

May 2002

From 31 March 2002 the ICC rules governing presentation of documents under Letters of Credit are to be complemented by a new supplement to the UCP 500 for electronic presentation of credits – known as eUCP 500.

The new eUCP supplement is necessary because the existing UCP rules were drafted with the presentation of paper documents in mind. This left some uncertainty as to how those rules should be applied to electronic presentation.

ICC updates rules for use of electronic documents in International Trade

The eUCP sets out a contractual framework defining various matters of specific relevance to electronic presentation including new rules for the place, time and format for presentation electronically.

We have prepared below a brief summary of these new rules together with a general commentary on their potential impact in the banking sphere.

Applicability

For the supplement to apply, the letter of credit must expressly incorporate the eUCP. If eUCP is not incorporated, a party has no right to present electronically under the old rules.

It is not necessary to expressly incorporate both the UCP 500 and the eUCP, since the supplement incorporates the UCP 500 in any letter of credit subject to it.

AN ELECTRONIC RECORD WHICH CANNOT BE AUTHENTICATED IS CONSIDERED NOT TO HAVE BEEN PRESENTED.

New definitions

The eUCP provides that:

“Appears on its face” shall mean the examination of the data content of an electronic record.

A “document” shall include an *electronic record* which is defined as:

- data created, generated, sent, communicated, received, or stored by electronic means
- that is capable of being authenticated as to the apparent identity of a sender and the apparent source of data contained in it, and as to whether it has remained complete and unaltered
- is capable of being examined for compliance with the terms and conditions of the eUCP Credit (see comment below)

“Electronic signature” means a data process attached to or logically associated with an electronic record and executed or adopted by a person in order to identify that person and to indicate that person’s authentication of the electronic record.

“Place for presentation” of electronic documents means an electronic address.

“Received” shall mean the time when an electronic record enters the information system of the relevant recipient in a form capable of being accepted by that system.

“Sign” shall include an electronic signature.

Main provisions

The main provisions incorporated in the eUCP of which users should be aware include:

Presentation of electronic documents

A Letter of Credit allowing presentation of electronic records must state a place for presentation of these and for paper records, if a mixture of the two is to be used.

If more than one record is to be presented electronically under a letter of credit, the beneficiary is responsible for notifying the bank to which presentation is made once the presentation is complete.

Each presentation (whether paper or electronic) under a Letter of Credit must identify the letter of credit under which it is presented. Failure to do so may result in it being treated as not received.

If the relevant bank for presentation is open but its system is unable to receive a transmitted electronic record on the agreed expiry date, the bank will be deemed to be closed and the date for presentation and/or the expiry date extended to the first following banking day on which the bank is capable of receiving an electronic record.

An electronic record which cannot be authenticated is considered not to have been presented.

Examination

If an electronic record contains a hyperlink or reference to an external system, the bank must examine the document, including the hyper-link/reference to an external system. Any failure of the link to allow access to the linked document shall constitute a discrepancy.

The forwarding of electronic records by a nominated bank pursuant to its nomination implies that the bank has checked the apparent authenticity of the records.

Notice of refusal

Timing for the examination of documents commences on the banking day on which the beneficiary’s notice of completeness is received.

...OTHER THAN CHECKING THE APPARENT AUTHENTICITY OF AN ELECTRONIC DOCUMENT, BANKS ASSUME NO LIABILITY WITH RESPECT TO THE IDENTITY OF THE SENDER...

Provision is made in the eUCP for a reasonable time not exceeding five banking days following the banking day on which the presentation is complete for giving a notice of refusal of electronic documents. It should be noted that this is less than the maximum seven days allowed under traditional paper based UCP rules.

If an issuing bank, the confirming bank or a nominated bank provides such a notice (however, an inability by the bank to open documents presented in an agreed format shall not constitute a valid ground for such a notice – see below) which includes electronic records and does not receive instructions from the addressee within 30 calendar days, the relevant bank must return any paper documents not already returned to the presenter and may dispose of the electronic records in any appropriate manner without any responsibility.

Date of issuance

The date on which an electronic document appears to have been sent by the issuer shall be considered the date of issuance, unless the document specifically states otherwise. The date of receipt will be the date it was sent if no other date is obvious.

It should be noted noting that the eUCP provides that where an electronic record evidencing transport does not indicate a date of shipment or dispatch, the date of issuance of the electronic record will be the date of shipment or dispatch.

Corruption of an electronic record after presentation

If a bank receives an electronic record which appears to have been corrupted (such that the bank cannot examine it), the bank may request that the document be re-presented. If it requests such a re-presentation:

- time for examination of the document shall be suspended until the document is re-presented
- if the nominated bank is not the confirming bank, it must provide the issuing bank and any confirming bank with notice of its request
- but if the same record is not re-presented within 30 days, the document will be treated as not having been presented.

Limitation on banks liability – allocation of risk for forged documents

The eUCP provides that other than checking the apparent authenticity of an electronic document, banks assume no liability with respect to the identity of the sender or the source and content of each electronic document. However, it is advisable that the parties to the Letter of Credit seek to reduce further the risk of the banks paying against a forged electronic document by agreeing with the issuing bank a format for presentation which would render it difficult for a forged document to go undetected.

Commonly asked questions and answers

In what format should the electronic documentation be presented?

The format should be agreed in advance and provided for in the letter of credit. In the absence of agreement, any format will suffice.

What if the Letter of Credit calls for presentation of originals and one or more copies?

Under eUCP a single electronic document will suffice.

Can eUCP deal with part paper part electronic presentation?

Yes. A party may wish to identify specifically which documents may be presented electronically.

What happens if a bank cannot examine the electronic document for some technical reason?

eUCP provides that a bank cannot refuse to accept an electronic document in the agreed format or any electronic document where the Letter of Credit specifies no format. To avoid being caught out by documents in an unfamiliar format, banks will need to specify precisely the formats that are acceptable. Where a bank cannot receive an electronic document for technical reasons on a day it is open for business, the deadline for presentation shall be extended to the following banking day on which the document can be received.

...PARTIES MUST FIX THEIR OWN TECHNICAL
STANDARDS AND KEEP THOSE STANDARDS
UNDER REVIEW.

General commentary

eUCP provides no guidelines as to the appropriate technical safeguards or standards to be applied to electronic documentation. This is done deliberately to keep the framework technologically neutral and adaptable as technology develops. This means parties must fix their own technical standards and keep those standards under review.

Documents incorporating digital signatures and latest encryption technology such as Bolero which allow the recipient to verify both the identity of the sender and the authenticity of the message will undoubtedly qualify as electronic records under the eUCP. Over time, and as more documentation becomes electronic there will be pressure to accept documents from less secure, or less well known, systems. Parties will need to develop their own guidelines and minimum standards for what qualifies as an acceptable electronic record and incorporate those terms into the Letter of Credit.

In checking electronic documents for conformity, that the banks duty is to exercise reasonable care to ascertain whether or not they appear on their face to comply with the terms of the Letter of Credit. That involves looking at the content only of the electronic document.

As to ascertaining the genuineness of documents, eUCP provides that the banks duty is limited to checking their apparent authenticity. The banks liability in respect of checking for apparent authenticity is expressly limited under eUCP to checking matters that are apparent in the document received by the use of a commercially acceptable data process for the receipt, authentication and identification of electronic records. This permits the bank to place reliance on the information it receives from a trusted third party used for authenticating the message. The bank will nevertheless remain responsible for ensuring that the system is kept up to date with technological advances and current banking practice and that any known security deficiencies are covered.

Contacts

Michael Kenny
mkenny@wfw.com
+44 (0) 020 7814 8042

David Kavanagh
dkavanagh@wfw.com
+44 (0) 020 7814 8114

Nick Fenner
nfenner@wfw.com
+44 (0) 020 7814 8075

Rubin Weston
rweston@wfw.com
+44 (0) 020 7814 8220

Watson, Farley & Williams
15 Appold Street
London EC2A 2HB
Tel: +44 (0) 20 7814 8000
Fax: +44 (0) 20 7814 8141/2

www.wfw.com