

## Can an issuing bank be a nominated bank under UCP 600 framework?

---

### Inception:

The first formal definition of nominated bank mentioned in article 2 of UCP 600 not only made a sole reference of “concept of availability” based on which a nominated bank can be recognized under a letter of credit transaction but also raised confusion among the practitioners & academicians while discussion taken place on the online letter of credit forum, seminar and conversations that “can a issuing bank be a nominated bank.”. The objective of this educational paper is to analysis the issue from various perspectives with a view to appease those curious practitioners & academics on above.

- **Historical analysis of a nominated bank:**

The term “nominated bank” was first incorporated in UCP-400(1983) by providing a parenthetical definition in article 11(b), expressly:

*“All credit must nominate the bank (**nominated bank**) which is authorized to pay (**paying bank**), or to accept drafts (**accepting bank**) or to negotiate (**negotiating bank**), unless credit allows negotiation by any bank (**negotiating bank**)”*

With reference to above sub article, it was revealed that the name of the nominated bank keep changing with the availability of the credit, i.e. paying bank, accepting bank, negotiating bank etc. The concept of changing nominated bank’s name on the basis of availability of credit has still been going on either in an explicit or oblique manner. The word “nominated bank” was used more extensively in UCP 500(1993) than that of its predecessor. As a result of continual development, the nominated bank has now been defined at article 2 of UCP 600 [so that a common understanding on it can achieve] followed by a special article-12 entitled “nomination” in UCP 600.

Now we try to analyze the core question “**Can an issuing bank be a nominated bank**” from UCP history:

*According to sub article 11(c) & (d) of UCP 400:*

- (c) *Unless a nominated bank is the issuing bank or the confirming bank, [Emphasis added] its nomination by the issuing bank does not constitute any undertaking by the nominated bank to pay, to accept or to negotiate.*
- (d) *By nominating a bank other than itself [Emphasis added], or by allowing for negotiation by any bank.....with the provision of these article”*

The above sub article made an unambiguous reference that the nominated bank could be defined on the basis of “availability” of the credit and an issuing bank could be termed as a nominated bank if credits were available with the issuing bank counter.

In addition to above, according to sub article 10(b) (i) of UCP 500:

*“Unless the credit stipulates that it is available only with the issuing bank,[Emphasis added], all credits must nominate the bank “(the nominated bank) which is authorised to pay, to incur a deferred payment undertaking, to accept draft(s) or to negotiate. In a freely negotiable credit, any bank is the nominated bank.”*

The determination of nominated bank on the basis of “availability” has slightly been changed in UCP 500 from its predecessor [UCP 400]. Under the framework of UCP 500, issuing bank has been separated distinctively from the nominated bank and got a well deserved recognition as a principle obligator. Similar position has been taken in UCP 600 article 2. Now

*“Nominated bank means the bank with which the credit is available or any bank in case of a credit available with any bank”*

If we look into the sub article 6(a) [*“.....a credit is available with a nominated bank is also available with the issuing bank”*], sub article (d)(ii) [*“.....a place for presentation other than that of issuing bank is in addition to the place of the issuing bank”*] and sub article 38(b) definition of transferring bank [*“.....an issuing bank may be a transferring bank*], the distinction between issuing bank and nominated bank has been sought after more eminently. Moreover starting point of sub article 12(a) *“unless nominated bank is the confirming bank.....”* has provided us clear indication that issuing bank can not be a nominated bank.

- **Importance of Article 2 [definition] in UCP 600 for avoidance of repetitive words:**

One of the objectives of drafting group while revisions of UCP 500 is to avoid repetitiveness [emphasis added] through providing definition in article 2 as a set of common rule [this is the first time that UCP mentioned that UCP is a set of rules]. As reflection of above, we didn't see anywhere in UCP:

- The word *“unless otherwise stipulated”* which was frequently used in UCP 500.
- The sole reference of *“appear on its face”* has found only in sub article 14(a) of UCP 600, which was found each and every transport article of UCP 500 repetitively and so on.

Based on above objective, if we look into sub article 6(a) of UCP 600, we observed that this sub article 6(a) has been segregated into three parameters to cover the entire transaction under it. Sub article 6(a) of UCP 600 as follows:

*“A credit must state the bank with which it is available or whether it is available with any bank. A credit available with a nominated bank is also available with the issuing bank.”*

The above three lines sub article on availability seemed to have some insight meaning with a view to cover all of the possible alternatives regarding “availability of a credit” under a particular letter of credit transaction. Based on above logic through keeping the objective of the drafting group in mind, we can infer that :

- The first line of above sub article is applicable where credit available with a named nominated bank.
- The second line is applicable where credit available with any bank.
- The third sentence is applicable in both of the above cases along with credit available with the issuing bank only [by payment, by deferred payment, by acceptance etc. as per sub article 7(a)(i)]

**Hence including issuing bank in a nominated bank may sense repetitive usages of it, which is in contradiction with the objective of UCP 600.** Similar explanation is applicable for sub article 6(d)(ii) and sub article 38(b) definition of transferring bank of UCP 600.

#### **Analysis from “Availability” point of view**

Now, we try to analyze the subject captioned proposition based of possible availability of credit under a particular letter of credit transaction:

##### **Proposition: 1**

- **Where credit is available with a nominated bank:**

**According to the definition of nominated bank at article: 2**

*“Means the bank with which the credit is available or any bank in the case of a credit available with any bank”*

The above definition implies that in order to involve a bank [other than issuing bank] in a particular letter of credit transaction, it must be authorized/nominated by the issuing bank through either field 41D, i.e. available with- where credit is transmitted through SWIFT or in case of mail, an issuing mentioned that the credit is available with a particular bank or any bank. In other word, **in order to perform either “Honour” or “Negotiation”, a bank [other than issuing bank] must require authorization from the issuing bank. [Emphasis added]**

The entire possible alternatives regarding availability of a credit to the nominated bank explicitly mentioned in sub article **7 (a) (ii) to (iv) of UCP 600.** In where, we can see that issuing bank termed as a last resort where nominated bank failed to perform either reluctant to perform on issuing bank’s instruction or agreeing to perform but later decline. This proposition stands on the strength of sub article 6(a) of UCP 600 i.e. a credit is always available with the issuing bank. So termed issuing bank as nominated bank will not only contradict with the basic instinct of issuing bank [as a principal obligator] but also degrade its [issuing bank] position under a credit.

**Proposition: 2**

**Where credit available with issuing bank:**

According to sub article 7(a) (i) of UCP 600, It has been appeared that a credit can only be available with the issuing bank by sight payment, deferred payment or acceptance only which implied that issuing bank only extended its obligation only towards beneficiary or his or her authorized person or entity [straight letter of credit]. An issuing bank is allowed to do it under the auspicious of sub article 7(b) of UCP 600 and should not be termed as a nominated bank by the virtue of definition of Nominated bank. In other word, **the sole function of issuing bank i.e. “Honour”, needs not be necessary to appear its name as available because of with which explicitly mentioned in sub article 7(b) of UCP 600:**

*“An issuing bank is irrevocably bound to honour **AS OF THE TIME [EMPHASIS ADDED]** it issues the credit”*

Moreover making no reference of nominated bank in sub article 16(f) & (g) of UCP 600 strengthen the position that issuing bank should not be treated as nominated bank in any circumstances.

**Conclusion:**

From above analysis, we can conclude that article 2, definition of nominated bank under UCP 600 should read as follows:

*“Nominated bank means **the bank [OTHER THAN ISSUING BANK]** with which credit is available or **any bank [OTHER THAN ISSUING BANK]** in case of credit available with any bank.”*

---

**A.T.M Nesrul Hoque**

Executive Officer

Bank Asia Limited

MCB SK. Mujib Road Branch.

e-mail: [nesarul@bankasia.com.bd](mailto:nesarul@bankasia.com.bd).

November 2008