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The story of the English strict compliance principle in letters of credit and its consistency with the UCP

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***J.I.B.L.R. 71** **Introduction**

Letters of credit are recognised as documentary letters of credit—or documentary credits—due to the concept of documentary compliance, which is known as strict compliance under English law. It is said that documentary credits are meant to be cash for sellers [1] even though the cash is conditional on a conforming presentation. Commercially, they are meant to minimise the risk of any evasion of performance by both parties: buyers as to the payment of the price, and sellers as to the delivery. The latter risk is minimised by the enforceability of the concept of compliance pursuant to which sellers or banks are not entitled for payment or indemnity unless they present documents that are in conformity to what is required in the credit.

This article seeks to identify the nature of the principle of strict compliance under English law and the generated rules of such a principle. It critically evaluates the English law generated rules from the principle of strict compliance, in the light of their consistency with the UCP, particularly UCP 600. In the course of doing so, the article will answer the following questions: What is the nature and the scope of the principle of strict compliance? What legal rules has the strict compliance generated? To what extent are the English law rules of strict compliance consistent or inconsistent with compliance in UCP 600 and ISBP? To what extent will the inconsistent rules have impact on documentary credits and their underlying policy?

The article is mainly divided into three sections. The first is to evaluate the basic nature of the principle of strict compliance. The second section provides analyses as to the scope of the principle of strict compliance. This is achieved by revealing the generated rules of such a principle by assessing the general rules (e.g. Identification of Goods) and the particular rules (e.g. No Requirement for Descriptions of Goods, Non-Documentary Conditions are Effective, Additional Documents are Disregarded). It thus addresses whether the rules are consistent with the UCP or not. The third section provides critical evaluation as to the status of English law rules that are inconsistent with UCP 600.

Principle of strict compliance

Principles refer to the direct substantive objectives of a legal order, such as freedom to contract or fairness. [2] English law sets out the concept of "strict compliance" [3] as a principle for the determination as to whether are the documents under a documentary credit conform to terms of the credit. Strict compliance is regarded, as a matter of form, as a principle, because it directly reflects one of the substantive objectives of documentary credits, namely: documentary credits are meant to be a secure method of payment to buyers in terms of minimising the risk of non-delivery of the required goods or services, by virtue of making the honour (i.e. payment or negotiation) of the credit and the bank's indemnity conditional upon the presentation of documents that comply with what is required in the credit. [4]

The principle of strict compliance is encapsulated in the statement of Sumner L.J. in *Equitable Trust Co of New York v Dawson Partners Ltd* [5]:

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"There is really no question here of waiver or of estoppel or of negligence or of breach of a contract of employment. It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines."

Sumner L.J. endeavoured to functionalise the principle of strict compliance by spelling out the consequences of disregarding strict compliance.[6] Thus a bank is not entitled to indemnity for payment against documents that a duly diligent banker would refuse them for non-compliance. ***J.I.B.L.R. 72*** It is irrelevant that the bank has exercised reasonable care in the determination of the compliance.[7] This element is inferred from the ratio that:

"[T]here is really no question here of waiver or of estoppel or of negligence or of breach of a contract of employment."[8]

The form of strict compliance as a principle lacks the attribute of taking direct action in a determinative functional way on identified facts;—namely, it does not tell us how functionally strict the compliance is. The application of such a principle might provide inferences in this respect. Thus the credit in *Equitable Trust*[9] required a presentation of a certificate issued by the Chamber of Commerce of Batavia. Such a body did not actually exist. The beneficiary presented a certificate issued by the "Handelsvereeniging of Batavia" which was a semi official body that fulfilled the functions normally associated with a chamber of commerce. It was held that such a presentation was in compliance with the credit. The application of the principle of strict compliance in this case had little precedential value, since no attempt was made to set out an abstract point or rule that can be followed in future cases. It can, nevertheless, be inferred from such an application that the strict compliance does not necessary need to be interpreted as a mirror image compliance under English law. This might appear to be contrary to a previous dictum expressed, in 1922, by Bailhache J. in *English, Scottish and Australian Bank Ltd v Bank of South Africa*[10] in which the principle of strict compliance had been referred to as "an exact compliance". Such an expression should not be taken literally. Given the fact that documentary credits came into common use in international trade in the United Kingdom just after the end of the first war,[11] it was necessary to emphasise the establishment of the principle of strict compliance under common law, in order to protect the commercial essence of documentary credits particularly in the environment where the UCP did not exist. This interpretation finds its support in *Kredietbank Antwerp v Midland Bank plc*[12] where Evans L.J. stated:

"… [T]he requirement of strict compliance is not equivalent to a test of exact literal compliance in all circumstances and as regards all documents. To some extent, therefore, the banker must exercise his own judgment whether the requirement is satisfied by the documents presented to him."

The counterpart of English law's principle of strict compliance in the international banking community is the concept of compliance in that the presented documents must be in regular order.[13] Sumner L.J. in *Equitable Trust*[14] referred to the strict compliance as being "common ground" and this is true in respect of the concept of compliance as it operates as trade usage in the transaction of documentary letters of credit across borders. Such a trade usage fulfils the common requirements for trade usage under English law (i.e. universal,[15] notorious,[16] certain,[17] compulsory[18] and reasonable[19]). Indeed, the concept of compliance functions as trade usage that, as "common sense", is associated with the existence of documentary letters of credit. Thus the existence of the trade usage of compliance is unchangeable as it is essential to the viability of documentary letters of credit.[20] The buyer would be entirely vulnerable if the concept of compliance did not apply, because the sole means available to the buyer for self protection, the requirement of documents evidencing due shipment, would be useless in the absence of compliance.[21]

However, the scope of the trade usage of compliance is a different matter. There is no escape from fragmentations as to the scope of compliance across legal orders and communities. The scope of compliance can be described as strict,[22] as an exact,[23] as in regular order[24] or even as in regular form.[25] What is vital is the function of compliance. Forming the concept of compliance as a ***J.I.B.L.R. 73*** principle captures all the cases of documentary credits, but does not determine how compliance functions in a determinative way on identifiable facts even where the principle of compliance is described as a strict. In other words, we need to look at the generated rules of the principle of strict compliance to determine the functional scope of compliance. Nevertheless, the elasticity nature of strict compliance principle has the advantage of being adaptable to developing trade usage and to changeable matrix of facts. Such elasticity, however, leads to uncertainty on how strict the compliance is. Uncertainty can

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be tackled by general and particular rules. That is the undertaken approach in many documentary credits cases under English law as clarified below.

General rules

Rules provide the determinative positions as to the function of the scope of the principle of strict compliance. [26] The principle of strict compliance generated rules that have the character of particularity rather than generality. There are very few general rules for compliance under English law. This is, however, plausible because a general rule carries with it unmanageable consequences where a general rule does not reflect the underlying policies of documentary credits. This is due to the fact that a general rule has broad determinative uniform applications, so it captures many, if not all, cases. [27] It is submitted that the other reason beyond the restrain from the enactment of general rules is to avoid the conflict with both the changeable banking practices in documentary credits and the UCP, particularly after 1962 where the banks in the United Kingdom accepted to incorporate the UCP.

Rule of appearance

One of the main elements of the principle of autonomy under documentary credits is the general rule of appearance. Namely, the bank needs only to examine what appears on the documents and thus the bank is not entitled to examine the underlying facts, [28] goods [29] or the relevant contracts. [30] The general rule of appearance has a dual role one for autonomy and the other for compliance. As for the latter, the appearance rule serves as being a standpoint determining the scope of the principle of strict compliance. Thus compliance of documents should only be based on what appears on the documents. The appearance concept is formed as a general rule under English law and, indeed, such a rule applies in the primary stage of the examination of documents to all cases in compliance. Furthermore, the English general rule of appearance directly protects one of the purposes of documentary credits (i.e. they are a means of a low risk method of payment for sellers and banks. The seller is assured to receive a payment without the interference of facts other than the condition to present conforming documents with the terms of the credit. The bank is also assured the right of reimbursement and needs not to consume its time by looking at the underlying facts. Such a speed enhances the opportunity for the buyer to deal with documents prior to the arrival of goods [31]). Certainty is a result of the advantages of the rule of appearance. The rule is consistent with the UCP. [32]

Identification of the goods

The requirement of identification of the goods under English law is also formed as a general rule. It thus captures most cases, if not all, in the determination of whether the documents are in compliance or not. Pursuant to this rule each document must refer to the identification of the goods. [33] This reference to the identification of the goods relates to the goods referred to in the credit or in the invoice. It also relates to the goods that are the subject matter of the transaction or even to the goods that have been shipped. [34] The scope of the standard of how documents must identify the goods is adaptable. Primarily, the documents must refer to the identification of the goods with reasonable certainty. [35] Where, however, the contents of the document are not linked with other documents contents "no—linkage", [36] and its status calls for a further inquiry, then such a document must unequivocally identify the goods. [37] It is submitted, the type of documents that need to relate to the identification of the goods must be such that serve the purpose of investigation as to a particular or general status of the goods. For example: packing list, weight list, origin certificate, inspection certificate, health certificate and the like. Documents such as beneficiary's certificate or a copy of the beneficiary's ***J.I.B.L.R. 74*** passport do not relate to the investigation of goods, they are not indented to be subject to the rule of "identification of the goods".

In *Bank Meli Iran v Barclays Bank* , [38] which was not a UCP case, the description "new—good, Cheverolet trucks" in the presented documents was not held to be the same as "new Cheverolet trucks". Thus such a presentation was not held to be in compliance. It can be inferred from the facts of this case that the difference clearly affected the identification of the goods. The matter was not substantively in relation to the description of the goods, but was rather regarding their identification. In *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* , [39] which was subject to UCP 1976, Sir John Donaldson stated:

"There is, in my judgment, a real distinction between an identification of the goods, the subject matter of the transaction, and a description of those goods." [40]

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In *Banque de l'Indochine* certificates of weight, quality, packing and origin, as well as EUR 1 certificates, were not in compliance on the ground that they did not identify the goods in question. The nature of the deficiency is explained below only in respect of the origin and quality documents. The credit required the following goods:

"Covering shipment: '2000 (two thousand) metric tons up to 5 per cent more or less EEC white crystal sugar category no.2 minimum polarisation 99.8 degrees … and freight liner out Djibouti packed in new polythene lined jute bags of 50 kgs net as per your telex dated 1/7/81'. " [41]

The presented bill of lading described the goods as 40,000 polythene lined unmarked jute bags of white crystal sugar weighing 2,018.6 metric tons gross, and provided that the goods were loaded on "Markhor" at Antwerp bound for Djibouti in transit for Yemen. One of the certificates of origin and one of the quality certificates referred to the goods as 1,009 gross 1,000 metric tons net of sugar of the correct description. They, however, indicated that the goods had been loaded on "MV Markhor or substitute". The other certificate of origin referred to the goods as 1,009.6 gross 1,000 metric tons net of sugar of a like description. It indicated that the consignment was by "Transports mixtes a destination Djibouti Port in Transit Yemen". [42] It was held the description of the goods as "sugar" in documents other than the commercial invoice was sufficient for a good tender pursuant to sub-art.32(c) UCP 1974 which stated:

"In all other documents the goods may be described in general terms not inconsistent with the description of the goods in the credit." [43]

It was further held that the description of goods is a separate issue from the identification of the goods as the latter was not subject to the latitude rule for descriptions of goods under sub-art.32(c) of UCP 1974. Thus two of the above certificates referred to the consignment of the goods on a vessel of "MV Markhor" which might be different from "Markhor", and one of the certificates did not name the vessel. This fact had the capacity, in the context of the lack of linkage and the fact that the documents call for inquiry, [44] to indicate that the sugar might have come from different sources. Accordingly, the presentation of these certificates was not in compliance as the goods had not been identified "unequivocally". It would have been sufficient to identify the goods by making a reference to marks on the bags, or to a hold in the vessel which they occupied provided that no other goods were in the hold. [45]

The question is whether English rule for identification the goods applies on documentary credits subject to UCP 600 or not. [46] The position of UCP 600 is quite clear. There is no mandatory requirement to contain any description of the goods, or a reference as to the identification of the goods, in the presented documents. The new structure of the test of compliance in UCP 600 [47] indicates that there is no requirement for consistency, or consistent linkage between the contents of documents. [48] Further, sub-art.14(e) UCP 600 states:

"In documents other than the commercial invoice, the description of the goods, services or performance, if stated, may be in general terms not conflicting with their description in the credit." [49]

The words "if stated" were introduced to confirm that there is no requirement for consistency. The ICC Banking Commission clearly confirmed this position in their Opinion regarding an enquiry as to a health certificate that did not bear any description, or reference as to the identification, of the goods. The Commission stated: ***J.I.B.L.R. 75***

"There is no requirement in UCP for the certificate of health to bear a description of the goods that corresponds with that given in the credit, or for any goods description …" [50]

The only documents that are required to relate to the goods under UCP 600 are the commercial invoice [51] and the certificate of origin. [52] The new revision of ISBP [53] regulates a new list of documents which are: packing list, weight list, beneficiary's certificate, analysis certificate, health certificate, inspection certificate, and quantity and quality certificates. It is not expressly required in the ISBP that these documents need to relate to the invoiced goods, even though they are—except beneficiary's certificate—related to the investigation of a particular status of the invoiced goods. As an exception, the ISBP states that the certificate of origin—which has also an investigation's function as to the goods—must relate to the invoiced goods. [54]

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It is not for banks to challenge the effectiveness of obvious terms

The obvious meaning of the expressed instructions in the credit should not be challenged by:

- looking at commercial purposes that a reasonable banker would not realise unless a further investigation beyond the common knowledge is conducted [55] ;
- reasoning the commercial cause of the clear required term in order to disregard its effectiveness. [56]

This is, generally, consistent with UCP 600. [57]

In *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [58] the credit called for a "certificate of inspection" in respect of "Christmas tree lights". It was held that the bank had the right of indemnity where it accepted what it had appeared to be a reasonable certificate of external inspection. The presented certificate in this case provided that the lights had been properly packed in the correct quantity and exhibited no apparent defects. The bank was not entitled to look at the non—apparent purposes of the terms of the credit:

"[T]he banker is not concerned as to whether the documents for which the buyer has stipulated serve any useful commercial purpose or as to why the customer called for tender of a document of a particular description." [59]

The justification of this rule is that the bank was under an obligation to multiple parties and "delay in deciding may in itself result in a breach of his contractual obligations to the buyer or to the seller". [60] This statement by Lord Diplock should not be taken broadly.

Particular rules

The distinction between a general rule and a particular rule is that in the latter the rule captures few cases. Still, a particular rule is directed to more specific matrix of facts. The disadvantage is that it might be disputable that the matrix of facts matches the intended ones by the particular rule. The advantage is that no great damages would be caused if the particular rule does not substantively reflect the underlying policy of documentary credits, because the application of a particular rule does not affect a large number of banking and trading practices. [61] This section deals with the generated particular rules from the principle of strict compliance.

Particular rules that are not expressly regulated in UCP 600

It is not a surprise to find some issues in compliance are regulated under English law or other legal orders and not being tackled by UCP 600. This is due to the fact that the UCP operate throughout legal orders.

Non-banking usage or practice is irrelevant

Banks are only concerned with facts that are gained from common knowledge or from trade usage in relation to documentary credits or banking practices. This particular rule is directly generated from the general rule of appearance. [62] In *JH Rayner & Co Ltd v Hambros Bank Ltd* , [63] the credit was not subject to the UCP, one of the terms of the credit contract provided that payment must be against documents relating to "coromandal groundnuts". The Court of Appeal held the fact that the trade usage perceived the words "coromandel groundnuts" as the same as "machine-shelled groundnut kernels" was irrelevant to decide the compliance of the documents, as ***J.I.B.L.R. 76*** it was not expected from banks to be aware of such a trade a usage or practice. It might be argued that this particular rule leads to uncertainty as to the determination of the relevant trade usage regarding the compliance of documents. It is submitted, however, that it is expected from banks to easily define the relative content of their practice and to be aware of their industry terms of art. In *Bulgrains & Co Ltd v Shinhan Bank* , [64] the case was regarding the status of a refusal notice for non-compliance. The High Court held that the reference to a SWIFT message "MT734" in the communication between the banks was an industry term of art meant that the bank was refusing the presented documents. [65]

Reasonable interpretation as to ambiguous instructions

Even though one of the UCP 600 aims is to remove ambiguity and to encourage banks to be explicit in documentary credits terms, [66] there is no provision directly tackles the issue of ambiguous instructions. This is plausible as the matter is subject to the contractual interpretation approaches of legal orders. The matter can be managed by providing adequate trainings to bankers. [67] Under Common law, banks are entitled to reasonably interpret ambiguous instructions. [68] In *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* , [69] the credit contained a section under the heading of "the required documents that must be presented" and another section under the heading of "special conditions". The contents of the latter section vary and unclear. Conditions 8 and 9 of the special conditions section state respectively:

"(8). Non-negotiable documents alongwith photo copies of original B/L should be sent to the applicant of LC by Courier service on their address FB/5, 3rd Floor, Awami Complex, Usman Block, New Garden Town Lahore-Pakistan. (9) Original documents alongwith eight copies each of invoice, packing list, weight and measurement list, Bill of Lading and certificate of origin should be sent to us by Courier at the cost of beneficiary." [70]

The issuing bank refused to reimburse the confirming bank which negotiated the credit, on the basis the presentation was deficient. Thus the issuing bank did not receive the weight and measurement list and the certificate of origin from the confirming bank, as the latter might also did not receive such documents from the beneficiary. The question was whether these documents were essential against which the honour of the credit (i.e. negotiation and payment) was agreed to be made under the terms of the credit; or were they merely documents to be forwarded after negotiation had taken place to the issuing bank?

It was held by the Court of Appeal that condition 8 related to the performance of the underlying contract and not to the honouring of the credit. Similarly, the court held that it was certainly reasonable to construe condition 9 as being related to documents which were not essential against which the honour of the credit was agreed to be made. Condition 9 was not clear and precise as required by art.5(b) of UCP 500. If documents of condition 9 were presented, they would have been treated as additional documents that must be disregarded, and thus irrelevant to the decision of honouring the credit. The issuing bank was held liable to the conforming bank for indemnity and damages.

The UCP do not, generally, deal with the approach of the interpretation of the ambiguous terms in the credit. UCP 600 regulates the position of a documentary credit's term that stipulates the required documents without spelling out the required content or the name of the issuer of the documents. [71] Pursuant to sub-art.14(f) of UCP 600 the bank in this case must ensure that such documents fulfil their apparent required function. In this situation the English principle of reasonableness [72] is compatible to include the rule of UCP 600. Reasonableness, however, might permit factors other than the rule of "fulfilling the apparent function" to play a role in the interpretation. Still, art.4 of UCP 600 discourages parties from including copies of the underlying contracts, proforma invoice and the like. The UCP 600 Drafting Group provided in their Commentary that it is recognised that the UCP are incapable of prohibiting parties from issuing a documentary which attaches one of the above documents. [73] This is a realisation of the enforceability power of the transnational norm of "freedom to contract".

Particular rules consistent with UCP 600

The compatibility of English rules and UCP 600 indicates that English legal order is viable in the international business community, as the applicability of the UCP is very common. On the same spirit, it is an indication that the UCP rules are achieving their objective of being ***J.I.B.L.R. 77*** uniform rules across borders. [74] The consistent rules illustrate the similarity of the functions of compliance under both English law and the UCP.

No requirement for descriptions of goods

It is sufficient that the goods descriptions are contained in the set of documents as a whole. There is no requirement under English law [75] and UCP 600 [76] to contain the full set of goods descriptions in each document.

Acceptance of additional data

Additional data are accepted unless they invite a further inquiry or discrepancy. So the statement in the commercial invoice that describes the goods as "Origin: Any Western Brand—Indonesia (Inalum Brand)" is in conformity with the requirement that the goods must be "any western brand". [77] This is consistent with the UCP. [78]

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Additional documents are disregarded

Sir Christopher Staughton in *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [79] divided the presented documents in documentary credits into three types. The first is the documents that are required by a condition in the credit against which the honour of the credit is to be made. They are stipulated documents. The second is the documents that are mentioned in the credit without being based on a condition in the credit against which the honour of the credit is to be made. They are treated as additional, or non-stipulated, documents. [80] The third is the presented documents that are not mentioned in the credit, they need not to be examined. They are referred to in this article, and known, as additional documents. Additional documents should not be relevant in the determination of the compliance as to the presented documents. Additional documents are "properly irrelevant in law". [81] This is consistent with the UCP. [82] However, the status of the second category of the presented documents is not expressly regulated in the UCP.

Limited examination of bills of lading

The bank is not entitled to check every clause in the bill of lading to work out whether the goods are in defect or not. The examination of bills of lading in this respect is confined to check whether there is an endorsement that refers to a defect in the goods or in their packing. [83] This is consistent with the UCP. [84]

Typographical errors are disregarded

Strict compliance does not generally extend to the obvious typographical errors such as to the telex number as 931310 instead of 981310. [85] This is generally consistent with the UCP. [86] However, the position under the UCP is clearer and more certain in that the ISBP provide abstract points and examples for typographical errors. [87]

Particular rules inconsistent with UCP 600

The inconsistency between English rules of compliance and the UCP rules is an essential stage to understand the extent of the effectiveness of these rules.

Non-documentary conditions are effective

A non-documentary condition is a documentary credit's condition requires a fact to exist without specifying the document that needs to be presented to prove that fact. A non-documentary condition needs to be satisfied by presenting a document that proves the existence of the called fact. [88] The credit in *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [89] required:

"Shipment to be effected on vessel belonging to shipping company that member of an International Shipping Conference." [90]

It was held that the bank must have satisfied itself of the existence of such a fact by calling for any reasonable evidence establishing that fact. This is rooted to the fundamental principle of "freedom to contract" under most legal orders. [91] In contrast, the UCP dictate the parties to disregard a non-documentary condition. ***J.I.B.L.R. 78*** [92]

De minimis

Originally, there is no application to the de minimis rule (i.e. insignificant differences must be ignored) on documentary credits under English law. This is due to the interpretation as to the principle of strict compliance in both *Moralice (London) Ltd v E D and F Man* [93] and *Soproma SpA v Marine and Animal By Products Corp* .[94] Such a position is in conflict with the UCP. [95]

The evaluation of the inconsistent rules and their effectiveness

The presented doctrinal arguments that determine which rules prevail under English common law, or which rules should prevail, take into account the following core factors: the underlying policy of documentary credits (i.e. secure method of payment), the power of transitional norms, the UCP objective of uniformity and the legal orders need for viability.

The applicability of the English general rule of identification of the goods

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The answer to the question of whether English rule for identification of the goods applies on documentary credits subject to UCP 600 should be affirmative. On the one hand, treating documents that do not identify the goods as in compliance with the credit—which does not expressly require the identification of goods in the required documents—might reduce the rate of rejections. [96] It serves for the purpose of clarity as banks are assured that the UCP treat such documents as in compliance. It releases sellers as it minimises the risk that the credits might be dishonoured. It releases sellers from complexity, as the case may be.

On the other hand, buyers would be left vulnerable as there is no assurance that the required documents relate to the invoiced goods. It is submitted that if the English rule of "identification of the goods" is not applicable on documentary credits subject to UCP 600, it would be an invitation to fraud. [97] Indeed, security for both sellers and buyers is one of the main underlying substantive objectives of documentary credits. Getting the right balance of security as to the documentary credit's parties should not be sacrificed for formal uniformity. Thus the rule of UCP 600 that rejects the requirement to relate documents to the identification of goods does not reflect the underlying policy of documentary credits. Legal orders, therefore, constraint to uphold such a UCP rule. The results affect certainty (i.e. parties know in advance their legal positions), [98] in terms that the positions of legal orders regarding the applicability of such a UCP rule are uncertain. In addition, there are two technical arguments for the applicability of the English rule.

First, it might be argued that the English rule as to the identification of goods is implicit in the new list of documents in ISBP 2013, except the beneficiary's certificate. This is justified by the fact that the function of the documents in the new list is to investigate a particular status of the invoiced goods. Further, the fact that the ISBP made only a statement in relation to the beneficiary's certificate in that such a certificate does not need to include any goods description [99] indicates there is an implied rule to relate to the invoiced goods in all other documents in the new list. It is difficult to see the effectiveness of such an argument. Given the facts of both the ISBP expresses the requirement to relate to the goods only in respect of origin certificates [100] and invoice, [101] and that it is clear from the ICC Opinions there is no requirement to relate to the goods in health certificates. [102]

Secondly and more effectively is the argument that is based on the distinction between the concept of the identification of goods and the concept of the description of goods, as drawn by Sir John Donaldson in *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* . [103] Indeed a reference to the code number or marks of the package of goods is regarded as being sufficient to identify goods, but might not be treated as a description of goods. In conclusion, the concept of identification connotes to the assurance that the documents are linked to the same goods. It reflects the underlying policy of documentary credits as being means of a secure method of payment. Thus in the light of *Fortis Bank SA/NV Stemcor UK Ltd v Indian Overseas Bank* , [104] the interpretation that is based on security (i.e. the underlying policy of documentary credits) as expected by international traders, and even bankers, must be taken into account.

The applicability of the English particular rule for non-documentary conditions

English Common law treats contractural express terms as being the most likely manifestation of the intention of the parties. [105] This is due to the high hierarchy of the enforceability, as to the substance, of the fundamental Common law principle of "freedom to contract". ***J.I.B.L.R. 79*** Naturally, it is obvious and certain that parties can exclude or amend any incorporated UCP term by an expressed contractual term. But, it is not certain that spelling out a non-documentary condition in the credit reflects the intention of the parties to exclude sub-art.14(h) of UCP 600 (i.e. the non-documentary condition is disregarded). [106] The question is whether courts, as a matter of interpretation, are willing to strike down such a UCP rule. It is submitted that there are four interconnected issues that need to be scrutinised to answer such a question.

Firstly, is the nature of the relevant UCP term which is sub-art.14(h) in UCP 600. It is essential to determine whether such a term operates independently as law, by means, for instance, of unchangeable trade usage or commercial custom. [107] For in this case the term might have a paramount status. However, neither sub-art.14(h) has the status of law, nor is regarded as a fundamental concept in documentary credits or in UCP 600. [108] This eases the task of striking down such a UCP term.

Secondly is the level of the importance of the non-documentary condition for the operation of the credit. In *Korea Exchange Bank v Standard Chartered Bank* [109] and *Kumagai-Zenecon Construction Ltd (in Liq) v Arab Bank plc* [110] the non-documentary conditions—subject to sub-art.13(c) of UCP 500 which was the precedent provision of sub-art.14(h) of UCP 600—were given effect as they were essential for the commercial operation of the relevant credits. It is submitted that such

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an argument of whether the non-documentary conditions are essential or not is substantively irrelevant, because, as above discussed, the applicable UCP term [111] does not have a paramount status.

Thirdly, the underlying aim of the promulgation of sub-art.14(h) is to eradicate the "wrong practice of incorporating non-documentary condition(s) into documentary credits". [112] Given the fact that the issue of non-documentary condition causes severe problems to all parties dealing with documentary credits, the ICC Banking Commission has endeavoured to promote for formality over substance. Formality in the sense of laying the risk on the parties who incorporate non-documentary conditions, by the function of disregarding such conditions. Formality narrows the scope of discretionary. It serves for the purpose of clarity. It might thus lead to uniformity in practices which is the substantive aim of the UCP. [113] On the other hand, substance in this issue stands for the effectiveness of the intention of the parties that is driven from the fundamental principle of "freedom to contact". It requires banks to call for a document that is reasonably required for the relevant non-documentary condition. It achieves fairness for the parties who express, and intend to give effect to, the non-documentary conditions. The formality of sub-art.14(h) causes repugnancy as to the principle of "freedom to contract" which is a transnational norm. It must be realised that up to this date the UCP or any other self- regulatory rules has not reached the level of being capable of enforcing mandatory rules. [114] Courts, therefore are confident to strike down the repugnant UCP rule, namely, sub-art.14(h).

Fourthly, the expressed trend under English law is to interpret the UCP throughout international lens of business practices rather than a literalistic national approach. It was stated by Thomas L.J., with whom the other judges agreed, in *Fortis Bank SA/NV Stemcor UK Ltd v Indian Overseas Bank* [115] the UCP must be interpreted as:

"… [A] self-contained code for those areas of practice which it covers and to reflect good practice and achieve consistency across the world. Courts must therefore interpret it in accordance with its underlying aims and purposes reflecting international practice and the expectations of international bankers and international traders so that it underpins the operation of letters of credit in international trade. A literalistic and national approach must be avoided."

It might seem for the first insight that as the uniformity of practices is the main underlying aim of the UCP, [116] the interpretation of non-documentary condition must substantively serve for the purpose of uniformity. It entails that sub-art.14(h) must be effective to the extent of being capable to prevail irrespective of the "freedom to contract". This argument is flawed. International traders do not expect that a non-documentary condition would be ignored. Clearly, sub-art.14(h) has the effect of favouring the interests of banks over traders. This might due to the fact that there were no representatives for exporters or importers in the Drafting Groups responsible for the design of UCP 600 and traders represented only about one per cent of the members of the ICC Banking Commission. [117] Still, the approach of the interpretation ***J.I.B.L.R. 80*** in *Fortis* is compatible with the English law reasonableness principle of interpretation. [118] A reasonable reader amongst international traders would not expect sub-art.14(h) to have a full effectiveness. Such a reasonable interpretation reflects the expectation of international traders that is referred to by Thomas L.J. in *Fortis* . [119]

In conclusion, courts are willing to strike down the repugnant UCP rule, namely, sub-art.14(h). Banks therefore need to be aware that a non-documentary condition is operative under English law, irrespective of the relevant UCP rule to disregard that condition. By accepting to furnish a non-documentary condition in documentary credits, the bank signifies its intention to respect such a condition. Beneficiaries are advised to include the document which complies with the non-documentary condition in a document that is clearly required by a documentary condition. [120] Fortunately, the rule of non-documentary conditions under both English law and the UCP is a particular rule and it does not therefore capture many cases.

The applicability of de minimis

It is submitted that the refusal to apply the de minimis rule—in both *Moralice (London) Ltd v E D and F Man* [121] and *Soproma SpA v Marine and Animal By Products Corp* [122] on the basis of strict compliance suffers from the lack of acclamation (i.e. general adoption). [123] Thus at the time of these judgments the courts did not give an adequate weight to trade usage or market practices, as the case may be at that time. Even if the trade usage at that time supported the judgments of the above cases, the fact that the judgments are in contrast with the current trade usage and the UCP makes it difficult to see the viability, or even the applicability, of such law nowadays. Thus most documentary credits apply the de minimis as they are subject to the UCP, and it is clear that there is no place for the applicability of the above cases in the context of UCP 600. [124] For documentary credits that are not subject to the UCP, courts might find that parties had the intention to apply the current trade usage rather

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than the exclusive rules in the above cases. The *Moralice* and *Suproma* rule is not the creature of a fundamental doctrine under English legal order. Rather, the rule is purely the product of the concept of compliance in documentary credits. It cannot, however, be denied that the rule in *Moralice* and *Soporma* is law. They are, generally, applicable where there is no evidence that parties have contracted out of them.

In the light of the above arguments, there is no decisive answer as to the applicability of the English rules where the relevant documentary credit is not subject to the UCP. Thus the determinative function of the *Moralice and Suproma* the rule is questionable. The other dilemma is that, the effectiveness of such a rule, if it is applicable, is in contrary with the current trade usage. It is submitted that the cause of these dilemmas is that the interpretation of the relation of de minimis to the principle of strict compliance was not left to be determined by trade usage, as a matter of fact by expert evidence.[125] Law is rigid where trade usage is generally changeable. This is an example where the interference of law in an elastic transnational norm (i.e. compliance of documents) generates unpleasant results. The rule of *Moralice* and *Soporma* is particular and it does not therefore operate as an essential step in the initial stages of compliance to all documentary credit cases. Pursuant to this rule the presentation is regarded as deficient where documents appear to indicate to quantity of goods slightly less or more than what is required in the credit. Given the fact that the presentation as to quantity of goods is an essential requirement for plenty of documentary credits, the *Moralice* and *Soporma* rule unfortunately captures many cases.

Conclusion

The concept of compliance was originally set out in a form of principle under English common law. It was described as a "strict compliance" by Sumner L.J. in *Equitable Trust* and was earlier described in a dictum in another case as an "exact compliance". Such descriptions were essential in confirming the establishment of compliance, which is a fundamental trade usage in documentary letters of credit, in a trading environment in which the UCP did not exist. The form of principle as to "strict compliance" has the attributes of both being applied to all documentary credits cases and the ability to reflect the underlying policy of documentary credits (i.e. secure methods of payment). Such a principle, however, does not determine the functional scope of compliance or how strict the compliance is. Its elastic nature might have thrown uncertainties on how compliance is at the time of *Equitable Trust* . The principle is, however, adaptable in terms of the capability to generate rules and to absorb developing trade usage and banking practices addressing factual circumstances. The functional scope of compliance is determined and shaped by the generated rules of the principle of strict compliance. It is evident by the generated rules that ***J.I.B.L.R. 81*** compliance under English law does not mean an exact literal or a mirror image compliance. Indeed most of the strict compliance rules (i.e. Rule of Appearance, Descriptions of Goods are not Required, Acceptance of Additional Data, Additional Documents are Disregarded, Limited Examination to Bills of Lading, Typographical Errors are Disregarded) are consistent with the UCP. The analysis reveals that there are three English rules that are inconsistent with UCP 600. The first is the general rule for "Identification of the Goods". It is evaluated that the English rule requires the identification of the goods in the presented documents must substantively prevail. The attempt to decline its applicability by enforcing a contrast rule in UCP 600 is an illustration of a failure to reflect the underlying policy of documentary credits (i.e. secure methods of payment). The thirst for formality to achieve uniform practices should not be at the cost of the balance of security (i.e. secure methods of payment not only for sellers but also for buyers). The second is the particular rule that "Non-Documentary Conditions are Effective". It is also evaluated in the article that the English rule of treating non-documentary conditions as effective must substantively prevail. The UCP must not be repugnant as to transnational fundamental norms such as "freedom to contract". The third is the particular rule which rejects the application of "De Minimis". Such a rule has no place of application where documentary credits are subject to the UCP. In respect to documentary credits that are not subject to the UCP, it is evaluated that the English rule should not be effective. The rejection of de minimis is an illustration of how the rigidity of law causes dilemmas and thus pure compliance's matters need to be determined by the practices of the market. In conclusion, English strict compliance is generally viable within current international banking practices of compliance. The main hurdles, such as imbalanced security and repugnancy as to transnational norms, in the path of the viability of compliance need to be tackled by the UCP.

Mohd Hwaidi

Footnotes

1 *Intraco Ltd v Notis Shipping Corp of Liberia (The Bhoja Trader) [1981] 2 Lloyd's Rep. 256; [1981] Com. L.R. 184* at [9] per Donaldson L.J.

2 Kennedy, "Form and Substance in Private Law Adjudication" [1976] 89 Harvard Law Review 1685, 1688.

3 *Equitable Trust Co of New York v Dawson Partners Ltd (1927) 27 Lloyd's Rep. 49* at 52.

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4 Such an objective operates as transnational unchangeable trade usage: *Hwaidi and Ferris, The Existence of International Unchangeable and Changeable Trade Usage (SLS Conference, Edinburgh, September 2013)* at http://archive.legalscholars.ac.uk/edinburgh/restricted/paper.cfm?id=107 [Accessed November 18, 2013].

5 *Equitable Trust Co of New York v Dawson Partners Ltd (1927) 27 Lloyd's Rep. 49* at 52.

6 This is known as "formal realizability" (i.e. the quality of ruleness by directing an official to respond as to each of easily distinguishable list of facts in certain situations by intervening in a determinate way) see Kennedy, "Form and Substance in Private Law Adjudication" [1976] 89 Harvard Law Review 1685, 1686–1690.

7 For a contrary view in that there is a duty of reasonable care in the determination of compliance: see Adodo, "A Presentee Bank's Duty when Examining a Tender of Documents under the UCP 600" [2009] J.I.B.L.R. 566.

8 *Equitable Trust Co of New York v Dawson Partners Ltd (1927) 27 Lloyd's Rep. 49* at 52.

9 *Equitable Trust Co of New York v Dawson Partners Ltd (1927) 27 Lloyd's Rep. 49* .

10 *English, Scottish and Australian Bank Ltd v Bank of South Africa (1922) 13 Lloyd's Rep. 21* at 24: *Malek and Quest, Jack: Documentary Credits, 4th edn (2009), para.8.31*.

11 Hershey, "Letters of Credit" [November 1919] Harvard Law Review Association.

12 *Kredietbank Antwerp v Midland Bank plc [1999] 1 All E.R. (Comm.) 801; [1999] Lloyd's Rep. Bank 219* at 223.

13 See Draft Uniform Regulations on Export Commercial Credits (1927) presented to ICC's 4th Conference: *Dan Taylor, The Complete UCP, (2008), 30, ICC*. See also art.10 UCP (1933) No.82 and art.9 UCP (1951) No.151.

14 *Equitable Trust Co of New York v Dawson Partners Ltd (1927) 27 Lloyd's Rep. 49* .

15 *R. v Stoke-upon-Trent Inhabitants 114 E.R. 1263; (1843) 5 Q.B. 303* at 307; *Re Goetz, Jonas & Co Ex p. Trustee [1898] 1 Q.B. 787* at 795 CA, per AL Smith L.J.; *Brown v IRC [1965] A.C. 244; [1964] 3 All E.R. 119* : *Halsbury's Laws of England, 5th edn 92012), 32 para.57*.

16 *Wood v Wood (1823) 1 C. & P. 59*; *Gabay v Lloyd 107 E.R. 927; (1825) 3 B. & C. 793* ; *Lloyd's Bank Ltd v Swiss Bankverein (1913) 108 L.T. 143* at 145; *Royal Exchange Shipping Co v Dixon (1886) 12 App. Cas. 11* at 18; *R. v Stoke-upon-Trent Inhabitants (1843) 5 Q.B. 303* at 307; *Re Goetz, Jonas & Co Ex p. Trustee [1898] 1 Q.B. 787* at 795 CA, per AL Smith L.J.; *Brown v IRC [1965] A.C. 244; [1964] 3 All E.R. 119* : *Halsbury's Laws of England 5th edn (2012), 32 para.57*.

17 *Sewell v Corp (1824) 1 C. & P. 392* at 393; *Devonald v Rosser & Sons [1906] 2 K.B. 728* at 743 CA per Farwell L.J.; *Cooper v Strauss (1898) 14 T.L.R. 233*; *Re Walkers, Winser and Hamm and Shaw, Son and Co [1904] 2 K.B. 152* at 159; *Daun v City of London Brewery Co (1869) L.R. 8 Eq. 155* ; *Harker v Edwards (1887) 57 LJQB 147* at 148 CA, per Lord Esher M.R.; *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd 1916 S.C. 134* at 138 HL per Lord Buckmaster L.C., and at 140 per Lord Shaw; *Sagar v H Ridehalgh & Son Ltd [1931] 1 Ch. 310 CA* : *Halsbury's Laws of England 5th edn (2012), 32 para.58*.

18 *David Bederman, Custom as a source of law (2010), 83*.

19 *Olympia Co v Produce Co [1917] 1 K.B. 320 CA* .

20 *Hwaidi and Ferris, The Existence of International Unchangeable and Changeable Trade Usage (SLS Conference, Edinburgh, September 2013)* at http://archive.legalscholars.ac.uk/edinburgh/restricted/paper.cfm?id=107 [Accessed November 18, 2013]; see Kozolchyk, "Should future UCP revisions be carried out differently?" [2007]1 DCInsight: some principles such as documentary compliance reach the level of axiom.

21 As this is the distinction between travellers letters of credit and the modern documentary letters of credit: *Peter Elinger, Documentary Letters of Credit: A Comparative Study (Singapore: University of Singapore Press, 1970), 24–38*.

22 *Equitable Trust Co of New York v Dawson Partners Ltd (1927) 27 Lloyd's Rep. 49* at 52.

23 *English, Scottish and Australian Bank Ltd v. Bank of South Africa (1922) 13 Lloyd's Rep. 21* at 24.

24 Article 10 UCP (1933) No.82.

25 Draft Uniform Regulations on Export Commercial Credits (1927) presented to ICC's 4th Conference: *Dan Taylor, The Complete UCP, (ICC, 2008), 30*.

26 For the attributes of the form of rules: Kennedy, "Form and Substance in Private Law Adjudication" [1976] 89 Harvard Law Review 1685, 1686–1690.

27 Kennedy, "Form and Substance in Private Law Adjudication" [1976] 89 Harvard Law Review 1685.

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28 *Westpac Banking Corp v South Carolina National Bank [1986] 1 Lloyd's Rep. 311* at 315 per Goff L.J.; *Forestal Mimosa Ltd v Original Credit Ltd [1986] 1 Lloyd's Rep. 329* at 334.

29 *Guaranty Trust Co of New York v Van den Berghs Ltd (1925) 22 Lloyd's Rep. 446* at 454 per Scrutton L.J.; *Biddell Bros v E Clemens Horst Co [1911] 1 K.B. 934* at 958 per Kennedy L.J.

30 *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord) [1983] 1 A.C. 168* at183; *Credit Industriel et Commercial v. China Merchants Bank [2002] C.L.C. 1263* at [30].

31 For instance, *Biddell Bros v E Clemens Horst Co [1911] 1 K.B. 934* at 958 per Kennedy L.J.

32 Article 4 UCP 600; art.5 UCP 600; sub-art.14(a) UCP 600.

33 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] Q.B. 711* at 731–732 per Sir Donaldson M.R.

34 *Glencore International AG v Bank of China [1996] 1 Lloyd's Rep. 135* at 150.

35 *Glencore International AG v Bank of China [1996] 1 Lloyd's Rep. 135* at 148 dictum per Rix J. in respect of *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] Q.B. 711* .

36 The meaning of the term "linkage" varies: in this article "linkage" denotes to the idea that documents must be consistent with one another in terms of rendering the documentary credit operative, this meaning was suggested by the claimant in *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] Q.B. 711* at 731. In ICC Position Paper No.3 "linkage" refers to a condition in a documentary credit which can be clearly linked to a stipulated document. In *Malek and Quest, Jack: Documentary Credits, 4th edn (2009), para.848* "linkage" denotes to the reference to the identification of the goods.

37 *Glencore International AG v Bank of China [1996] 1 Lloyd's Rep. 135* at 148 dictum per Rix J. in respect of *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] Q.B. 711* .

38 *Bank Meli Iran v Barclays Bank [1951] 2 Lloyd's Rep. 369* per McNair J.

39 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] Q.B. 711* .

40 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] Q.B. 711* at 731–732, per Sir Donaldson M.R.

41 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] Q.B. 711* at 730.

42 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] Q.B. 711* at 731.

43 Equivalent to art.23 UCP 400, sub-art.37(c) UCP 500 and sub-art.14(e) UCP 600.

44 *Glencore International AG v Bank of China [1996] 1 Lloyd's Rep. 135* at 148, dictum per Rix J. in respect of *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] Q.B. 711* .

45 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] Q.B. 711* at 732, per Sir Donaldson M.R.

46 For an affirmative answer see below, *The Evaluation of the Inconsistent Rules and their Effectiveness*.

47 Sub-art.14(d) UCP 600.

48 *Drafting Group, Commentary on UCP 600: Article by Article Analysis, (ICC No.680, 2009), 65*.

49 Equivalent to sub-art.37(c) UCP 500.

50 *Opinions 2009–2011, R.728*.

51 Article 18 UCP 600; ISBP 2013, para C3.

52 *Opinions 2009–2011, R.727*: it referred to ISBP 2007, para.183.

53 ISBP 2013 ICC No.745.

54 ISBP 2013, paras L1, L4.

55 *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd [1973] A.C. 279* .

56 *Midland Bank Ltd v Seymour [1955] 2 Lloyd's Rep. 147* at 151 per Devlin J.; see *Malek and Quest, Jack: Documentary Credits 4th edn 92009), para.8.29*.

57 Sub-art.14(d) UCP 600.

58 *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd [1973] A.C. 279* .

59 *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd [1973] A.C. 279* at 286 per Lord Diplock.

60 *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd [1973] A.C. 279* at 286 per Lord Diplock.

61 Kennedy, "Form and Substance in Private Law Adjudication" [1976] 89 Harvard Law Review 1685, 1688.

62 See above, *Rule of Appearance*.

63 *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd [1943] 1 K.B. 37* .

64 *Bulgrains & Co Ltd v Shinhan Bank [2013] EWHC 2498 (QB)* .

65 *Bulgrains & Co Ltd v Shinhan Bank [2013] EWHC 2498 (QB)* at [42].

66 See Collyer, "A look back at the UCP revision" [2006] 10 DCInsight at 22.

67 Banks in Middle East have heavily invested, and engaged, in trainings for the use of the UCP: see Burjaq, "UCP 600: a reaction from the Middle East" [2007] 1 DCInsight.

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68 *Midland Bank Ltd v Seymour [1955] 2 Lloyd's Rep. 147* at 153 per Devlin J.; *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd [1973] A.C. 279* at 286 per Lord Diplock; *Credit Agricole Indosuez v Muslim Commercial Bank Ltd [2000] 1 All E.R. (Comm) 172; [2000] 1 Lloyd's Rep. 275* .

69 *Credit Agricole Indosuez v Muslim Commercial Bank Ltd [2000] 1 All E.R. (Comm) 172; [2000] 1 Lloyd's Rep. 275* .

70 *Credit Agricole Indosuez v Muslim Commercial Bank Ltd [2000] 1 All E.R. (Comm) 172; [2000] 1 Lloyd's Rep. 275* at 282.

71 Sub-art.14 (f) UCP 600.

72 *Antaios Compania Naviera SA v Salen Rederierna AB [1985] A.C. 191* at 201 per Lord Diplock; *Investors Compensation Scheme LTD v West Bromwich Building Society (No.1) [1998] 1 W.L.R. 896; [1998] 1 All E.R. 98* at 114 per Lord Hoffmann; see Hwaidi and Harris, "The Mechanics of Refusal in Documentary Letter of Credits: An Analysis of the Procedures Introduced By Article 16 UCP 600" [2013] 4 J.I.B.L.R. 146–155, 154; see Adodo, "Is the Plain Meaning Approach to Construction of 'Unambiguous Words' in Contract Still Alive in the English Courts?" [2013] Kluwer Law European Business Law Review at 537-551.

73 *Drafting Group, Commentary on UCP 600: Article by Article Analysis, (ICC No.680, 2009), 29*.

74 Dan Taylor, *The Complete UCP*, (2008), 27, ICC.

75 *Midland Bank Ltd v Seymour [1955] 2 Lloyd's Rep. 147* at 153 per Devlin J.

76 Sub-art.14(e) UCP 600; *Opinions 2009–2011, R.727; R.728 and R.729*.

77 *Glencore International AG v Bank of China [1996] 1 Lloyd's Rep. 135* at 154.

78 *Collected Opinions 1996–2005, R.322*; *Opinions 2009–2011, R. 757*; *Collected Opinions 1996–2005, R.405*; *Opinions 2009–2011, R. 740*.

79 *Credit Agricole Indosuez v Muslim Commercial Bank Ltd [2000] 1 Lloyd's Rep. 275* at 282.

80 See above *Reasonable Interpretation as to Ambiguous Instructions*.

81 *Soproma SpA v Marine & Animal By-Products Corp [1966] 1 Lloyd's Rep. 367* at 390 per McNair J.

82 Sub-art.14(g) UCP 600; sub-art.13(a) UCP 500.

83 *British Imex Industries Ltd v Midland Bank Ltd [1957] 2 Lloyd's Rep. 591* . *National Bank of Egypt v Hannevig's Bank Ltd (1919) 1 Lloyd's Rep. 69* .

84 Article 27 UCP 600 is equivalent to art.32 UCP 500.

85 *Bankers Trust Co v State Bank of India [1991] 2 Lloyd's Rep. 443* .

86 *Collected Opinions 1996–2005, R.209*; *Collected Opinions 1996–2005, R.408*.

87 ISBP 2013, A23; ISBP 2007, para.22.

88 *Union Bank of Canada v Cole (1877) 47 L.J.C.P. 100*; *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] Q.B. 711* .

89 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] Q.B. 711* at 719 per Parker J.

90 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] Q.B. 711* at 717.

91 *Berger, The Creeping Codification of the New Lex Mercatoria, 2nd edn (2010)*.

92 sub-art.14(h) of UCP 600; sub-art.13(c) of UCP 500.

93 *Moralice (London) Ltd v E D and F Man [1954] 2 Lloyd's Rep. 526* .

94 *Soproma SpA v Marine and Animal By Products Corp [1966] 1 Lloyd's Rep. 367* .

95 Sub-art.30(a) UCP 600; sub-art.39(a) UCP 500.

96 As it is one of the main factors to revise UCP 600: Introduction UCP 600; see Collyer, "A look back at the UCP revision" [2006] 10 DCInsight at 22.

97 *Malek and Quest, Jack: Documentary Credits, 4th edn (2009), para.850*.

98 Kennedy, "Form and Substance in Private Law Adjudication" [1976] 89 Harvard Law Review 1685, 1688–1689.

99 ISBP 2013 para.P4.

100 ISBP 2013 paras L1, L4.

101 ISBP 2013 para.C3.

102 *Opinions 2009–2011, R.728*.

103 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd [1983] Q.B. 711* .

104 *Fortis Bank SA/NV Stemcor UK Ltd v Indian Overseas Bank [2011] EWCA (Civ) 58 at [29]; [2011] 1 C.L.C. 276* at 287; see below under the heading *Non-documentary conditions are effective*.

105 *Homburg Houtimport BV v Agorsin Private Ltd (The Starsin) [2004] 1 A.C. 715* at [11].

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106 UCP 600 sub-art.14(h) states: "If a credit contains a condition without stipulating the document to indicate compliance with the condition, banks will deem such condition as not stated and will disregard it".

107 For the function of unchangeable trade usage as being law: *Hwaidi and Ferris, "The Existence of International Unchangeable and Changeable Trade Usage" (SLS Conference, Edinburgh, September 2013)* at http://archive.legalscholars.ac.uk/edinburgh/restricted/paper.cfm?id=107 [Accessed November 18, 2013].

108 *Benjamin's Sale of Goods, 8th edn (2010), para.23.114*.

109 *Korea Exchange Bank v Standard Chartered Bank [2006] 1 S.L.R. 565* at 577.

110 *Kumagai-Zenecon Construction Ltd (in Liq) v Arab Bank plc [1997] 3 S.L.R. 770*.

111 Sub-art.14(h) UCP 600.

112 ICC Position Paper No.3 (1994).

113 *Dan Taylor, The Complete UCP (ICC, 2008), 27*.

114 There is a stronger view in that the UCP have never been "a legal regime automatically applicable": see Debattista, "The new UCP 600—changes to the tender of the seller's shipping documents under letters of credit" [2007] J.B.L 329 at 332-333.

115 *Fortis Bank SA/NV Stemcor UK Ltd v Indian Overseas Bank [2011] EWCA (Civ) 58 at [29]; [2011] 1 C.L.C. 276* at 287.

116 *Dan Taylor, The Complete UCP (ICC, 2008), 27*.

117 Bacon, "Who speaks for the exporter" [2006] 9 DCInsight.

118 *Antaios Compania Naviera SA v Salen Rederierna AB [1985] A.C. 191* at 201 per Lord Diplock; *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All E.R. 98* at 114 per Lord Hoffmann; see Hwaidi and Harris, "The Mechanics of Refusal in Documentary Letter of Credits: An Analysis of the Procedures Introduced By Article 16 UCP 600" [2013] 4 J.I.B.L.R. 146–155, 154.

119 *Fortis Bank SA/NV Stemcor UK Ltd v Indian Overseas Bank [2011] EWCA (Civ) 58 at [29]; [2011] 1 C.L.C. 276* at 287.

120 To avoid the application of sub-art.14(e) UCP 600.

121 *Moralice (London) Ltd v. E D and F Man [1954] 2 Lloyd's Rep. 526* .

122 *Soproma SpA v Marine and Animal By Products Corp [1966] 1 Lloyd's Rep. 367* .

123 For the concept of acclamation, see *Hwaidi and Ferris, "The Existence of International Unchangeable and Changeable Trade Usage" (SLS Conference, Edinburgh, September 2013)* at http://archive.legalscholars.ac.uk/edinburgh/restricted/paper.cfm?id=107 [Accessed November 18, 2013].

124 Article 30 UCP 600.

125 For expert evidence in banking law, see Elinger, "Expert Evidence in Banking Law" [2008] 11 J.I.B.L.R. 578.

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