have the opposite meaning, namely "under the letter of credit and out of the total amount of the letter of credit".
 - Sub-article 14 (a) of UCP 600 states that the examination of documents must be carried out "on the basis of the documents alone", and sub-article 16 (a) states that when a bank "determines that a presentation

does not comply, it may refuse to honour or negotiate". [Experts note: It is presumed that as this is a credit subject to UCP 500, that the Respondent is referring to UCP 500 sub-article 14 (b)].

- Sub-article 16 (b) states that the issuing bank "may in its sole judgement approach the applicant for a waiver of the discrepancies". That was what happened in respect of the payments for EUR 23,250 and EUR 48,000, but not for the subsequent ones. [Experts note: It is again presumed that the Respondent is referring to UCP 500 sub-article 14 (c)].
- With regard to the discrepancies affecting the CMR, in its SWIFT message dated 1 April 2008 the Initiator "agreed to the discrepancies", but at the same time informed the Respondent that it had applied to the ICC in Country N for an official opinion.

No specific comment was made by the Respondent in response to the Initiator's assertion relating to the discrepancy described as "late presentation".

On the strength of the above, the Respondent is of the opinion "that the discrepancies have been validly opposed to the Initiator" and formally requests a DOCDEX Decision in accordance with the ICC Documentary Credit Dispute Expertise Rules, article 3.2.3.

Documents submitted by the parties

Documents submitted by the Initiator (all of which are copies).

- (i) Appendix 1 – SWIFT Copy of the documentary credit No. 12345 received by Initiator;
- (ii) Appendix 2 – SWIFT copy of the amendment No 1 received by Initiator;
- (iii) Appendix 3 – Copy of the ICC draft dated 5 May 2008 Document 470/TA.657. Conclusion and analysis to the query of ICC Country N edited by Department of Policy and Business Practices;
- (iv) Appendix 4 – Invoice No 6789 JM issued by Company P on 21-05-2008 total amount of EUR 155,000 indicating "Payment: As per irrevocable documentary credit number 12345 dated 070607 for EUR 155,000. Out of this documentary credit Number 12345: EUR23,250 against positive commissioning certificate signed by Company G and end-user (Company P) but not later than 30SEPT2008, so payable on 30SEPT2008";
- (v) Appendix 5 – Invoice No 6789 JM issued by Company P on 21-05-2008 total amount of EUR155,000 indicating "Payment: As per irrevocable documentary credit number 12345 dated 070607 for EUR155,000. Out of this documentary credit number 12345: EUR7,500 out of EUR 15,500 at 12 months after CMR date being 28.11.2007 for the Weigh bridges so on 28.11.2008 payable";
- (vi) Appendix 6 – Invoice No. 6789 JM issued by Company P on 21-05-2008 total amount of EUR155,000 indicating "Payment: As per irrevocable documentary credit number 012345 dated 070607 for EUR155,000. / Out of this documentary credit number 12345: EUR8,000 out of EUR15,500 at 12 months after CMR date being 12.10.2007, for the ABS hopper scales so on 12.10.2008 payable";
- (vii) Appendix 7 – SWIFT copy of advice of refusal issued by Respondent on 11/06/08 acknowledging receipt of Initiator's document remittance dated 03-06-2008 for EUR23,250/EUR8,000/EUR 7,500 Indicating "DOCS REFUSED OWING THE FOLLOWING DISCREPANCY: LATE PRESENTATION / INV. EVIDENCING PAYMENT OUT OF THIS DOC. CREDIT".

Documents submitted by the Respondent (all of which are copies).

- (i) ANNEX 1 – Copy of SWIFT issue of documentary credit
- (ii) ANNEX 2 – Invoice No. 6789 JM issued by Company P on 15-06-2007 total amount of EUR155000 indicating "Payment: As per irrevocable documentary credit number 12345 dated 070607 for EUR155,000. Out of this documentary credit Number 12345: EUR23,250 as advance payment at sight against invoice";
- (iii) ANNEX 3 – Invoice No. 4567 JM issued by COMPANY P on 16-10-2007 total amount of EUR155,000 indicating "Payment: As per irrevocable documentary credit number 12345 dated 070607 for EUR155,000. Out of this documentary credit Number 12345: EUR48,000 at 30 days from CMR date for the ABS hopper scales"

- (iv) ANNEX 4 – CMR showing field 16 Carrier S as carrier/field 23 Company E as carrier signature/field 4 Country N, 12-10-2007 as place and date of shipment;
- (v) ANNEX 5 – Invoice No. 3456 JM issued by Company P on 22-11-2007 total amount of EUR155,000 indicating “Payment: as per irrevocable documentary credit no. 12345 dated 070607 for EUR155,000. Out of this documentary credit Number 12345: EUR45,000 at 30 days from CMR date for the Weigh bridges”;
- (vi) ANNEX 6 – CMR showing field 16 Company S as carrier/field 23 Company C as carrier signature/field 4 Country F, 28-11-2007 as place and date of shipment. The date “28” is modified without approbation;
- (vii) ANNEX 7 – Idem Initiator Appendix 4 – Invoice No. 6789 JM;
- (viii) ANNEX 8 – Idem Initiator Appendix 6 - Invoice No. 6789 JM;
- (ix) ANNEX 9 – Idem Initiator Appendix 5 – Invoice No. 6789 JM;
- (x) ANNEX 10 – SWIFT message regarding rebuttal of discrepancies issued by Initiator on 16/07/2008 and received by Respondent.

Analysis

Whether the drafted “Analysis and Conclusion” of Opinion TA 657 is effective in the light of the full knowledge of all the details of the dispute.

The DOCDEX Panel would like to point out at the outset that draft Opinion TA 657 attached to the Initiator's claim as attachment 3 has been revised during the Banking Commission meeting in Paris on 24 October 2008 and has been adopted and issued on 3 November 2008 as official Opinion TA 657rev in ICC Document 470/1110 rev final. As a result of that revision, the 2nd discrepancy was considered as not valid. Conversely, no change was made to the conclusion under the 1st discrepancy which was confirmed as leading to the valid refusal of the CMR.

An official Opinion of the ICC Banking Commission addresses the facts and the questions specifically raised in the query. A DOCDEX Panel is not empowered to decide whether an opinion adopted by the Banking Commission is right or wrong. A DOCDEX Panel will decide the case on the basis of the submissions made by the parties and the accompanying documents. In this case, the DOCDEX Panel does not believe that the parties' submissions change the facts based on which official Opinion TA 657rev was adopted.

The validity of the refusal by the Respondent to honour drawings for EUR 23,250, EUR 8,000 and EUR 7,500 on the grounds of the following discrepancies:

- Late presentation
- Invoice evidencing payment out of this documentary credit

The DOCDEX Panel considers that, while the credit could have benefited from a clearer drafting, the Respondent was wrong in refusing two of the three drawings (EUR 23,250 and EUR 8,000), but right in refusing the third drawing of EUR 7,500.

The credit was a mixed payment credit. Mixed credits typically require that the credit amount be payable in fractions on different maturities. In the case in hand, the Panel would have expected the invoices presented with the CMR and covering the two maturities under the credit (30 days and 12 months from the date of CMR) to have been issued for an amount of EUR 108,500 (aggregate of EUR 93,000 and EUR 15,500) – or part thereof in the event of partial shipment. If that were the case, the Respondent, upon taking up the documents, would have undertaken to make payment on the stated maturities. However, this is not what happened, undoubtedly because of the poor drafting of the credit, including, in particular, field 45A. The beneficiary has elected to make six presentations:

- A presentation for the advance payment, which has been paid and is not the subject of the dispute submitted to DOCDEX;