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The UCP 600: documentary credits in the 21st century

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*J.B.L. 355 Background to reform

Cross-border trade has increased dramatically in the last 30 years and consequently there is a greater need for harmonisation of commercial law at international level. Obvious methods of creating transnational commercial law include international conventions and forms of soft law such as model laws, international restatements and contractually incorporated uniform rules.[1] Harmonisation may also occur more informally, such as where courts in one jurisdiction follow judicial decisions elsewhere. Yet the process of creating an international set of rules which transcend domestic law is fraught with difficulty. If a drafting group aims for simple statements of principle, these statements will be easier to translate into other languages and will appeal to the international business community. Yet, if principles are stated too baldly, there is a danger that the domestic courts in various countries will interpret the rules in different ways.[2] A delicate balance has to be sought between simplicity and detail in order to ensure that legal rules are sufficiently flexible to meet the needs of different trades and to adjust to technological advances.

The focus of this article is upon the Uniform Customs and Practice for Documentary Credits (UCP), which consists of a set of principles which standardise banking procedures for payments byway of documentary credits. These principles do not apply automatically, but are in play once traders choose to pay by letter of credit and to incorporate the UCP as part of their contract terms. The UCP was first issued by the International Chamber of Commerce (ICC) in 1933. It has been regularly revised since then in order to ensure that it reflected current banking and trade practice. The most recent version had been the UCP500, promulgated by the ICC in 1993 and effective from January 1, 1994.[3] The ICC Commission on *J.B.L. 356 Banking Technique and Practice (Banking Commission) initiated a fundamental review in 2003. After three years of preparation and consultation, unanimous approval of the draft was given by the Banking Commission on October 25, 2006. It is expected that the UCP600 will be used by banks and traders across the world from July 1, 2007 (and will therefore be referred to as the "UCP600 (2007 revision)").[4]

Over the years, the letter of credit has been a popular choice. It is particularly attractive when traders are conducting business across great distances in relation to highly valuable cargoes. In this situation, they either need to know each other well enough to trust one another or they need to put some sort of payment mechanism in place which will offer certain safeguards to

protect each of them. The letter of credit offers considerable advantages in these respects. It is documentary in nature and independent of the sale contract because payment is made in return for shipping documents rather than the goods themselves. Subject to what has been agreed, the seller can call for payment as soon as he or she has shipped the goods and tendered the documents stipulated in the letter of credit. The buyer can reassure him or herself that the correct goods have been placed in the hands of a carrier by, for example, demanding not only a shipped bill of lading, but also an inspection certificate signed by an independent and reputable third party. Yet, despite these advantages, the industry has faced a number of challenges in recent years. Letters of credit are costly to arrange and consequently traders who deal regularly with each other in politically stable countries may well prefer a cheaper trade financing technique. It is estimated that documentary credits only represent 10 to 15 per cent of world trade volumes, whereas 80 per cent of trade is upon open account terms[5] (where the goods and documents are delivered directly to the buyer on the understanding that the seller will be paid at an agreed time). More broadly, there has been significant growth in export/import factoring and other related financial services.[6] Although the letter of credit is likely to be favoured in the world's more difficult markets because it is a flexible mechanism which can be adjusted to minimise particular risks, increasingly large western retailers importing manufactured products are insisting upon the cheaper payment method of open account terms.

As the use of a letter of credit is an expensive option, its appeal to the international business community will be reduced where there is any risk of uncertainty which may lead to a dispute. Evidence that in recent years up to 70 per cent of documents tendered by sellers have been rejected by banks on first presentation due to discrepancies therefore caused disquiet amongst traders.[7] The fact that certain banks began to charge a discrepancy fee provoked further concern. As a result, traders wanted improvements to be made to ensure that payments were rapid and reliable. Yet the difficulties facing the drafters of the new UCP in *J.B.L. 357 satisfying the expectations not only of traders but also banks, carriers and other third parties should not be underestimated. Letters of credit are often used in marginal settings, where parties know little about each other. The UCP provides a set of privately created rules which are not comprehensive and which, of necessity, are supplemented by national rules. The drafters therefore needed to create a set of workable principles which would be acceptable in every country, regardless of its social, political and economic characteristics. It would have been a daunting task.

A striking feature of the 2007 revision has been the intensity of the consultative process which has involved a nine-person UCP Drafting Group and a larger 41-member UCP Consulting Group, which commented upon drafts and liaised with 45 ICC National Committees worldwide.[8] It was therefore possible to obtain feedback in relation to the impact a suggested change might have upon a particular country or region. Furthermore, other ICC Commissions (such as Transport, Insurance and Commercial Law and Practice) received drafts of the provisions which might affect them. A key characteristic of this consultation process was the large number of business people involved: the Consulting Group, for example, consisted of insurers and carriers as well as lawyers, bankers and others. This was seen as desirable because the operation of documentary credits have an impact which goes far beyond the banking industry. It also has the advantage of minimising any risk that the recommendations would be seen as weighted in favour of one particular group.[9] This article will examine some of the major changes made and will consider to what extent the UCP600 represents an improvement upon its predecessor.

The drive for clarity and certainty

The definition section and the role of the banks

In order to avoid repetition and to clarify later Articles, an extensive list of definitions is provided in Art.2. The old Art.2 in the UCP500 focused on what was meant by a documentary credit and those involved in the process were only briefly acknowledged. In contrast, Art.2 of the UCP600 expressly defines the main players. For example, an "applicant" was casually referred to as a bank customer in the UCP500. Although its meaning is obvious, providing a definition is useful because the applicant plays a pivotal role in initiating the letter of credit procedure and this term is referred to in later provisions in the UCP. Consequently, the applicant is described as "the party on whose request the credit is issued". Equally, the "beneficiary" is defined as "the party in whose favour a credit is issued". The *J.B.L. 358 use of the term "party" is well chosen because it is neutral in character and can include private individuals, corporate entities and banks.

The definition section contained in Art.2 includes the relevant banks. The "issuing bank" is defined as "the bank that issues a credit at the request of an applicant or on its own behalf". The issuing bank will be bound to pay in accordance with the letter of credit or to reimburse another bank which has been authorised to do so.[10] It is typical for an arrangement to be made between the issuing bank and other banks, which are defined by the functions they will fulfil. Thus, if a nominated bank's role is to advise the beneficiary on the opening of the credit, it is known as the "advising bank". In contrast, if a nominated bank is authorised or required to confirm the credit, it is referred to as the "confirming bank". If the bank confirms the credit, it will also have a contractual relationship with the beneficiary because it has added its own independent undertaking to pay the beneficiary. This is recognised in the list of definitions, which describes "confirmation" as meaning a "definite undertaking of the confirming bank, in addition to that of the issuing bank, to honour or negotiate a complying presentation".[11] The responsibilities of issuing banks, confirming and advising banks are then dealt with in consecutive Articles later in the UCP600.[12]

Despite the need for clarity in order to avoid costly disputes, letters of credit must be sufficiently flexible to reflect the parties' wishes. Consequently, a "nominated bank" is defined in Art.2 as a "bank with which the credit is available or any bank in the case of a credit available with any bank". This definition allows the parties to decide whether the letter of credit should only be available at one particular bank or should be freely payable at any bank which the beneficiary cares to select. Similarly, according to Art.12, the role of the nominated bank must be determined by considering the nature of its authority which it has been given by the issuing bank.

The lengthy definition section has meant that subsequent Articles could be redrafted more succinctly. "Honour" is defined for the first time and includes immediate payment, or incurring a deferred payment undertaking or accepting a bill of exchange ("draft") by a bank. The concept of "negotiation" caused much more difficulty because it had been open to different interpretations in different countries: it was not clear whether it necessarily involved payment and, if so, whether it also referred to the manner of payment.[13] It is rendered certain by Art.2, which states that:

*J.B.L. 359 "*Negotiation* means the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by

advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank."

By using the word "purchase", it is evident that the definition is concerned with payment where money will change hands. This is an improvement upon the old Art.10(a)(ii) of the UCP500 which, in defining the concept of negotiation, referred to "giving of value"; this phrase would have made sense to any lawyer, but could have unnerved ordinary traders. By hammering out definitions for these concepts (which are bolstered by an interpretation section contained in Art.3), 13 later Articles could be redrafted in a much simpler form. The definition section provides a vital starting point; readers are expected to refer to later Articles to get the full picture. Thus the new definition section makes it clear that it is the *nominated* bank which can negotiate. If one then refers to Art.7, the role of the *issuing* bank is set out: it does not negotiate but it must reimburse a nominated bank which has honoured or negotiated a draft; if a nominated bank has not done so, the issuing bank must honour the letter of credit itself. As the UCP is concerned with codifying banking practices, this precise mapping of the different roles of the banks is vital.

The structure and style of the UCP600

The whole of the UCP has been streamlined by merging some Articles and dealing with issues in other ways. The UCP500 contained 49 Articles; the final version of the UCP600 has been reduced to 39 Articles. Omissions have been rectified and, for example, the position of a second advising bank is dealt with for the first time.[14] Some of the alterations made are quite subtle. For example, the UCP500 provided that it was binding on all parties; although a commentator might therefore have described it as a set of "rules", the Articles were not described in that way by the UCP itself. In contrast, in Art.1 of the UCP600, it is stated expressly that the provisions of the UCP are "rules" which, when incorporated in the text of the credit, are binding "unless expressly modified or excluded by the credit". The provisions of the old UCP500 often ended with the words "unless otherwise stipulated in the credit". As Art.1 of the UCP600 makes provision for modification, this phrase is superfluous and has quite rightly been dropped from the Articles which follow.

Under the UCP500, parties could specify that the credit was revocable. This would mean that, if a series of deliveries had been arranged, the buyer could ask the bank to cancel the credit after the first delivery. In contrast, according to Art.3 of the UCP600, letters of credit are irrevocable. This means that, if parties wish to establish a revocable credit, they must choose either to incorporate the UCP500 into their contracts or to incorporate the UCP600 with suitable modifications. *J.B.L. 360 Although this change reinforces the idea that documentary credits create a clear and certain payment mechanism where the beneficiary can feel reassured that he or she will receive his or her money, it is not entirely satisfactory to create a situation where banks may be tempted to continue using the UCP500 when offering a revocable credit.

Article 3 is a new interpretation section which appears to be intended to make the UCP easier to use. For example, it is provided that, "[u]nless required to be used in a document, words such as 'prompt', 'immediately' or 'as soon as possible' will be disregarded." This provision can be found in Art.46 of the UCP500, but it seems more logical to include it within an interpretation section. However, the UCP600 goes much further than the UCP500 in striking out vague phrases such as "reasonable", which were present in the UCP500 but which have now been discarded in order to minimise the risk of a dispute. It is surprising to see therefore

that banks are still required, by Art.16(d), to give notice of discrepancies to the beneficiary by telecommunication or other "expeditious" means[15] ; this phrase seems out of place in a set of rules which aim to achieve certainty and clarity.

Doctrine of strict compliance

The standard of examination In arranging for the carriage of goods overseas, sellers need the reassurance that the standards applied by banks in scrutinising documents will not vary from country to country. A measure of predictability is needed because, if the documents are rejected, this is likely to cause delay and expense in selling the goods elsewhere. Yet the traditional rule in English law and elsewhere is harsh: there must be strict compliance between the documents tendered by the beneficiary and the stipulations in the letter of credit.[16] This rule was not spelt out in the UCP, although Art.13(a) of the UCP500 offered some guidance in relation to the banks' scrutiny of documents. It provided that compliance with the terms of the credit must be determined in accordance with "international standard banking practice as reflected in these Articles". The concluding words "as reflected in these Articles" were not thought to confine banks solely to the standards embedded within the UCP itself; reference to the UCP could be supplemented by considering the standard practice rules established by financial institutions in particular regions.[17] Article 14(d) of the new UCP600 appears to confirm this view by making reference to "international standard banking practice", but omitting the final words. As the UCP600 contains general rules rather than detailed guidance, it is sensible to make it clear that banks should *J.B.L. 361 make reference to generally accepted banking procedures even if they are not reflected in the UCP itself.

As letters of credit are frequently used in transactions between parties who have had no previous dealings, disputes can easily arise and the parties may not be willing to compromise. Although reference can be made to the UCP and international standard banking practice, this will not necessarily suffice if a clear-cut answer is sought to a particular question. In order to reduce the number of documents which were rejected by banks, a Task Force of the Banking Commission of the ICC produced detailed standardised guidance for checking documents in the International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP), which was approved on October 30, 2002.[18] The ISBP articulated general principles, such as the fact that documents need not be identical, but should not be inconsistent, and provided specific guidance on matters such as the necessity of a signature on a particular document.

However, the existence of the ISBP and other sets of principles such as the eUCP, which deal with electronic forms of transport documents, raised a dilemma for the drafters of the UCP600. Should they incorporate all of these principles into the UCP to achieve cohesion? Or should they aim for a broad set of governing principles? In the end, the drafters did not incorporate the ISBP, but merely absorbed some of its concepts, such as the point that the data in documents need not be precisely the same.[19] The UCP600 therefore retains the character of a codified set of principles.[20] In some ways, this may appear unfortunate because it means that, in providing legal advice, reference must be made to the ISBP, which is part of international standard banking practice, in addition to the UCP. Advisers frequently have to cross-refer between statutes and conventions in dealing with other types of international trade problems and it makes the law less accessible as a result.[21] However, the answer would not have been to incorporate part, but not all, of the ISBP because it would have left the remainder of the ISBP in some form of legal limbo with the risk that those provisions would

be seen as redundant and ignored completely. On the other hand, incorporating the whole of the ISBP into the new UCP would have given rise to a different set of problems. One objection which could have been made is that the ISBP operates in a different way from the UCP. Unlike the UCP500 and the eUCP, parties are not expected to incorporate the ISBP into their contracts so that it forms part of the contract terms. Furthermore, the object of the ISBP is to guide documentary *J.B.L. 362 practitioners by providing authoritative statements on particular issues and it does not necessarily reflect prevailing practice in some regions; the courts are therefore free to accept a specific banking practice outlined in the ISBP or to reject it if the circumstances suggest that it is appropriate to do so.[22] The drafters' decision to go for a set of guiding principles which would be simple and relatively easy to translate appears to be a wise one. As banking practice is not static, the clean and simple lines of the UCP600 should mean that it is more able to adapt to developments in banking practice, thereby rendering it more attractive to traders.

The spareness of the UCP600 is also evidenced by the removal of vague phrases. So, for example, banks are no longer required to inspect documents with "reasonable care"[23] in determining whether they comply with the letter of credit.[24] Although some ICC members advocated that banks should not be required to inspect documents at all, this met with resistance and the result is that the UCP600 still requires them to do so. As an examination is necessary, it can be argued that, implicitly, it must not be negligent. Consequently, this revision cannot be presented as a significant one and it is unlikely by itself to affect the percentage of documents which are rejected.

In tune with the doctrine of the autonomy of the credit,Art.14(a) of the UCP600 provides that banks (nominated banks, confirming banks and issuing banks) must make their checks on the basis of the documents alone. Article 13(a) of the UCP500 had required banks to examine documents to ascertain whether "on their face" they appeared to comply with the terms and conditions of the credit. Obviously, documents must be regular and of the type current in the trade in question.[25] However, the precise meaning of the phrase "on their face" was controversial. It appeared in a number of different Articles in the UCP500 and its meaning varied according to the context in which it was found. In relation to examination of documents, it should refer to the fact that the banks' examination is confined to the documents alone.[26] Nevertheless, in the past some banks have assumed that they must simply pay regard to the front page of the document.[27] The general thrust of the revision was to reduce uncertainty by removing vague or ambiguous phrases. It had been suggested that the phrase was redundant and should be removed entirely from the new draft. However, the eventual consensus was that it should be retained in relation to examination of documents in Art.14, but that it should be removed from all other provisions in the UCP600. Its retention is a reminder that the banks' scrutiny of documents may be superficial; banks are not expected to know the customs of a particular trade and nor are they obliged to verify any *J.B.L. 363 of the information contained in the documents supplied.[28] In practice, banks may well be more proactive[29] ; however, the UCP does not impose such an obligation upon them.

The Preclusion rules The rule of absolute documentary conformity can lead to harsh results. It is almost impossible to achieve complete standardisation in an area where each letter of credit will normally be adjusted to reflect the parties' concerns and the trade in question. However, the potential for unfair treatment of beneficiaries is reduced considerably by preclusion rules which require the issuing bank to act speedily in giving notice of documentary defects. Article 14(e) of the old UCP500 spelt out that a bank's failure to do so would mean that it was precluded from claiming that the documents were non-conforming.

As a consequence, time limits for scrutinising documents are immensely significant. Drafters of the UCP600 struggled to find a simple rule governing time limits which would cover all possibilities. At one extreme, a letter of credit might call for hundreds of pages of documentation, some of which might require translation; but, at other times the documentation required might be minimal. Article 14(d) of the UCP500 had provided that each bank involved (the nominated bank, confirming bank and issuing bank) had a "reasonable time" within which to inspect, not exceeding seven banking days. The thrust of the new revision was to eradicate vague phrases such as "reasonable". Yet there was a fear that, if "reasonable time" was replaced by a set period of days, banks would assume that every time a beneficiary of a credit presented documents, they were entitled to take those set period of days to process them, thereby causing unnecessary delays in making payments to beneficiaries. Another danger was that the buyer would expect the bank to take this period of time before his or her account was debited to reflect the payment made. It was therefore suggested that banks should be protected by providing a "safe harbour" period, which would consist of a minimum set period of days which would always be seen as a reasonable time for inspection of documents, together with a maximum period of time which would be available depending on the circumstances of the individual case. In the end, however, it was decided that, in the interests of certainty, there should be one set period and the new Art.14(b) of the UCP600 therefore provides that each bank has five banking days as a maximum period, after the day of presentation, within which to consider the documents. The five-day period represents a compromise: some traders argued *J.B.L. 364 that the period of examination should be even shorter (such as three days) because of the costs which can accrue during this period of time, such as storage charges.[30]

Like the UCP500, the drafters have separated the duty to examine documents from the duty to give notice. The duty to examine is contained within Art.14, but the duty to give notice is to be found (along with the preclusion rules) in Art.16. A subtle link between these two Articles is to be found in Art.16(b) which provides that, if a bank contacts the applicant to explore whether he or she is prepared to waive the discrepancy, this does not have the effect of extending the five-day time period specified in Art.14(b). The slightly tortuous position is that, if a bank fails to comply with the maximum time period for examination of documents, it will not have served a proper notice which satisfies Art.16.[31] This brings Art.16(f) into play, which provides that it is precluded from claiming that the documents do not comply with the letter of credit. This is also true where, for example, a bank failed to properly notify the beneficiary of the defects. Nevertheless, by forcing banks to act speedily and to serve one single notice specifying each and every discrepancy (together with a statement indicating whether it is returning the documents or seeking further instructions), the combined effect of Arts 14(b) and 16 may reduce the number of documents rejected on first presentation. It should also mean that, if a beneficiary presents his or her documents well before the credit's expiry, he or she will have more time to rectify a discrepancy and to present conforming documents.

"Original" documents The credit will state that the beneficiary must supply certain documents and traditionally this had involved handwritten or typed documents. Article 20(b) of the UCP500 took account of technological changes and the widespread use of computer-generated documents and stated that, unless the letter of credit provided otherwise, banks should also accept as original documents, a document produced by reprographic, automated or computerised systems, or carbon copies, provided they were marked as original and, where necessary, signed. However, this led to difficulties because this provision could be interpreted to mean that all word-processed documents must be marked as an original as well as being

signed.[32] This strict interpretation meant that computer-generated documents, which were properly signed and complied in every respect with the letter of credit, could be rejected simply because they were not marked as originals. The ICC therefore consulted specialists and the result was a Policy Statement issued on July 12, 1999 which provided guidance on the interpretation of Art.20(b). The Policy Statement made it clear that documents would be presumed to be originals unless they were obvious copies such as photocopies and faxes. *J.B.L. 365 This presumption met with general approval[33] and it has now been absorbed into Art.17 of the UCP600. It is provided that at least one original of each document required by the credit must be presented. However, Art.17 goes on to state that a bank should treat any document as original if it states that it is an original document, or if it appears to have an original signature, mark, stamp or label of the issuer of the document, or if it appears to be produced on original stationery or if it appears to be written, typed, perforated or stamped by the issuer's hand (unless the document makes it clear that it is a mere copy).

The UCP600 is therefore more satisfactory for users than the UCP500: it incorporates the Policy Statement and presents the principles within a more rational scheme. The parts of the old Art.20 of the UCP500 which related to "original" documents can be found in the new Art.17. This includes related matters, such as the position where the credit calls for documents "in duplicate"; here, it is ordinarily sufficient if at least one original is submitted. However, other issues, which are independent of the definition of an original document (such as the use of facsimile signatures and stamps), have been hived off. They are dealt with in the new Art.3, which is concerned with general matters of interpretation. The UCP600 should be easier to use as a consequence.

Description: the commercial invoice and other documents The key document is the commercial invoice. According to the old Art.37(c) of the UCP500, the description of the goods in the invoice must correspond with the credit, whereas the goods might be described in more general terms in all other documents provided the description did not conflict with the credit. In the UCP600, Art.18 sets out the essential ingredients of the commercial invoice; Art.18(c) specifies that not only the description but also services and performance must comply with the credit. In relation to other documents, one must refer to Art.14, which sets the standard expected of banks in their examination of documents. Article 14(e) in the UCP600 provides that the description of the goods, services or performance, if stated, can be in general terms provided that they do not conflict with the terms of the credit. Although there is no major change in approach, the new provisions are wider in scope in covering descriptions of services and performance in addition to the goods themselves. Furthermore, the decision to separate the treatment of the commercial invoice from other less important documents is yet another example of the drafters' desire for a clear and simple structure.

Identification and linkage Certain data must be included in each individual document tendered to link it to the cargo in question.[34] This requirement can easily be defended because a document is of little value if the goods to which it refers cannot be readily identified and it would create a fertile ground for fraud. More controversially, in relation to documents other than transport documents, insurance *J.B.L. 366 documents and the commercial invoice, there was a further requirement in Art.21 of the UCP500 that the data contained in them must not be inconsistent with any other document stipulated by the credit.[35] This is an area which demanded a fresh reappraisal because a large percentage of the cases where documents have been rejected on the grounds of discrepancy are the result of inconsistent data between documents. Much of this data may not have been specified in the letter of credit itself or required by the UCP. The Drafting Group of the UCP600 considered including a rule which

stated that the data contained in each particular document should only be considered in the light of the stipulations in the credit and the UCP; this would put the burden upon the applicant to state precisely what information was required in any given document. The advantage of this proposal was that, provided the goods were sufficiently identified in the credit, there would be no danger of uncertainty. Unfortunately, this proposal was rejected by the national committees.[36] Instead, under the UCP600, the new Art.14(d) provides that:

"Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit."

There was discussion over whether the closing words ("any other stipulated document") should be included; the effect of their presence is to require linkage between all documents which have been specified in the credit. Checking for conflicts between a number of documents is intensely time-consuming for banks and increases the risk that documents will be rejected as discrepant and there appears to be little to be gained from the exercise.[37] This result is seen in some quarters as a contentious one.[38]

Modifications of the doctrine Like Art.39 of the UCP500, Art.30 of the UCP600 modifies the doctrine of strict compliance. Subject to certain conditions, there is a tolerance of 5 per cent more or 5 per cent less if there is some discrepancy as to quantity. If the words "about" or "approximately" are used in relation to the amount of the credit or the quantity or the unit price stated in the credit, a tolerance not to exceed 10 per cent more or 10 per cent less is permitted. However, there is a new provision, contained in Art.14(j), which will also affect the doctrine of strict compliance. In general, there is no need for the addresses of the beneficiary and applicant to correspond with either the credit or other documents, provided the addresses are within the same country as the addresses stated in the credit. Their *J.B.L. 367 contact details are irrelevant.[39] In many respects, this is a welcome modification because addresses are invariably in local languages and it is therefore easy for foreign beneficiaries to make a minor mistake. On the other hand, it would be unfortunate if this new provision had the effect of encouraging banks to take a lax attitude towards the question of identification of the parties. This would make money laundering considerably easier and the banks would risk falling foul of money laundering legislation.[40]

The changes made in the UCP600 are relatively minor and the ISBP and old case law will still be relevant in applying the doctrine of strict compliance. It may well be that, despite the change relating to addresses and the preclusion rules relating to examination of documents, the adoption of the UCP600 will not lead to a dramatic reduction in the percentage of documents which are rejected as discrepant.[41]

Non-documentary conditions

Article 13(c) of the UCP500 provided that if a credit stated a condition which must be satisfied but without referring to a document (for example, a stipulation that the goods must be of Italian origin), banks could ignore it. This principle is logical: banks are concerned with documents and not with facts relating to the goods themselves. Nevertheless, it could surprise applicants, not all of whom were aware of this provision and who might therefore fail to specify an appropriate document in the credit (such as a certificate of origin). This lack of precision was unsatisfactory and gave rise to litigation.[42] In response, Position Paper 3 was issued by the Banking Commission expressing disapproval of the fact that certain banks were

continuing to incorporate conditions into letters of credit. This issue is now dealt with by Art.14(h) of the UCP600. It is in simpler language than its predecessor, but is not significantly different in any respect. There is a risk that this issue may continue to cause difficulties. Parties are free to modify the UCP600 and could possibly attempt to modify this provision; furthermore, Position Paper 3 may no longer apply. It cannot therefore be said that the problems posed by non-documentary conditions have entirely disappeared.

The autonomy of the credit

The principle that the letter of credit is separate and independent from the underlying sales transaction underpins the law of documentary credits. The old *J.B.L. 368 Art.4 of the UCP500 provided that the "parties" concerned would deal with documents and not with goods. The new Art.4 is much more precise in the sense that it states that it is the "banks" who deal in documents (thereby excluding the applicant and beneficiary by using that term). In other respects, the new Art.4 largely reflects Arts 3 and 4 of the UCP500 and it is made clear, for example, that the bank's undertaking to honour the credit is not affected by any defences which may be available to the applicant in relation to the underlying contract.

Article 4(b) of the UCP600 is, however, a new addition. It provides that:

"An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, pro forma invoice and the like."

As this is merely an exhortation, it is likely that some applicants will still ask for copies of sales contracts and pro forma invoices to be included and some banks will accede to this request because they want the business. Nevertheless, this provision is intended to discourage the practice because it can lead to documents being rejected as discrepant because they do not match some special phrase in the original sale contract.[43] Furthermore, if the applicant'smotive for requiring a copy of the original sale contract to be included in the credit is to protect him or herself from a fraudulent seller, Art.4(b) sends out the message in a subtle way that there are better ways of doing this, such as by requiring a certificate of inspection of the cargo by an independent expert.

Transport documents

The UCP600 is very much a code of rules for bankers, guiding them for example in relation to examination and rejection of documents. Consequently, like the UCP500, the UCP600 lists a series of transport documents in turn; this is helpful to banks when it comes to processing them. Thus, there is detailed guidance in relation to multimodal or combined transport documents where two modes of transport are involved (Art.19),[44] bills of lading (Art.20),waybills (Art.21), charterparty bills of lading (Art.22), air transport documents (Art.23) and road, rail or inland waterway documents (Art.24). The classification is similar to the UCP500. The UCP600 could have classified documents in a different manner. For example, they could have been divided into two sorts: those which are documents of title and those which are not. Bills of lading--whether multimodal or not--are documents of title. Sellers can use them to pass the property in the cargo to another and it is necessary to present a bill of lading to a carrier in order to obtain the release of the cargo. In contrast, waybills simply operate as a receipt and a contract of carriage. It *J.B.L. 369 has been argued that it is pointless to make a distinction, as the UCP does, between, for example, a multimodal bill of lading and a marine bill of lading. Traders can fail to make this distinction and may submit

the wrong type of bill of lading to a bank, which is then likely to reject it as discrepant.[45] However, one problem in distinguishing documents of title from other types of transport document is that the analysis of documents of title can vary from country to country. For example, straight bills of lading are treated in the same way as ordinary bills of lading by the English courts, but this is not necessarily so throughout the world.[46] As the aim of the UCP is to obtain universal approval to certain rules relating to banking practice, an advantage of the classification adopted in the UCP600 is that it is neutral and should not result in any clash with municipal law.

There is one notable omission from the classification of documents in the UCP600 outlined above: there is no specific Article dealing with transport documents issued by freight forwarders. In the UCP500, Art.30 had provided that a freight-forwarding agent could issue a complying document as long as he or she had signed either as the carrier or as his or her agent. The freight-forwarding community was anxious that a reference to freight forwarders' documents should be included in any revision because they were afraid that otherwise banks might not accept them. However, without ignoring those concerns, the drafters of the UCP600 have taken a different approach. If one considers the UCP500, one can see that the central feature of Art.30 was not that the document was being issued by a freight forwarder, but rather that the person issuing a transport document should be acting in the appropriate capacity when he or she issued the transport document and that this should be stated. The drafters of the UCP600 therefore took the opportunity to delete Art.30. Instead, Art.14(l) provides that parties other than the carrier, owner, master or charterer can issue documents provided that they comply with the requirements associated with the individual documents set out in the transport Articles. These Articles make it clear that, although agents may sign documents, they must identify the capacity in which they sign and on whose behalf they do so.[47] There is therefore no need to retain a special Article for freight forwarders and the redrafted transport Articles should resolve any confusion over the identification of carriers and agents.

Subtle but important changes have been made to the transport Articles which those working in the field need to be aware of. Modifications are permitted by Art.1 and adjustments may be desirable to tailor the credit to the circumstances of the individual transaction. Although a detailed analysis of the transport documents is beyond the scope of this article, it is provided elsewhere.[48] There is no doubt that banks will be obliged to offer appropriate training to their staff in relation to *J.B.L. 370 these changes and this may affect the cost of using letters of credit as a payment mechanism. Importers applying to open a letter of credit will need to take care in completing new forms incorporating the UCP600. On the other hand, the new transport Articles are presented in a clear manner, which should commend them not only to banks, but also to traders and other entities which provide services, such as freight forwarders, carriers and customs brokers.

Problems and challenges

Exceptions to the principle of the autonomy of the credit

In any sales transaction, there is a risk that the goods supplied will be defective in some respect. If the defect is serious, or the wrong goods are delivered or no goods are supplied at all, it is easy for the buyer to jump to the conclusion that the seller is dishonest. A general principle, which was spelt out in Art.3(a) of the UCP500 and which has been carried through into Art.4 of the UCP600, is that the banks are concerned with documents and not with the

performance of the underlying contract. Thus, if there is a breach of that contract, the applicant cannot ordinarily stop his or her bank from fulfilling its primary obligation to honour the credit where the documents presented appear to comply with its requirements. Any dispute over the nature and quality of the cargo is a matter for the seller and buyer which can be settled by litigation or arbitration.[49]

Nevertheless, the principle that the letter of the credit is independent of any underlying contract is subject to a well-established exception of fraud. The scope of this exception is hedged round with restrictions by English courts: it only applies if a third party has not acquired rights[50] and where it can convincingly be shown that the beneficiary has been knowingly dishonest.[51] The exception is narrowly confined to situations where the beneficiary fraudulently presents documents that contain material misrepresentations of fact which he or she knows are untrue and the fraud comes to the notice of the bank. Fraud by independent third parties is irrelevant.[52] The exception has been construed narrowly because the purpose of irrevocable documentary credits has always been to provide the seller with much needed reassurance that he or she would be paid before he or she transferred control of the goods.[53]

*J.B.L. 371 Although the fraud exception to the autonomy of the credit is well established worldwide,[54] there is no express reference to it in the UCP500. Equally, the UCP600 leaves questions of fraud to the relevant municipal law. This could be seen as a weakness, but it must be borne in mind that the precise scope of the fraud exception remains controversial. For example, not all jurisdictions accept the English courts' view that banks must pay for documents which are nullities provided the seller and his or her agents have acted in good faith and the document appears conforming.[55] Furthermore, it is unclear whether the notion of fraud could be drawn to encompass more than dishonesty on the part of the beneficiary. In Australia, for example, there have been suggestions that unconscionable conduct of a gross nature might suffice.[56] The drafters of the revision were wise to leave the fraud exception to the law of various jurisdictions. It must be recalled that the UCP is concerned with matters of good banking practice which the parties voluntarily incorporate into their contracts; it would be a futile exercise to draft provisions which conflicted with domestic law.

Fraud is an especially complex problem and the risk is best thrown on to applicants and their advisers who are in the best position to check on the people they choose to do business with. Banks can also play a significant role by scrutinising documents carefully, particularly the bill of lading.[57] One possible method of tackling the risks of fraud is to require the beneficiary to warrant that the documents presented are not forged or otherwise fraudulent. The advantage of such a warranty is that it gives a bank more power to refuse documents because it can rely upon the warranty alone rather than the fraud exception. However, neither the UCP500 nor the UCP600 deal with warranties. Its omission does not indicate disapproval. The UCP does not cover every issue and some matters may be best left to domestic courts which are free to accept an express warranty, or to imply one, where appropriate.[58]

Apart from established fraud, there have been other situations where the courts have suggested that an injunction could be granted to prevent the bank paying on a letter of credit. One example is total failure of the basis of the contract[59] ; *J.B.L. 372 another is illegality, if it can be proved.[60] Both exceptions are controversial and their scope is uncertain. No mention of such matters is made in the UCP. It can be argued that, for the foreseeable future, the position in relation to any exceptions to the autonomy principle is best left to be regulated by

market forces: if courts in a particular country provide wide-ranging exceptions, beneficiaries will demand that their credits are confirmed by banks located in other jurisdictions.[61]

Fraud and deferred payment letters of credit: the Santander decision

Article 6(b) of the UCP600 requires every letter of credit to state how the beneficiary will be paid. Four types of a bank's undertaking in a credit are set out: (i) payment in exchange for the tender of documents (payment at sight), or (ii) deferred payment, where payment is made at a maturity date specified in the letter of credit, or (iii) acceptance of a draft (bill of exchange) for the amount of the credit, or (iv) negotiation of a draft (bill of exchange) drawn by the beneficiary on a third party. The last two categories involve the presentation of a bill of exchange along with other documents stipulated in the credit. Bills of exchange were once common, but banking practices have changed: for example, the need to write an acceptance on the bill of exchange itself is cumbersome and inappropriate in a world of telecommunication.[62] Furthermore, in some countries, stamp duty is payable if a bill of exchange is used.[63] The first two categories, payment at sight and deferred payments, have therefore become much more popular as methods of payment. A deferred payment credit is not payable until the maturity date, which may be some months after the documents are presented. This method of payment is attractive to both importers and exporters. Buyers welcome the delay before paying for imported goods. Although sellers will want to be paid immediately after they have handed over the shipping documents, they can normally arrange to obtain a payment at a discounted rate in advance of the maturity date.

The UCP500 had also recognised the same four types of undertakings in a credit.[64] Bankers became concerned about the use of deferred payment credits after the controversial decision in *Banco Santander SA v Bayfern Ltd*, [65] which involved a dispute between an issuing bank and a confirming bank. In this case, Banque Paribas issued a deferred payment letter of credit in favour of the beneficiary, Bayfern Ltd. The agreed payment date was 180 days after the date of the bill of lading. The letter of credit was confirmed by Banco Santander, which promised to honour the credit at the maturity date and offered to pay at a discounted rate beforehand. This offer was taken up: Santander discounted *J.B.L. 373 the letter of credit and Bayfern assigned to Santander its rights under the letter of credit. Before the maturity date, it emerged that Bayfern might have been fraudulent. The issuing bank refused to reimburse Santander relying on the “fraud exception” and arguing that the fraud was known by the maturity date. The court was asked to determine which bank bore the risk of that fraud. It was held at first instance that the confirming bank bore this risk. This decision, which was subsequently endorsed by the Court of Appeal,[66] sent shockwaves through the banking community. The decision discouraged banks from discounting payments before the date of maturity. This injured small operations exporting goods because, as beneficiaries under letters of credit, many had relied upon receiving payment in advance (at a discount) in order to alleviate cash flow problems.

The much-criticised decision in *Banco Santander* must be understood. The decision turned upon the type of credit involved and an analysis of the date when the obligation to reimburse would arise. If this had been a case where the confirming bank had discounted a *negotiation* credit, discounting would have been expressly authorised and the issuing bank would have been obliged to reimburse the confirming bank regardless of any evidence of fraud revealed subsequently.[67] In contrast, where a deferred payment letter of credit was involved, the UCP500 only imposed an obligation to reimburse at the maturity date, which was after the fraud was assumed to have become known by the two banks. There was no agreement

between the parties, or established market custom, that the issuing bank must pay once the documents were tendered and accepted. The obligation to pay only arose on maturity. Another aspect of the decision was the fact that the confirming bank was an assignee of Bayfern's rights. By asking to be reimbursed for the full amount of the credit rather than the discounted amount, it was clear that Santander intended to take over Bayfern's rights to payment. Santander was therefore in the same position that Bayfern would have been if it had made a claim at the maturity date; as a result, the fraud exception could be pleaded in defence by the issuing bank.

Waller L.J., providing the decision of the Court of Appeal in *Banco Santander,* noted that deferred payment credits were a new payment mechanism and that the UCP did not directly deal with the issue of which party bore the risk of fraud when they were used. Although Waller L.J. expressed sympathy towards Santander, he observed that if parties chose not to use a bill of exchange or to make an express agreement regarding the risk of fraud, they must live with the consequences. The decision caused consternation amongst bankers, who did not necessarily appreciate that the decision in *Banco Santander* was quite limited in scope, not least because it is usually very difficult to prove fraud.[68] Nor was it always understood that *J.B.L. 374 the confirming bank had ways of protecting itself by, for example, insisting upon being appointed as negotiating bankers under a negotiation credit.[69]

There was therefore pressure upon the drafters to deal with deferred payment credits in more detail. Article 12 of the UCP600, entitled “Nomination,” is intended to respond to the furore created by the *Banco Santander* case. It is made clear that the position of the nominated bank depends upon what has been agreed. A nomination of a bank to accept a draft or incur a deferred payment undertaking has the effect of authorising that bank to prepay or purchase an accepted draft or a deferred payment undertaking. As a result, the nominated bank is entitled to be reimbursed by the issuing bank regardless of any intervening fraud.[70] Although this revision has been welcomed in banking circles, it may mean that issuing banks will be reluctant to issue deferred payment credits using a nominated bank for fear of exposing themselves to the costs of fraud, which they may not be able to recover from the applicants for the credit. If this is the result, it will disappoint beneficiaries who appreciated obtaining payment quickly by accepting a discounted rate. Equally, it will disappoint applicants who, by arranging a deferred payment at maturity, had time to investigate any possibility of fraud on the part of the beneficiary in the interim.[71]

Money laundering

There is no reference to money laundering legislation in the UCP600 despite the fact that international trade offers myriad opportunities for storing, moving and converting assets into money. English banks are affected in three ways by domestic legislation. First, they must have “know your client” (KYC) procedures to check upon the identity of new customers.[72] Secondly, they are expected to report suspicious activity transactions to the Serious Organised Crime Agency where they know or suspect, or objectively have reasonable grounds to know or suspect that a person is engaged in money laundering[73] ; suspicious activities would include, for example, unusual manipulations of money or obvious under-valuations of cargoes. Finally, bank officers can be guilty of a criminal offence if, for example, they receive “dirty money” or assist in transferring the money abroad *J.B.L. 375 which they knew or suspected was derived from criminal activity.[74] Consequently, if the applicant for a credit seems to have inexplicably obtained large amounts of money, banks should enquire further in order to protect themselves from exposure to criminal liability.

There are international and European initiatives to encourage all countries to implement money laundering legislation dealing with KYC procedures, suspicious activity reporting and criminal offences. However, this legislation would be part of each country's domestic law and there will be variations worldwide. It might have been possible to hammer out some common principles which could be absorbed into the revised UCP. This could have given rise to further problems. First, the KYC procedure is relevant for *new* customers: in most cases, it is likely to be irrelevant in relation to letters of credit because the applicant will be an existing customer of the issuing bank and the beneficiary will be an existing customer of a bank in its own country and they will therefore have been subject to the KYC procedure in the past.[75] Secondly, the circumstances which will trigger a suspicious activity report are varied and do not simply depend upon the amount of money involved, but may include, for example, the nature of the cargo, its value and the apparent source of the money. Once a suspicious activity report has been made, there will be a short period of time when the bank may need to freeze the customer's account in order to avoid committing a criminal offence[76] ; although there is a *force majeure* clause in Art.36 of the UCP600, it is submitted that the drafters were right not to attempt to extend it to protect a bank from civil action by its customer whilst the account is frozen; this is something which should be governed by a country's domestic law. Finally, it would seem odd to include the detailed requirements of criminal money laundering offences (including *mens rea*) within a code of banking practice. It is therefore submitted that the drafters of the UCP600 were right to exclude any detailed consideration of money laundering measures. It is a fast-moving area of law and it may well have been difficult to discern some general principles which would not have rapidly become outdated.[77] On the other hand, some brief reference to the guidance provided from time to time by the Joint Money Laundering Steering Group[78] in the introduction to the UCP600 might have been useful in order to acknowledge the challenges posed by money laundering and international criminal activity.

*J.B.L. 376 Conclusions

The new UCP600 will be costly to implement in terms of staff training and changes to computer software. It may be more difficult to advise clients on specific issues because the ICC Position Papers and many (but not necessarily all) of the ICC Banking Decisions[79] have now been swept away. It may have little effect on the percentage of documents rejected on first presentation as discrepant.[80] This is particularly true in relation to linkage between documents: the strict requirements that documents must not be inconsistent with each other could have been dropped.[81] The UCP has never been a comprehensive code; not only will users be obliged to refer to domestic law on particular matters, such as the fraud exception, but also to the ISBP in relation to the banks' examination of documents.

Despite these criticisms, if the revised UCP provides certainty and predictability in relation to the application of its rules, it will save unnecessary litigation and will make documentary credits a more attractive choice. As it is drafted in simpler and more elegant language than its predecessor, it should be welcomed because it will be easier to understand and translate. The fact that there has been confusion in the past over quite basic matters, such as the concept of negotiation, convincingly supports the argument that the structure and style of the UCP needed revision. In general, vague words have been eradicated; those that have been retained appear to favour the banks. For example, banks are still required to communicate with each other “without delay”[82] ; as no period of time is specified, it will be difficult to challenge a bank's actions in this regard. Nevertheless, the drafters appear to have largely succeeded in their aim of creating provisions which are free from ambiguity, thereby minimising the risk of national courts offering different interpretations of its rules.

The UCP600 is likely to be welcomed by bankers because it should make their role easier. For example, Art.14(g) provides that, if banks receive documents not required by the credit, they may disregard and return them to the presenter. This will save banks time and energy; previously the beneficiary could insist that these documents should be passed on to the issuing bank.[83] Another provision designed to assist the banks relates to custody of documents. It is made clear that, after refusing presentation on the basis of discrepancies, the bank can retain the documents whilst it seeks a waiver from the applicant. This provision protects banks who could otherwise be accused of waiving the discrepancies simply because they have retained the documents after serving a proper notice.[84] Nevertheless, the UCP600 is basically party neutral. It enhances the credit as a bank product that serves all who are involved in this type of payment mechanism, such as traders, *J.B.L. 377 carriers and others. The only obvious tension is in relation to the questions of scrutiny of documents. The burden is clearly upon the applicant to work out the reliability of the beneficiary and to take care in specifying documents in his application for a letter of credit.

The UCP takes effect by contractual incorporation and therefore depends upon the will of the parties. Parties almost invariably choose to incorporate it and, over the years, it has been seen as a cornerstone of international commercial law.[85] Although parties remain free to modify its rules, this can be a positive factor in improving practices which can then be considered in any later revision. Admittedly, the UCP is not comprehensive because it is subject to the domestic law of sovereign states; however, its lack of autonomy is inevitable because the validity and enforcement of international contracts depend upon national laws.[86] It is nevertheless a unifying force: Goode has observed that the UCP and other codes of practice promulgated by trade and professional organisations can contribute significantly to the development of uniform transnational rules by establishing usages which transcend the codes themselves; one example is the principle of the autonomy of the credit which is seen as underlying documentary credits, whether or not the parties have chosen to incorporate the UCP.[87]

A simple comparison of the two sets of principles does not reveal the intense discussion process which led to the final draft of the UCP600. Sometimes a rule represents a compromise by drafters with entirely opposing views. It is therefore a triumph that the revised UCP600 obtained unanimous approval from the Banking Commission. Arguably, even if the number of documents rejected is not reduced significantly after the UCP600 is used, it will still be judged a success. Like its predecessors, it can be seen as harmonising rights, duties and practice in relation to the operation of documentary credits, thereby aiding cross-border business. However, the biggest achievement of this revision is the introduction of a clear, light and open style which will aid comprehension and predictability.

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1.

R. M. Goode, “Rule, Practice, and Pragmatism in Transnational Commercial Law” (2005) 54 I.C.L.Q. 539 at p.541.

2.

In relation to the Vienna Convention on Contracts for the International Sale of Goods (CISG), see M. G. Bridge, “Uniformity and Diversity in the Law of International Sale” 15

PACE International Law Review (Spring 2003) 55 at pp.76-79 (reproduced as part of the bibliography of CISG materials on the PACE website).

3.

For a succinct summary of the various revisions of the UCP in the past, see E. P. Ellinger, "The UCP-500: Considering a New Revision" [2004] L.M.C.L.Q. 30 at pp.31-32.

4.

ICC Publication No.600.

5.

M. Rowe, "Integrated Products Threaten L/Cs" (2006) 12(3) *Documentary Credits Insight* 1.

6.

ibid., p.23.

7.

See the Introduction to the UCP600.

8.

See G. Collyer, "A Look at the UCP Revision" (2006) 12(4) *DC Insight* 1.

9.

Thus, for example, the redrafted Transport Articles were sent for comments to the UK Chamber of Shipping: "UCP Revision Update: The Home Stretch" (2005) 11 *DC Insight* January-March issue. In contrast, neither traders nor government officials were involved in drafting the UNIDROIT Principles of International Commercial Contracts: above fn.1, p.545.

10.

UCP600, Art.7. There were suggestions that the phrase "issuer" should be used instead, to take account of the fact that a number of corporate entities now issue letters of credit; however, the majority considered that the rules should focus upon banks in order to protect their role: W. Cameron, "Balancing the Pluses and Minuses of the Revision" (2006) 12(4) *DC Insight* 10.

11.

The confirming bank is bound from the moment it adds its undertaking: UCP600, Art.8.

12.

UCP600, Arts 7, 8 and 9 respectively.

13.

See D. Smith, “Negotiation is Not Always What Banks Think It Is” (2006) 12(3) *DC Insight* 10. Some guidance had been provided in UCP500, Art.10(a)(ii), which had made it clear that it meant more than examination of documents. See further above fn.3, p.37.

14.

UCP600, Arts 9, 37 and 38.

15.

This phrase can be found in UCP500, Art.14(d). Telecommunication would include telephone calls: *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islamic Iran* [1997] 2 Lloyd's Rep. 89.

16.

Equitable Trust Co of New York v Dawson Partners Ltd (1927) 26 Ll. L. Rep. 49, HL.

17.

J. F. Dolan, “Letters of Credit: A Comparison of UCP500 and the New U.S. Article 5” [1999] J.B.L. 521 at pp.523-525; C. del Busto, *Documentary Credits, UCP500 & 400 Compared* (ICC Publishing, 1993), pp.39-40.

18.

Published as ICC Brochure No.645. It will eventually be revised to take account of the new provisions in the UCP600.

19.

UCP600, Art.14(d).

20.

Standby credits are still included, despite the fact that they fulfil a different purpose from letters of credit: like guarantees, they act as a default mechanism to provide security in the event of the applicant's defective or non-performance. Many of the provisions of the UCP (particularly regarding transport documents) have no application to a standby and it is likely that banks may gradually move away from incorporating the UCP and will refer to the contractual terms contained within ISP98: above fn.3, p.34.

21.

See C. Debattista, “Legislative Techniques in International Trade: Madness or Method” [2002] J.B.L. 626.

22.

E. P. Ellinger, “Use of Some ICC Guidelines” [2004] J.B.L. 704 at pp.708-709.

23.

Required by UCP500, Art.13(a).

24.

Banks have never been expected to act as detectives: the onus has always been upon the customer to show lack of reasonable care in failing, for example, to detect a forgery: *Gian Singh & Co Ltd v Banque de l’Indochine* [1974] 1W.L.R. 1234 at 1239 *per* Lord Diplock.

25.

A. G. Guest (ed.), *Benjamin's Sale of Goods* (Sweet and Maxwell, 2006), para.23-206.

26.

C. del Busto, above fn.17, p.39.

27.

Above fn.21, pp.634-635.

28.

But it has been argued that this is an undesirable consequence because the scrutiny of documents by the banks can act as a significant check on fraud: P. Holst, “A Shipping Association's View” (2006) 12(4) *DC Insight* 9. Nevertheless, Art.34 of the UCP600, like its predecessor, protects banks by providing a general disclaimer of responsibility for fraud or inaccuracy in any document.

29.

Banks may well attempt to verify information or to encourage an applicant to waive a breach if it is of no real significance: R. Sappideen, “International Commercial Letters of Credit: Balancing the Rights of Buyers and Sellers in Insolvency” [2006] J.B.L. 133 at pp.141-142; R. J. Mann, “The role of letters of credit in payment transactions” (1999-2000) 98 *Michigan Law Review* 2494.

30.

Holst, above fn.28.

31.

Art.16(d) of the UCP600 provides that the notice must be served within five days of presentation of documents. For a critique of this split in duties, see Dolan, above fn.17, pp.530-531.

32.

Glencore International AG v Bank of China [1996] 1 Lloyd's Rep. 135, CA. See H. Bennett, "Original sins under the UCP" [2001] L.M.C.L.Q. 88.

33.

See *Credit Industriel et Commercial v China Merchants Bank* [2002] All E.R. (Comm) 427; A. Ganotaki, "Documentary Credits: Another Original Story" [2003] L.M.C.L.Q. 151.

34.

Banque de L'Indochine et De Suez SA v J.H. Rayner (Mincing Lane) Ltd [1983] Q.B. 711.

35.

C. del Busto, above fn.17, p.61. An ICC Opinion suggested that linkage between documents and the credit was essential: ICC Opinion R251, published in *ICC Banking Commission Collected Opinions 1995-2001* (ICC, 2002), p.57.

36.

Above fn.8, p.23.

37.

Cameron, above fn.10; J. Smith, "A Major Opportunity Missed" (2006)(4) 12 *DC Insight* 6 at p.7.

38.

It gave rise to some debate at the ICC UK Annual Trade Finance Seminar, "Understanding the UCP600", held on December 6, 2007 in London, which the writer attended.

39.

As an exception, where the address and contact details of the applicant appear in a transport subject to the UCP600, these details must be mentioned in the credit: UCP600, Art.14(j).

40.

See Regulation 1781/2006 of November 15, 2006, which applies to trade finance and which requires banks to provide accurate and meaningful information concerning the payer which must accompany transfers of funds.

41.

For a contrary view, see P. Taneja, "A Document Restoring the Credibility of L/Cs" (2006) 12(4) *DC Insight* 3.

42.

Above fn.34; Dolan, above fn.17, pp.534-536.

43.

F. Reynolds, “A Trader's View” (2006) 12(4) *DC Insight* 4 at p.5.

44.

Debattista observes that the fact that the first Article, amongst the transport Articles, deals with multimodal transport presumably reflects the importance of containerisation: C. Debattista, “The New UCP600--Changes to the Tender of the Seller's Shipping Documents under Letters of Credit” [2007] J.B.L. 329.

45.

L. A. J. Bacon, “Who Speaks for the Importer?” (2006) 12(3) *DC Insight* 6 at p.7.

46.

See K. Chalmer, “A Representative of a Carrier Looks at the Draft UCP” (2006) 12(3) *DC Insight* 11. The House of Lords has ruled that straight bills of lading (which are not negotiable) are documents of title in *JI MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2005] 2 A.C. 423.

47.

UCP600, Arts 19(a)(i), 20(a)(i), 21(a)(i), 22(a)(i), 23(a)(i) and 24(a)(i).

48.

See above fn.44.

49.

R. D. Harbottle (Mercantile) Ltd v Nat West Bank [1978] Q.B. 146.

50.

For example, a holder in due course of an accepted bill of exchange can enforce it regardless of disputes relating to the underlying transaction. For a discussion querying whether, from a policy perspective, third parties should have priority, see Sappideen, above fn.29.

51.

The burden of proving fraud is a heavy one where the applicant seeks an injunction to prevent the bank paying: *Discount Records Ltd v Barclays Bank Ltd* [1975] 1 W.L.R. 315; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] Q.B. 159.

52.

Montrod Ltd v Grundkötter Fleischvertriebs GmbH [2002] 1W.L.R. 1975.

53.

United City Merchants (Investments) Ltd v Royal Bank of Canada, The American Accord [1983] 1 A.C. 168 at 183-184 *per* Lord Diplock.

54.

The leading decision is *Sztejn v J Henry Schroder Banking Corp* (1941) 31 N.Y.S. 2d 631. See X. Gao, *The Fraud Rule in the Law of Letters of Credit--A Comparative Study* (Kluwer, 2002).

55.

Above fn.52. This decision was distinguished by the Singapore Court of Appeal on the basis that it concerned an unauthorised document rather than a forged one: *Beam Technologies v Standard Chartered Bank* [2003] 1 S.L.R. 597; L. Y. Chin and Y. K. Wong, "Autonomy--A Nullity Exception at Last?" [2004] L.M.C.L.Q. 14.

56.

Hortico (Australia) Pty Ltd v Energy Equipment Co (Australia) Pty Ltd (1985) 1 N.S.W.L.R. 545; *Inflatable Toy Co v State Bank of NSW* (1994) 34 N.S.W.L.R. 243; contrast *Olex Focas Pty Ltd v Skodaexport Co* (1996) 134 F.L.R. 331. See X. Gao, above fn.54, pp.94-96.

57.

Holst, above fn.28. It should be noted that Art.19 of the UN Convention on Independent Bank Guarantees and Standby Letters of Credit 1995 recognises a fraud exception.

58.

Bayerische Vereinsbank Aktiengesellschaft v National Bank of Pakistan [1997] 1 Lloyd's Rep. 59; Dolan, above fn.17, pp.536-537.

59.

Elian and Rabbath v Matsas [1966] 2 Lloyd's Rep. 495; contrast *Howe Richardson Scale Co Ltd v Polimex-Cekop* [1978] 1 Lloyd's Rep. 161.

60.

Mahonia Ltd v JP Morgan Chase Bank [2004] EWHC 1938 at [427]-[428] (violation of US security laws); N. Enonchong, "The Autonomy Principle of Letters of Credit: an Illegality Exception?" [2006] L.M.C.L.Q. 404.

61.

Dolan, above fn.17, pp.533-534.

62.

Telecommunication includes SWIFT communication: above fn.3.

63.

Banco Santander SA v Banque Paribas [2000] Lloyd's Rep. Bank 165.

64.

As regards the UCP500, see Arts 9 and 10.

65.

June 9, 1999, QBD (Comm).

66.

Above fn.63.

67.

Reference was made at first instance and by the Court of Appeal to *European Asian Bank AG v Punjab & Sind Bank (No.2)* [1983] 1 W.L.R. 642.

68.

D. Aharoni and A. Johnson, "Fraud and Discounted Deferred Payment Documentary Credits: The Banco Santander case" [2000] J.I.B.L.R. 22 at p.25.

69.

See S. Paterson and A. Johnson, "Fraud and Documentary Credits" [2001] J.I.B.L.R. 37 at p.40.

70.

As regards the undertakings of the issuing and confirming banks, see UCP600, Arts 7(c) & 8(c).

71.

Above fn.45, p.8. For further discussion, see J. Dolan, "Negotiation Credits under UCP600" (2007) 13(1) *DC Insight* 4; and M. Burjaq, "A Reaction from the Middle East" (2007) 13(1) *DC Insight* 9 at p.10.

72.

Money Laundering Regulations 2003 (2003/3075), s.4. See further, J. Ulph, *Commercial Fraud--Civil Liability, Human Rights, and Money Laundering* (OUP, 2006), paras 3.09 to 3.11.

73.

Money Laundering Regulations, above fn.72, s.7; Proceeds of Crime Act 2002, ss.330 and 331. For detail, see Ulph, above fn.72., paras 3.11 and 3.22 to 3.27.

74.

Proceeds of Crime Act 2002, as amended by the Serious Organised Crime and Police Act 2005, ss.327-329. For detail, see Ulph, above fn.72, paras 3.12 to 3.21.

75.

Beneficiaries under a credit are not necessarily seen as customers of the nominated bank and therefore subject to the KYC requirements: see the guidance provided by the Joint Money Laundering Steering Group at its website (*http://jmlsg.org.uk*), "Prevention of Money Laundering; Combating the Financing of Terrorism", ch.5.2.

76.

See Ulph, above fn.72, para.3.31.

77.

See, e.g. Regulation 1781/2006 of November 15, 2006, which requires banks to provide information concerning the payer in an international transaction.

78.

The website is: *http://jmlsg.org.uk.*

79.

ICC Publication No.632.

80.

Above fn.8, p.23. For a different view, see above fn.41.

81.

Above fn.8, p.23.

82.

UCP600, Arts 8, 9, 10, 11 and 35; UCP500, Arts 7, 9, 11, 12, 14 and 16.

83.

UCP500, Art.13(a).

84.

UCP600, Art.16(c)(iii). Retaining the documents may be useful to encourage negotiations for a settlement: above fn.3, p.40.

85.

E. P. Ellinger, “Use of Some ICC Guidelines” [2004] J.B.L. 704.

86.

Above fn.1, p.547.

87.

Above fn.1, p.550.