NOTTINGHAM TRENT UNIVERSITY

AN EVALUATION OF THE EFFICACY OF UCP 600 WITHIN ENGLISH AND JORDANIAN LEGAL ORDERS AND JORDANIAN COMMERCIAL PRACTICES

By

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ABSTRACT

The thesis develops and seeks to validate a conceptual model for the evaluation of the transnational effectiveness of terms regulating documentary credits. The standpoint of that evaluation is the commonly accepted median compromise of the contested needs of the parties who typically transact documentary credits. The model is formulated and validated by both a doctrinal study of the Uniform Customs and Practice for Documentary Credits (UCP) 600, and its previous iterations, and a functional comparative doctrinal study between English and Jordanian laws supplemented by an empirical study of Jordanian commercial practices.

It is postulated that the functional elements of the substance of documentary credits are the embedded usages of irrevocability, conformity and autonomy, and that it is only by the optimal application of these usages that the sociological value of documentary credits can be achieved and the objective median compromise of the contested needs of the transacting parties arrived at are rationally deducted. It is contended, by adapting social systems theory, that what is termed in this thesis as embedded trade usages of transnational commercial transactions constitute socially diffuse law having a normative force to the extent of displacing even some categories of mandatory law arising under autopoietic Municipal legal orders. The socio-legal nature of the embedded usages of both conformity and autonomy is critically analysed in the conceptual model in order to evaluate the legal positions, and the legal communication, of UCP 600 terms under the English and Jordanian legal orders and Jordanian commercial practices.

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CHAPTER 1: AIM, OBJECTIVES, CONCEPTUAL MODEL AND METHODOLOGY

THE AIM AND OBJECTIVES

1.1.1 The aim of this thesis is to develop a conceptual model for the evaluation of the transnational 'effectiveness' of terms regulating documentary letters of credit. As it would be wholly impractical to address transnational effectiveness by applying the conceptual model to all legal orders, two particular legal orders have been chosen (for reasons subsequently explained): namely, that of the English legal order and that of the Jordanian legal order as supplemented by Jordanian commercial practice.

1.1.2 The task is not, therefore, to discern whether the terms regulating documentary credits are right or wrong, but it is rather to discern whether such terms are, and can be, commonly applied with some means of functional coherence amongst the relevant actors. The transaction of documentary credits is an assurance of payment by the issuing bank to a particular beneficiary on the condition of presenting documents that appear to conform to the terms of the credit. It is one of the most common methods of payment in international supply contracts,[1] and it is inherently transnational since it facilitates a payment between sellers and buyers who are domiciled in different jurisdictions through banks which are also based in different countries. Any purportedly effective terms regulating documentary credits must, therefore, take effect transnationally, and as such their functional coherence inevitably involves the capability of them being both applied by the transactional actors across national borders and generating similar legal positions in the communication processes of all the various legal systems involved in the relevant transaction.

[1] Documentary credits were described as the "life blood of commerce" per Donaldson LJ in *Intraco Ltd v Notis Shipping Corp of Liberia (The Bhoja Trader)* [1981] 2 Lloyd's Rep 256; [1981] Com. Loyd's Rep 184.

1.1.3 The function of efficacy is the most essential element in the purpose of "Uniform Customs and Practice for Documentary Credits (UCP)": the latest revision is UCP 600, promulgated by the International Chamber of Commerce "ICC" in Paris governing most documentary credit transactions. [2] This function was expressed by Wilbert Ward, the original instigator of the UCP, in the introduction of the original UCP in 1922 that the adoption of uniform regulation on documentary credits by the ICC will *"obtain international uniformity ... and eliminate many difficulties between bankers and business men".* [3] The UCP were first introduced in parallel with the establishment of the ICC in the spirit of uniformity: the main aim of the ICC being to alleviate the confusion caused by national laws on commercial transactions across borders. To achieve such an aim apropos documentary credit transactions, the ICC promulgated a set of regulations (UCP) on documentary credits to establish uniformity in practice, *"so that practitioners would not have to cope with a plethora of often conflicting national regulations".*[4] Being transnationally effective is, thus, the key for successful terms regulating documentary credits.

1.1.4 The development of the proposed conceptual model aspires to give effect to various research objectives, namely those of:

1- Enhancing the understanding of the functional nature of documentary credits and the role of trade usages in transnational commercial law;

2- Facilitating how legal orders and quasi-legal orders can regulate documentary credits in an effective way;

3- Assessing the efficacy of UCP 600 within the functional comparative study between the English legal order and the Jordanian legal order and Jordanian commercial practices, and in doing so providing:

[2] ICC, *Uniform Customs and Practice for Documentary Credits "UCP 600",* (ICC No. 600, 2007).
[3] Taylor, *The Complete UCP*, (1ST edn, ICC 2008), 27.
[4] UCP 600, Foreword.

a) Doctrinal analyses as to the current and potential legal positions in relation to documentary credits under, respectively, the English legal order and the Jordanian legal order;

b) A hybrid of doctrinal and empirical analyses in order to ascertain the above referred to position of the Jordanian legal order;

c) A functional comparative evaluation of the similarities and differences between the above legal orders and the application of UCP 600 rules within these legal orders particularly in the light of the textual changes from the predecessor provisions of UCP 500;

d) An evaluation of the contested needs of the parties to documentary credit transactions, namely the applicants, the beneficiaries and the bankers.

CONCEPTUAL MODEL

1.2.1 A norm might be defined as an observed action or declared belief that is informally understood and socially expected by most members of a community. A norm might also denote a normative proposition having a normative force that is recognised either formally by the state (e.g. a law prohibiting money laundering) or informally by the members of the community (e.g. expelling the deviant member from the community).[5] Laws have impacts on norms, and norms have impacts on laws. Both are manifested through communications. Social norms are either accepted or rejected by the legal order with which the social norms communicate. Once accepted the social norm interacts with the internal legal doctrines of the communicated legal order, and such interaction generates a new legal doctrine under the respective legal order.[6] Over time the interplay between law and norms is dynamic and can be unstable.

1.2.2 In transnational law one cannot assume the community governed by a norm or a law is the same (some may be governed by the law, some by the norm and some by both). To some extent the legal and normative orders that govern transnational transactions are voluntary. This is for three reasons. Firstly, the parties are not necessarily subject to the same legal order when it comes to issues of both substantive law and enforcement of any legal decision upon their person or assets. Secondly, the dominant free market ideology of trade (a naturally market based activity)[7] has allowed choice of contractual terms and governing law to be made by parties – freedom of contract makes the laws submitted to (substantive and procedural) matters of voluntary agreement. Thirdly, trading relations are partially voluntary (freedom of contract in the sense of freedom to contract with whom one

[5] Lapinski and Rimal, *An explication of social norms*. [2005] Communication Theory, 15(2), 127–147.
[6] Luhmann, *Law as a Social System*, (1st edn, OUP 2004), translated by Klaus Ziegert.
[7] Hayek, *Individualism and Economic Order* (University of Chicago Press, 1948) vii, 271, [1].

wishes to contract with): obviously the possible counterparties are limited, but they are likely to be numerous.

1.2.3 In a situation where force may or may not be effective (when legal enforcement of decisions may or may not be effective) the reputation of both parties and legal orders becomes important. The reputation of the party is about behaving in accordance with the norms of the group;[8] the reputation of the legal order is for fair and predictable rulings. In transnational law the *reputation of legal systems* is important in a way it is not in law within a single jurisdiction (for obvious reasons – there is no place for choice of law in a single jurisdiction). Law needs to be chosen, and the law that will be chosen is the law that enables the parties to realise their ends (it meets their needs). So here alignment with the norms of the parties is a powerful force because it will guide the choices of the parties. The other factor likely to guide that choice is how well the law performs (it is clear, predictable, perceived as fair, impartial between nationals and foreigners and effective remedially). Therefore, evaluation should make effectiveness central because the perceived effectiveness of the law will determine its reputation which will determine its use.

1.2.4 In addressing the contested needs of the parties to documentary credits, it must be borne in mind that the perspective of one of the parties in documentary credits (i.e. the buyer as an applicant to the credit, the seller as a beneficiary in the credit and the bank as a facilitator of payment) as to the effectiveness of terms regulating documentary credits would tend to favour its own interests and to treat its own interests as the predominant ones. To balance the contested interests of the parties on the basis of a philosophical value that has not been broadly tested, would run the risk of being actually rejected by the parties. The produced communications (i.e. ideas generated from the interaction of ideas) that are commonly applied by the

[8] In psychology an individual who keeps disobeying group norms runs the risk of being institutionally deviant: Hackman, *Group influences on individuals in organizations*, in Dunnette and Hough (Eds.), *Handbook of industrial and organizational psychology* (1992 Vol. 3) Palo Alto: Consulting Psychologists Press, 234-245.

parties in the process of the competition of parties' interests in the free market,[9] can be regarded as the compromise of what had in reality already been determined by the parties as their own interest.

1.2.5 Social communications are not supported by a decisive mechanism (e.g. decisions provided by courts or arbitrators) which might determine them as normative expectations.[10] It is only the communications that are manifested by actions and commonly applied by actors that might have normative force.[11] Accordingly it is the usually accepted compromise that must be regarded as having normative force. It is on the basis of that compromise that the perspective of the efficacy of transnational terms regulating documentary credits is based, since it is the tested perspective as it is commonly accepted. Such a perspective is, thus close to the reality[12] of the transaction. It is the standpoint of the bargaining role of the transaction of documentary credits. Thus according to John Commons[13] a simple bargaining unit such as a sale of commodity, according to many economic theorists, consists of four competing parties as follows:

"B $100 B1 $ 90
S $110 S1 $120

The competing buyers offer to pay $100 and $90; the competing sellers offer to accept $110 and $120. The final price will lie between $100 and $110".[14]

[9] Hayek, *Individualism and Economic Order* (1948) vii, 271, [1] University of Chicago Press.
[10] Teubner, *Law As An Autopoietic System*, (1edn 1993, Blackwell Publishers) chas 2 & 3.
[11] Jacobson, Mortensen and Cialdini, *Bodies obliged and unbound: differentiated response tendencies for injunctive and descriptive social norms,* [2011] Journal of personality and social psychology, 100(3) 433-48.
[12] Rosenberg, 'Scientific Values and the Values of Science' in Carrier, Howard, Kourany (eds) *The Challenge of the Social and the Pressure of Practice: Science and Values Revisited,* (2008) University of Pittsburgh: he argues that truth is the goal of science and realism (sociological term) as the appropriate attitude towards successful scientific theories.
[13] Commons*, The Problems of Correlating Law, Economics and Ethics* [1932] 8 Wisconsin Law Review 3.
[14] Commons*, The Problems of Correlating Law, Economics and Ethics* [1932] 8 Wisconsin Law Review 3, 5.

1.2.6 So the prevailing price is the median compromise between the parties. Commons suggested that the bargaining transaction is the "*behaviourist negotiations of persuasion or coercion between persons deemed to be free and equal"*[15] which terminates a transfer of a constructive control of commodity and money. The transfer is not actual (or physical transfer) but the expectation that future physical transfer will be protected changing the position of the parties, and such a normative expectation is based on the usages of traders which reflect traders usual intention. Commons argued that Municipal laws are in alignment to the custom of merchants in order to reflect the intention of traders, and thus presumptions such as a trader takes goods in exchange of responsibility to pay are made and enforced by the state; hence usages become a law enforced by the state. Here there are two relevant issues for the conceptual model in this thesis. Firstly, the bargaining role of the transaction is the standpoint of the effectiveness of terms governing documentary credits. This leads to the result that the underlying sociological value and the collective function of documentary credits is the median compromise between the parties who typically transact documentary credits. Secondly, transnational terms and Municipal legal orders must be responsive to documentary credit usages in regulating documentary credits in order to reflect the intention of parties. The latter forms part of the means of responsiveness in the conceptual model as elucidated below.

1.2.7 The inquiry is to determine, or to have access to, how the median compromise of the contested interests of parties to documentary credit transactions would be accepted by the parties and other actors as that median compromise. The empirical approach would be to analyse the parties' practices in documentary credits, as practices manifest a selection of communications that are acted on and are effectively validated by their tangible application by the parties. Such an empirical approach is rendered impractical as the scope of the application of documentary

[15] Commons*, The Problems of Correlating Law, Economics and Ethics* [1932] 8 Wisconsin Law Review 3, 6.

credit practices varies from practices that have been applied just between the contracting parties, to those that are commonly applied between all traders at a local level and eventually to those that are commonly applied between all traders at an international level in the context of a wide range of underlying transactions. The range of practices and trades is so diverse as to make the selection of representative data subjects an inevitably subjective exercise on the part of the researcher.

1.2.8 For that reason, the median compromise has been primarily established by the exercise of deductive reasoning[16] from the contention in chapter 2 that there are usages embedded to a particular transaction. So in addition that such practices are well-observable and perceived by traders in the relevant context as being binding and thus usages, they are embedded in terms that the absence of which threatens the existence of the transaction. The embedded usages of "irrevocability", "autonomy" and "conformity" constitute the compromise of parties' contested interests in documentary credits. As the transaction of documentary credits is transnational, its embedded usages ought to be transnational and their existence should not be subject to a local context. The capability of the documentary credit instrument to reconcile the differences in the needs of international traders has led to its successful evolution as being the life blood of transnational commerce.[17] It is by the "collective function" of embedded trade usages of documentary credits that the accepted compromise is identified and by the functions of each embedded usage the communicative interests of the parties are determined, as evidenced primarily by the literature review and secondarily by the empirical findings from elite interviews.

[16] Fisher, *Critical Thinking,* (2011) Cambridge University Press.
[17] *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] Q.B. 146, 155 per Kerr LJ.

Substance Of Documentary Credits

1.2.9 The first and most essential step that a regulator of documentary credits (e.g. UCP community) must undertake is to understand the functional nature of documentary credits, and that is the compromise as to the contested needs of the parties which is made concrete by the embedded trade usages and their functions.

1.2.10 Where buyers and sellers enter into an international supply contract, sellers will often require a guarantee of payment prior to the shipment of the goods to avoid exclusive reliance on the financial covenant of the other contracting party. It is, however, for the security of buyers to hold payment until they receive the required goods or unless they are confident that the required goods are dispatched in a way that the seller's right in the goods are effectively transferred to the buyer. In addition, buyers in general wish to postpone their duty of making a payment in order to boost their liquidity. Sellers, however, wish to obtain payment immediately or at least to be assured that they are guaranteed to be paid in a determinable time prior to dispatching the goods. All the participating bankers responded to the question regarding the reasons that draw traders to deal with documentary credits by stating that the lack of trust between exporters and importers leads traders to use documentary credits as a method that provides security for both exporters and importers. Muhammad Burjaq stated that *"documentary credits are meant to minimise the risk of both the seller's evasion from delivery and the buyer's evasion from payment"*[18] and Nart Lambaz emphasised that *"first time sellers prefer to use documentary credits. Big companies prefer documentary credits with traders in developing countries. A documentary credit can also be a financial tool".*[19] Accordingly, the instrument of a documentary credit was created by the practice of

[18] Annex I, para 6.
[19] Annex I, para 6.

bankers and traders across borders as a response to the lack of trust between exporters and importers.

1.2.11 Pursuant to the embedded usage of irrevocability, a documentary credit provides the seller (beneficiary of the credit) with a guarantee of payment by a trusted third party, which is usually a bank, prior to the shipment of the goods. [20] The seller is assured that once the bank issues a documentary credit in his favour the bank is not entitled to revoke the duty to pay the credit, [21] and as such once the credit is issued the seller will be confident to start the process of manufacturing the goods, or buying the goods from the ultimate supplier, in order to export them to the buyer. The participating traders stated in the empirical study that a documentary credit is a kind of a guarantee for their rights. Jamal Abushamat summarised this view, stating *"as sellers we will be assured that the payment will be made before the arrival of the goods".*[22] The irrevocability usage, thus, serves the accepted need of assurance of payment prior to the shipment of goods.

1.2.12 According to the embedded usage of conformity sellers are not entitled to receive payment unless and until they present the documents that are required by the credit. Since buyers in the modern age of export and import do not own or control ships it is essential for them to receive documents evidencing the delivery requirements in the credit prior to the payment.[23] Buyers are entitled to receive documents that are in compliance with the required terms of the credit. Traditionally buyers use

[20] *United City Merchants (Investments) Ltd v Royal Bank of Canada*[1983] 1 AC 168, 183 per Lord Diplock where his Lordship clearly stated that documentary credits are methods of payment that are based on the assurance of the payment to the seller.
[21] "Regulations Affecting Export Commercial Credits", New York Bankers Commercial Credit Conference (1920); Article 6 UCP 500; Articles 2, 7, 8 UCP 600; English law: *Hamzeh Malas Sons v British Imex Industries Ltd* [1958] 2 Q.B. 127, 127 per Jenkins LJ; USA: *Foglino & Co v Webster*, 216 N.Y.S. 225 (1926); *West Virginia Housing Dev Fund v Sorka* 415 F Sunn1107 (1976); *cf*; Sarna, *Letters of Credit The Law and Current Practice*, (3ed, Carswell 1992) para 1.8.1; UCC, S. 2 (325) (3); s. 5 (106) (a) of the revised UCC now states that *"a letter of credit is revocable only if provides so"*; Germany: An Oelofse, *The Law of Documentary Letters of Credit in Comparative Perspective,* (1st edn, Interlegal 1997), 30; Jordan: Court of Distinction (Civil) *152/1975* Adalah Programme.
[22] Annex I, para 7.
[23] Chapter 2, para 2.2.20

documentary credits for C.I.F contracts and therefore, in most cases, they require documentary proof of the following: (i) verification of the purchased goods; (ii) the shipment of the goods; and (iii) the insurance of the goods.[24]

1.2.13 Although the function of the usage of conformity is to serve the accepted need of buyers for assurance of shipment as to the required goods, there are three accepted parties' needs that influence the connotation of conformity. The first is speed, as buyers require receipt of that documentary proof within a period of reasonable promptness after the bank's determination of conformity.[25] Also sellers want to be paid as soon as they present the required conforming documents.[26] The second emanates from the sellers' need of assurance of payment and that is the need of sellers for a manageable presentation of documents, so the presentation must be manageable by a reasonable seller and responsible actors issuing documents in connection with international supply contracts.[27] The third emanates from the need of banks for assurance of payment and that necessitates banks being able to undertake a manageable examination of documents, so banks will be protected from either a claim by the buyer or the seller.[28] These three needs make conformity an elastic concept having various meanings, some of which are close to the need of buyers for documentary assurance, whereas others travel from this need in order to fulfil the needs of manageable presentation and examination. The elastic concept of conformity is fully analysed and evaluated in chapters 3 and 4.

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[24] UCP 1974, Introduction; it is clearly noted from all the UCP revisions since 1933 that the documents that have commonly been required by buyers are invoices, transport documents and insurance documents. For the UCP revisions: Taylor, *The Complete UCP*, (1st edn, ICC 2008), 27.

[25] Buyers in international trade under English law are entitled to reject the goods if they are not shipped at the stipulated time: *Bowes v Shand* (1877) 2 App.Cas.455, *cf*,
Bowes v Chalyer (1923) 32 C.L.R. 159; Bridge and others (eds), *Benjamin's Sale of Goods* (8th edn, Thompson 2010), para 18.310.

[26] Under English law, for instance, terms relating to time in international trade are regarded as conditions to the effect that the breach of them gives rise to a repudiatory breach: *Bunge Corporation v Tradax Esport SA* [1980] 1 Lloyd's Rep 1 HL.

[27] The introduction of ISBP and many changes in UCP 600 are meant to serve the need of sellers for manageable presentation and to standardise the decisions of banks as to the conformity of documents: UCP 600, Foreword.

[28] Standardisation the banking decisions as to the conformity of documents would eliminate difficulties between banks and traders: chapter 2, para 2.3.1.

1.2.14 The autonomy usage protects the need of sellers for assurance of payment by asserting that the bank's duty to make payment should not be subject to any disputes arising between the seller and the buyer, so the only condition that might restrain the payment is the default of sellers in the presentation of documents as required in the credit.[29] This in turn assures banks that the instrument of a documentary credit is secure and easy to facilitate,[30] because banks are only concerned to examine whether the appearance of the presented documents fulfils what is required by the credit. Accordingly, the autonomy usage makes the accepted need of sellers and banks for assurance of payment more realisable.

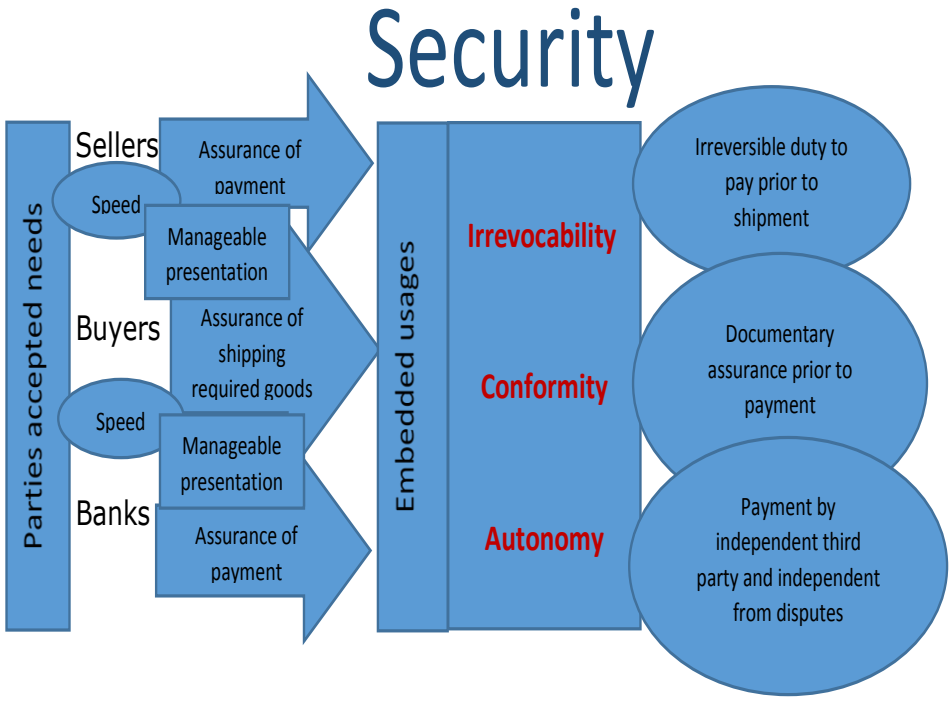
1.2.15 The fact that the embedded usages of irrevocability, conformity and autonomy have been commonly applied with some means of functional coherence by parties to documentary credits across international borders and by actors such as legal orders (e.g. English and Jordanian laws) and quasi-legal orders (e.g. UCP) has made them usages that have generated normative expectations of binding repetition. These usages, in turn, make concrete the median compromise of the parties' contested needs, and the rejection of one of the pillars of that median compromise would threaten the existence of any alternative compromise of those contested needs.

1.2.16 Accordingly, the sociological value underlying documentary credits is the critical balancing of the distinct archetypal security needs of each of the four groups of contracting parties who typically transact documentary credits (i.e. issuing bank, confirming bank applicants and beneficiaries). It is a teleological value as it is the cause and the function of the documentary credits' pillars (i.e. irrevocability,

[29] *United City Merchants (Investments) Ltd v Royal Bank of Canada*[1983] 1 AC 168, 183 per Lord Diplock where his Lordship clearly stated that documentary credits are methods of payment that are based on the assurance of the payment to the seller.
[30] Hassan, Lai and Yu, *Market Disciple of Canadian Banks' Letters of Credit Activities: An Empirical Examination,* [2002] The Service Industries Journal, (22) Oct 187-208.

conformity and autonomy).[31] Yet, the value underlying documentary credits, the pillars of documentary credits serving such value and the accepted needs of the parties underlying the pillars in addition to the functions of the pillars constitute the substance of documentary credits. The diagram below illustrates the substance of documentary credits.

Diagram 1: Substance of Documentary Credits



[31] For teleology: Kant, *Critique of Judgement*, translated by Nicolas Walker 1956 (OUP 2007).

Means: Responsiveness, Certainty, Flexibility, Communication And Clarity

1.2.17 For effective terms governing documentary credits the UCP community must appreciate and reflect the substance of documentary credits, to the extent that the embedded trade usages must prevail over other practices or norms in documentary credits. Otherwise parties, and even actors such as Municipal legal orders, of documentary credits would reject rules that do not reflect their compromised interests. But how can the UCP, or any terms intended to regulate documentary credits, convey the substance of documentary credits in an effective way? To be functionally determinable, the substance must be formed through means or tools reflecting the functions of the substance. It is proposed that responsiveness, certainty, flexibility, communication and clarity are the tools or means that are capable of reflecting the functions of the embedded trade usages and thus the compromised needs of the parties.

1.2.18 The UCP community must firstly utilise the tool of responsiveness as to documentary credit practices and the common fundamental doctrines of Municipal legal orders, in order to determine the subsequent suitable tools. In most cases certainty is the suitable means that addresses the needs of the parties. But given both the complexity of the broadness of various distinctive matrices of facts and that the UCP operate within different Municipal legal orders - so their application depends not only on the acceptance by parties but also by legal orders - it is impossible to achieve certainty for all situations. So if there are common prevailing mandatory doctrines under legal orders confining the scope of a common practice in documentary credits, then flexibility is the suitable means allowing the intended rule to be adapted rather than being rejected by legal orders. However, certainty and flexibility might be

combined in one rule, so each operates within its limits. The fourth tool is communication which can be utilised where there is a need to rectify mal practices or misunderstanding as to the sociological value of documentary credits and the accepted needs of the parties. The fifth, and most important, is the tool of clarity which must be utilised with all other tools. Each tool is explained below and the interaction between the tools is illustrated in diagram 2.

1.2.19 **Responsiveness.** The UCP 600 and ICC interpretative aids must be responsive to both the practices of documentary credit transactions and common fundamental doctrines of Municipal legal orders. In respect of responsiveness to common practices the UCP terms must reflect existing documentary credit trade usage that is categorised in this research as embedded usage (i.e. irrevocability, autonomy and conformity) because it is a socially diffuse law that has a transnational normative force amongst documentary credit parties, actors and legal orders.[32] Thus a UCP term that is repugnant to such usage would not be effective. Still, the UCP need to reflect the practices of documentary credit parties, since the accepted common practices are evidence of the constructive intention of the parties. According to Commons conformity of law, whether autopoietic Municipal legal orders or transnational self-regulatory rules, to mercantile usages is part of the bargaining transaction of the unity of activity (i.e. documentary credit) that is subject to disputes before courts or boards.[33]

1.2.20 It follows a UCP term envisaging a new practice must be revised if it is not accepted and adopted by parties. In the context of conformity, the UCP need to reflect the common practices adopted by the usual actors, not merely the parties, including the performance of transactions underpinning documentary credits, such as carriers and insurers, in order to facilitate a manageable presentation for sellers. In respect of

[32] Chapter 2, par 2.2.23.
[33] Commons*, The Problems of Correlating Law, Economics and Ethics* [1932] 8 Wisconsin Law Review 3; above 1.2.6.

responsiveness to legal orders, since a UCP revision is a body of self-regulatory rules operating across and within different legal orders, the effectiveness of UCP terms is contingent on a successful responsiveness to the mandatory rules and fundamental doctrines of Municipal legal orders (e.g. freedom to contract, *pucta sant servanda, ex turpi causa,* public policy and public morality). Unless the UCP are sufficiently responsive, a UCP term might be "coded as illegal" (i.e. these Luhmann terms are not necessarily related to criminal law, they merely mean that a social norm or concept is rejected when the binary code of legal/illegal of the system of law codes the norm as illegal so it is rejected from being part of the legal order)[34] and thus be unenforceable under the communications of particular Municipal legal orders.

1.2.21 **Certainty**. This means connotes the knowledge of the parties in advance as to the regulatory position (UCP 600 and the ICC interpretative aids) of documentary credits issues,[35] and the knowledge as to either the acceptance or the rejection of such a position by the applicable Municipal legal order. Therefore terms governing documentary credits must be coherent in achieving uniformity in interpretations. In order to assure sellers and banks as to the enforcement of their right to payment and reimbursement respectively there must be guidance providing rules as to the determination of the status of conformity, as it is an elastic concept, for common presentations, so that sellers and banks know in advance their position. The effectiveness of the means of certainty depends on the utilisation of the means of responsiveness and clarity.

1.2.22 There are other non-textual means – which this research will not deal with – that might lead to diverse inconsistent interpretations. One factor is that meaning may be lost in translation. Another factor is the epistemological position of bankers (i.e. the perspective of a banker as to the interpretation of issues is dependent on how

[34] Luhmann, *Law as a Social System*, (1st edn, OUP 2004), translated by Klaus Ziegert, 17-21.
[35] Kennedy, *Form and Substance in Private Law Adjudication*, [1976] 89 Harvard Law Review 1685, 1687.

that banker views the world and individual bankers might adopt commercial approaches, literal rigid approaches or legal protective approaches). For instance, the major concern for Arab-Bank is the compliance with Jordanian law and for that reason, unlike any other bank in Jordan, it determines the conformity of a presented bill of exchange according to the Jordanian Commercial Code.[36] A further factor is the lack of appropriate training.[37] Experts who run training sessions may have different interpretations, and this gives rise to the demand for experts who are admitted by the ICC in order to foster unified interpretations.

1.2.23 **Flexibility.** No law, self-regulatory rules or standard terms are able to expressly capture all potential situations that might be generated in the context of documentary credits. Indeed any transnational norm or trade usage is not absolute as it is subject to mandatory rules of Municipal legal orders, and thus it is not wise to envision transnational rules as being absolute. For instance, the effectiveness of the embedded usage of autonomy is subject to exceptions that vary across legal orders.[38] Here an attempt by the UCP to shield the autonomy principle from legal orders' exceptions would be futile and might, in a worst case scenario, lead to a complete rejection of the application of the UCP. Given the fact that each legal order has its own interconnected doctrines it is not generally the task of the UCP to fashion or even to categorise legal concepts. For instance, it is notable that the UCP do not seek to categorise the documentary credit relationship between the beneficiary and the bank. Any attempt to introduce such categorisation must be based on the policy of the adaptability of the UCP terms into various legal orders. Furthermore, flexibility is an essential tool to reflect the need of banks for manageable examination to the effect that banks must be permitted to exercise a marginal discretion in the determination of conformity as elucidated in chapter three.[39]

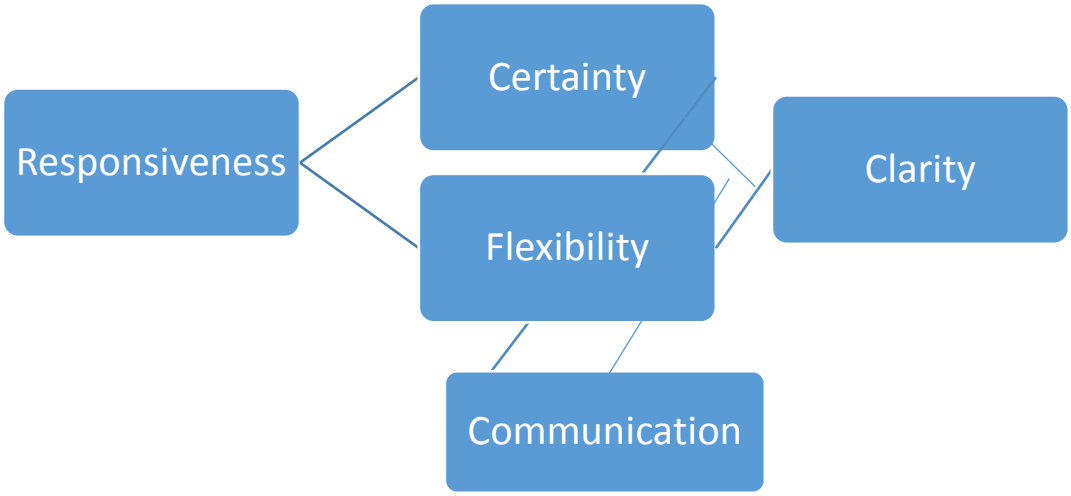
[36] Annex I, par 31.
[37] Annex I, par 26.
[38] Chapter 5 for fraud and illegality exceptions.
[39] Chapter 3, para 3.2.4.

1.2.24 **Communication**. Given the soft power of acclamation (i.e. acceptance, adoption and encouragement of adoption) by social actors, the UCP can influence parties and actors to documentary credits, and free actors such as legal orders, towards uniform outcomes or effects that are consistent with the sociological value of documentary credits. This is particularly the case where the lack of common understandings in relation to a documentary credit issue is affecting the certainty of the accepted needs of the parties. Therefore, it is sometimes necessary for the UCP community to formulate terms that are designed to rectify current misunderstandings, or some particular practices, that are considered by the UCP community to be contrary to the intended sociological value of documentary credits. This is not to challenge any rule of conduct (i.e. a rule that is commonly accepted by citizens),[40] as the UCP and their interpretative aids must be responsive to common practices. It is only where the practices are not common that they need to be challenged and shaped by the UCP and its interpretative aids. Similarly the UCP and their interpretative aids should not challenge perceived overriding mandatory law under Municipal legal orders,[41] otherwise the UCP and their interpretative aids will open themselves up to rejection by legal orders (i.e. if they attempt to override fundamental concepts considered to create overriding mandatory norms such as respect for party autonomy over the agreement they make).[42] To functionalise the tool of communication in a determinative way the tools of responsiveness and clarity must be fully utilised in the first place by means of effective guidance over the use of the transnational norms that the UCP are seeking to create.

[40] Hartian concept that there is a primary rule of conduct so rules are accepted by citizens: Hart, *The Concept of Law*, (1ST edn, OUP 1972) in his Postscript.
[41] Carter, *The Role of Public Policy in English Private International Law*, [1993] ICLQ, 42, 1 Jan 1-10; *Kuwait Airways Corp v Iraqi Airways Co* (No.6) [2002] 2 A.C. 883.
[42] For example: sub-article 14 (h) UCP 600 directing banks to ignore a non-documentary term would not be enforceable under English and Jordanian laws; below chapter 4, para 4.3.14.

1.2.25 **Clarity.** The language of UCP 600 and ICC interpretive aids must be imbued with autonomous self-contained meaning and be precise, so that both the semantic expression and the ordinary, or the technical, meaning of the words of a UCP 600 term should convey an obvious exclusive interpretation when they are read together with the guidance of ISBP and ICC Opinions or Papers. Such clarity demands comprehensibility, in that UCP 600 terms need to be understandable to the audience (i.e. reasonable bankers and traders). This might be achieved by the use of ordinary words, the implementation of a logical structure and the avoidance of undue verbosity.[43] Clarity affects all other tools and ultimately the commonality of applying the intended meanings of the UCP.

Diagram 2: Means



[43] Holland and Web, *Learning Legal Rules,* (6th edn, OUP 2006), 205-209.

PRINCIPLES AND RULES

1.2.26 It is necessary to look at how regulatory rules, UCP 600, form the concepts of irrevocability, conformity and autonomy (i.e. jurisprudential rules) in order to assess to what extent UCP 600 terms reflect the substance of documentary credits. Also there is, or must be, a relationship between the types of form and the means (e.g. standards or principles serve the means of flexibility where particular rules are more expedient for the means of certainty). Understanding different types of form enables us to evaluate how the intended outcomes of the concepts of irrevocability, conformity and autonomy need to be expressed. Moreover, such an understanding assists the research to determine the scope of conformity under the UCP and the English and the Jordanian legal orders. The understanding of the nature and categories of form is based on the work of Duncan Kennedy.[44]

1.2.27 Principles refer to the direct substantive objectives of a legal order, such as freedom to contract.[45] Rules convey the functional implementation of the objectives that requires an official to respond to a factual situation by intervening in a determinable way. Such an intervention manifests the merit of "formal realisability" (i.e. the quality of ruleness in terms of the capability to direct an official to respond to each of easily distinguishable lists of facts in certain situations by intervening in a determinative way)[46] which is, unlike principles, highly resonant in rules. Principles are in most cases general where rules are usually divided into general and particular rules. The attribute of generality in the case of rules *"kills many birds with one stone"*.[47] This, however, bears a high risk where there is an imprecision in the general

[44] Kennedy*, Form and Substance in Private Law Adjudication,* [1976] 89 Harvard Law Review 1685.
[45] Kennedy, *Form and Substance in Private Law Adjudication*, [1976] 89 Harvard Law Review 1685, 1688.
[46] Kennedy, *Form and Substance in Private Law Adjudication*, [1976] 89 Harvard Law Review 1685, 1690.
[47] Kennedy, *Form and Substance in Private Law Adjudication*, [1976] 89 Harvard Law Review 1685, 1688.

form of rule as there would be in reflecting the value of documentary credits. Rules usually emerge from principles and particular rules might emerge from general rules.

Summary Of The Conceptual Model

1.2.28 The conceptual model that is proposed in this study is based on the perspective of the sociological value of documentary credits: the critical balancing of the distinct archetypal security needs of each of the four groups of contracting parties who typically transact documentary credits (i.e. issuing banks, confirming banks, applicants and beneficiaries). Such value is made realisable and concrete by the documentary credits' embedded usages (pillars) of irrevocability, conformity and autonomy. The interactive communications between such usages and the fact that they are commonly applied as transnational norms evidence the accepted compromised needs of the parties that have triggered the embedded usages in the first place, and the functions of such usages protect the compromised needs. The sociological value, the pillars and their functions and the compromised needs as evidenced by the pillars constitute the substance of documentary credits. The UCP community must reflect the substance of documentary credits. The means to convey the substance are responsiveness, certainty, flexibility, communication and clarity. To determine the scope of the forms that intend to regulate documentary credits, the Kennedyian categories of jurisprudential rules of principles, general rules and particular rules are adopted.

THE DESIGN AND METHODS OF THE RESEARCH

1.3.1 The conceptual model in this research is applied to UCP 600 terms in the context of the English legal order and Jordanian legal order and Jordanian commercial practices. The methodology in the application of the conceptual model of this research is primarily doctrinal study (i.e. a study of legal norms from their legal sources, codes, cases, texts, commentary etc),[48] although such doctrinal study will - as regards certain aspects of particular research questions - be supplemented by an empirical study (i.e. involving elite interviewing of ministers, judges, bankers and traders in Jordan as to the use of documentary credits in Jordan, since as the key decision makers they are the relevant "elite").[49]

1.3.2 **The selected case for study.** The Jordanian Civil Code is based on Sharia law[50] and some elements of French Civil law that are consistent with Sharia principles.[51] The Jordanian Sharia law has influenced many Arabic countries such as the United Arab Emirates, Sudan and Kuwait. Jordan is the researcher's home jurisdiction where he practices law and has contacts. The Jordanian jurisdiction system is a hybrid system of Civil law and Common law. Thus, it is based on formal codes and precedents of the highest court (i.e. Court of Distinction).[52] Only the decisions of the Court of Distinction, (which is known in France and Egypt as the Court of Cassation but is referred to in this research as the Court of Distinction, since it is the correct translation from Arabic), are binding on all courts. The Court of Distinction is not an appeal court for factual disputes, but rather it is an appeal court for disputes in

[48] James, Holland and Webb, *Learning Legal Rules*, (7th edn, OUP 2010).
[49] Richards, *Elite Interviewing: Approaches and Pitfalls*, [1996] Politics, (March) 199-204.
[50] Article 1 Civil Code (1976).
[51] Jordan Laws and Rules, *Memorandum of Clarification of Civil Code,* (1977).
[52] Zoaby, *Legal Culture: The Law in our Life: Comprehensive Study of Jordanian Law in Light of The Updated Legislations and the New Practices* (1st edn, Wael 2008).

respect of the position at law.[53] However, as a matter of documentary credit's law, Jordanian law has few detailed and precise rules dealing with documentary credits, and it is – as are other Arabic laws - currently heavily reliant on a single out of date commentary text.[54] In the context of documentary credits, English common law is a hegemonic legal order that influences many legal orders including Jordanian law[55] and the UCP itself.[56] The fact that Jordanian law is a hybrid legal order enhances its ability for the adaptation of hegemonic foreign functional doctrines.[57] In the context of evaluating the effectiveness of UCP 600 - and analysing the pillars of documentary credits - under the Jordanian legal order it is necessary therefore to also conduct such a task under English common law. Hence, the selected legal orders (i.e. English and Jordanian laws) are compatible for this research.

1.3.3 The need for empirical study and formal realisability. Jordanian law lacks rules having the character of "formal realisability" (i.e. the quality of ruleness in terms of the capability to direct an official to respond to each of easily distinguishable lists of facts in certain situations by intervening in a determinative way)[58] regulating documentary credits subject, or not, to the UCP. Accordingly this research requires empirical study with judges, bankers, traders and ministers to inform the doctrinal study of how Jordanian law deals, and ought to deal, with documentary credits subject to UCP 600. The empirical analyses provide insight as to the objective needs and interests of documentary credit parties in Jordan. This of course sets the platform of how Jordanian doctrines interact with such objective needs and interests in responding to documentary credit issues. The benefit is to postulate functional

[53] Article 191 Jordanian Civil Procedures Rules (1988).
[54] The work of Professor Awad: Awad, *Documentary Credits*, (1st edn, Dar Elnahda 1985).
[55] The Court of Distinction in *Alrasheed Bank v Publisher of the House of International Books 1733/2011* Adalah Programme has referred to the work of Prof Awad, *Documentary Credits*, (1st edn, Dar Elnahda 1985) as a source and this work is influenced by English common law in many aspects.
[56] For instance: one of the key changes in UCP 600 was the promulgation of article 7 (c) which addresses the issues created by the English Court decision in *Banco Santander SA v Bayfern Ltd* [2000] 1 All E.R; Hwaidi, *The implications of Banco Santander SA v Bayfern Ltd on deferred payment under documentary credits in UCP 600*, [2011] I.B.L.J (May) 569-576.
[57] Plessis, *Comparative Law and the Study of Mixed Legal Systems*, in Reimann and Zimmermann (eds), *The Oxford Handbook of Comparative Law*, (1ST edn, OUP 2006), 489.
[58] Kennedy*, Form and Substance in Private Law Adjudication,* [1976] 89 Harvard Law Review 1685, 1686-1690.

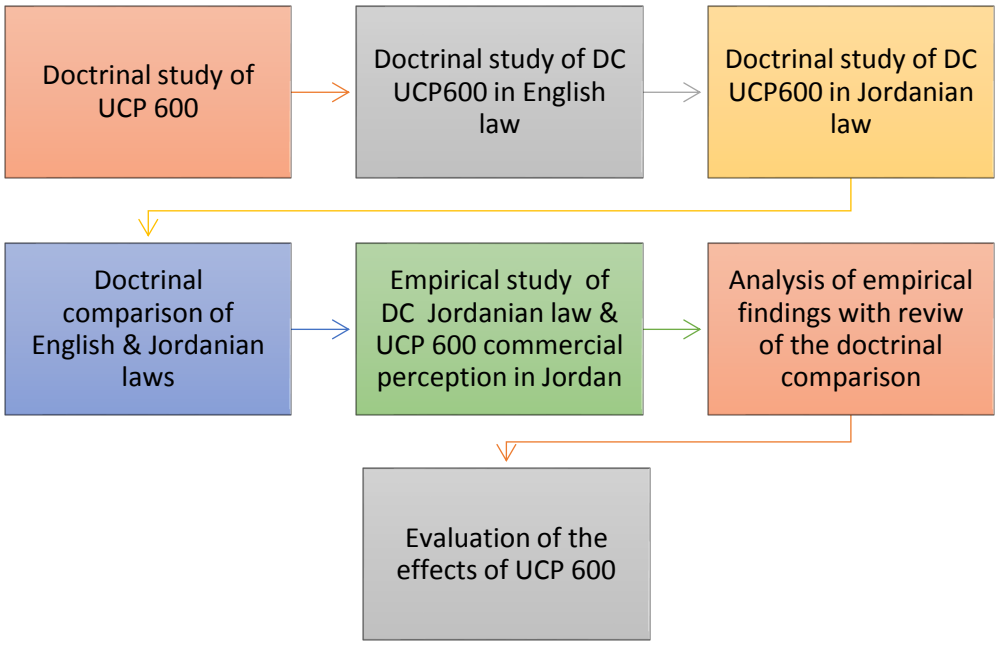
doctrines as to the legal positions under Jordanian law. Also the empirical analyses inform the conceptual model particularly in respect of the various objective needs of documentary credit parties with emphasis on the Jordanian banking community since bankers are the key players in documentary credits.

1.3.4 This is in contrast with English common law, which has both detailed and authoritative precedents regulating documentary credits subject to the UCP and offer relative certainty as to how the UCP are perceived and interpreted in the context of English commercial practices: the perception of British banks having been presented thoroughly to the ICC in the context of most iterations of the UCP[59] and the ICC Drafting Group being headed by a British banker.[60] Given the extensive geographical reach of English common law in the context of documentary credit trade practices, an empirical study of the documentary credit trade practices in the context of English law would have to be a long term project stretching over many states. It is appropriate for the empirical study to be confined to Jordan, but the approach adopted in this research of combining doctrinal legal and empirical study of documentary credit transactions could form a conceptual template for future empirical study of documentary credits, or indeed other trade practices, in connection with English law.

1.3.5 **Methodological steps of the research.** There are seven steps to the research methodology leading to the evaluation of the effectiveness of UCP 600 as illustrated in diagram 3. The first four steps were conducted by doctrinal study. The fifth step was conducted empirically. The six and seventh steps comprised the analyses of the empirical data in light of the doctrinal study followed by the evaluation. The methodological bases of those steps are explained below.

[59] Ellinger, *The Uniform Customs and Practice for Documentary Credits (UCP): their development and the current revisions*, [2007] L.M.C.L.Q. 2 (May), 152-180.
[60] UCP 600, Introduction; Gary Collyer is a worldwide documentary credit banking expert who also presents the British banks issues.

Diagram 3: Methodological Steps of the Research



Doctrinal Study

1.3.6 **General overview.** Doctrinal or black letter law is traditionally based on positivism[61] (i.e. law is an independent body of systematic rules that is studied separately from morals or other social factors) or interpetivisim[62] (i.e. law is based on normative social premises so law and morals cannot be divided). The doctrinal study of this research is a hybrid one, in that whilst in most cases positivism applies, in the some cases interpretivisim applies. This is explained below.

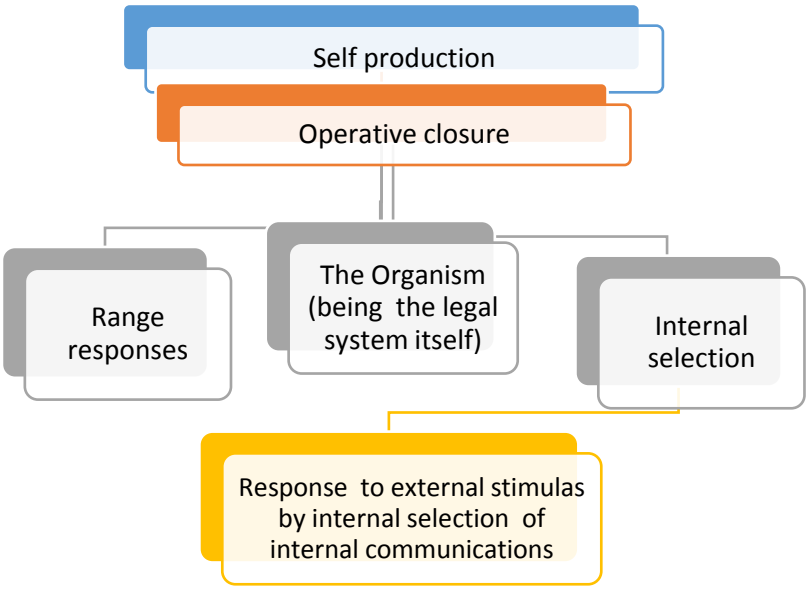
1.3.7 **Hart and Luhmann.** The research pursues by the doctrinal study Hart's descriptive jurisprudence, being a pragmatic conceptual analysis that is not premised upon any inference from legality to legitimacy.[63] However, such an approach is also normative

[61] Lead by Herbert Hart: Hart, *The Model of Rules, Positivism and The Separation of Law and Morals*, [1958] Harvard Law Review, 4; Hart, *The Concept of Law*, (1st edn, OUP 1972).
[62] Lead by Ronal Dworkin: Dworkin, *The Model of Rules*, [1967] The University of Chicago Law Review, 35,14; Dworkin, *Taking Rights Seriously*, (1977); Dworkin, *Law's Empire*, (1st edn, Universal Publications 1986).
[63] Hart, *The Concept of Law*, (1ST edn, OUP 1972) in his Postscript.

in the sense that it answers to norms of constructive theory and aims to discipline the use and structure of concepts. As it is a conceptual analysis of law, it rationalises the concept of law through the articulation of criteria as to its use.[64] The research endeavours to identify the legal positions - by conceptual analysis – that English and Jordanian courts will adopt to the use of UCP in documentary credits. The research is therefore seeking the general, not absolute, shared criteria for the application of legal concepts. In particular, the nature of legal orders in this research is seen through the lens of Luhmann's theory of law as a social system.[65] Pursuant to such a theory, law is a self-produced social system which has – as with other social systems – evolved as an autopoietic construct from being directly related to its environment so as to have its own internal limited range of responses and an internal basis for the selection of a particular response to external stimuli. The range of responses is the operation of legal norms that have been developed internally: they are the internal communications (i.e. interconnected legal doctrines or norms) of the system of law. Law responds to its environment through an internal selection of the interaction of its internal communications. Both elements constitute the operative closure of law or legal order to the effect of achieving the autonomy and the boundaries of a system of law. This is illustrated below in Diagram 4.

[64] Coleman and Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (1st edn, OUP 2002), ch 8 by Coleman.
[65] Luhmann, *Law as a Social System*, (1st edn, OUP 2004) translated by Klaus Ziegert.

Diagram 4: Elements of a System of Law



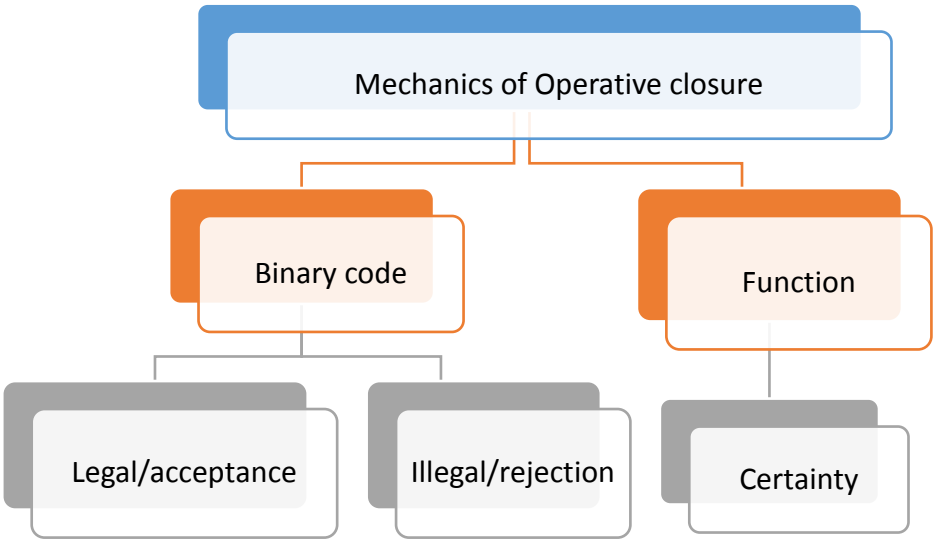
1.3.8 There are two indispensable mechanics of operative closure as illustrated in diagram 5 below. [66] The first indispensable mechanic is its function of achieving certainty of outcome as the ability of a legal order to make a final determinative decision is essential for the maintenance of the normative function of law. Therefore the internal communications of a legal order must be collectively stabilised, by operative closure, at the moment when the legal system communicates with its external environment (i.e. the disputants) in response to an external stimulus (i.e. the dispute that has been referred to it). The second mechanic is the binary code of the system that ensures that the system of law responds internally to the external stimuli by operating its binary code to code those stimuli as either as legal or illegal (i.e. as postulated by Luhmann as terms merely referring to the acceptance or rejection by the legal system of issues brought before it by the disputants and not as meaning legality and illegality under public law) and then communicating with its external environment on the basis of that coding.

[66] Luhmann, *Law as a Social System*, (1st edn, OUP 2004) translated by Klaus Ziegert, cha 2.

1.3.9 If the communicated fact is coded illegal it means that it is rejected by the legal system in the sense that it will not become part of the legal system at the time of the communication (there being a temporal aspect to legal norms in that any decision made by a legal order is effective only at that time and may differ from prior and subsequent decisions). If the fact is coded legal it will become part of the internally communicated doctrines, and that represents the cognitive face of law at a given point of time. Thus the operations of law distinguish fact from legal norm and it is that distinction that is central to the normative programming of law through which legal systems are able to achieve normative operative closure at any single point of time. [67] Such a structure ensures that all operations and norms of a legal order are considered to be internal to the legal order itself, unlike Hart's rules of recognition that are sometimes presumed derived from outside law.[68] Understanding law through Lumann's theory makes obvious that a term of the UCP needs to be successfully communicated to all the various legal orders that are, effectively, being requested by the UCP community to take cognisance of and give effect to the UCP and its interpretative aids. Such effect can only be achieved by operation of law's binary code in the sense of the norms of the UCP being coded as being legal (i.e. accepted) by those legal orders notwithstanding any contrary interconnected doctrines of a divergent legal order. Therefore the tool of responsiveness is an essential to communicate with legal orders.

[67] Luhmann, *Law as a Social System*, (1st edn, OUP 2004) translated by Klaus Ziegert, cha 3.
[68] Luhmann, *Law as a Social System*, (1st edn, OUP 2004) translated by Klaus Ziegert, introduction.

Diagram 5: Indispensable Mechanics of Operative Closure



1.3.10 **Dworkin.** As explained above, according to Luhmann's theory law responds to an external stimulus through the internal selection of law's interconnected internal communications. It is however submitted that there can be latent values that might also play a role – along with the legal communications - in triggering the binary code of the acceptance or the rejection of an outside norm (i.e. Luhmann does not deny the unapparent influence of social norms as they are part of ongoing complex causal relationships between the systems in society). This is particularly the case where there is a severe conflict as to the shared criteria for the application of concepts. In such a situation the research seeks to apply Dworkin's normative interpretative jurisprudence (i.e. angling the analysis to normative premises so as to defend the legal concepts and interpret them in a way so as to be consistent with societal morality) in some of the legal analyses particularly that relate to proposing transnational guidance.[69] Such normative jurisprudence functions through constructive interpretation, which proceeds by imposing the 'best' light of meaning

[69] Dworkin, *Law's Empire*, (1st edn, Universal Publications 1986).

on the legal practice of law from the perspective of the internal participants of law, such as judges, and then restructuring such *contested law* according to that meaning.[70]

1.3.11 Communication and evaluation. In conclusion, a successful responsiveness by the UCP to the internal communications within legal orders constitutes part of the conceptual model as to the efficacy of UCP 600, because such a successful communicative responsiveness is an objective necessary to the means of certainty, flexibility and communication which in turn is essential to achieve the needs of the documentary credit parties underpinning the security of documentary credits. This approach being essentially Hartianian, but also Dworkinian in so far that the successful responsiveness with legal orders is not a mere objective necessity but also a doctrinal value.

CRITICAL ANALYSIS AND COMPARATIVE ANALYSIS

1.3.12 The research conducts doctrinal critical analysis of documentary credit transactions, as set out in Diagram 3, under (a) UCP 600, (b) UCP 600 in the English legal order and (c) UCP 600 in the Jordanian legal order. It also conducts functional comparison between English common law and Jordanian law.

1.3.13 UCP and doctrinal analysis. A UCP revision is regarded as a like-legal order having systematic rules, interpretive standards[71] and normative function.[72] Such a claim is based on the theory of the privatisation of law-making as a new paradigm in law making in transnational commercial law.[73] Many international private organisations

[70] Dworkin, *Law's Empire*, (1st edn, Universal Publications 1986).
[71] Chapter 2, para 2.3.1.
[72] By virtue of international trade usage as to the ubiquity of the UCP: Hwaidi and Ferris, *The Existence of International Unchangeable and Changeable Trade Usage*, submitted paper to the SLS on Sep 2013 <http://www.conference.legalscholars.ac.uk/edinburgh/paper.cfm?id=107>.
[73] For the theory of privatised law-making: Berger, *The Creeping Codification of the New Lex Mercatoria,* (2edn, Kluwer Law International 2010), 38-51.

function as formulating agencies by publishing "self-regulatory rules"[74] in order to regulate a particular field in international trade. Prominent among these rules is the UCP. The ICC publishes valuable interpretive aids to foster an international interpretation of the terms of the UCP. The doctrinal critical analysis begins with UCP 600 in its transnational context in order to provide the doctrinal positions of documentary credits subject to UCP 600, which are in turn set to be tested under the English and Jordanian legal orders.

1.3.14 English critical analysis. Secondly, the doctrinal critical analysis is applied to English common law to analyse the effects of the UCP 600 doctrinal positions under English law. English common law is based on judicial precedents; it has, as does any legal order, its own doctrinal system that must be followed in making and interpreting law.[75] English common law is a coherent hegemonic law in the context of documentary credit transactions and provides detailed and certain functional legal positions on many issues regarding documentary credits both when subject to the UCP or when not so subject. It is a necessary step to evaluate the effects of UCP 600 in terms of whether the generated positions under English common law are as intended by the UCP 600 Drafting Group and to evaluate such effects against the yardstick of security. Such analyses ease the process of the critical analysis under Jordanian law.

1.3.15 Jordanian critical analysis. Thirdly, after the provision of the doctrinal positions under UCP 600 and English common law, the doctrinal critical analysis is undertaken under Jordanian law which is based on formal Codes and judicial precedents of the highest court. The Jordanian doctrinal positions are partly influenced by the analysis of the doctrinal positions that offer model functional solutions under English common

[74] The UCP are identified as being "self-regulatory rules" in Ly, *International Business Law and Lex Mercatoria*, (1st edn, North Holland 1992), 164. The UCP are perceived as a self-contained code under English law: *Fortis Bank S.A./N.V, Stemcor UK Limited v Indian Overseas Bank* [2011] EWCA (Civ) 58, [29]. The UCP are described as "code like" by Berger, *The Creeping Codification of the New Lex Mercatoria,* (2edn, Kluwer Law International 2010), 38-51.
[75] James, Holland and Webb, *Learning Legal Rules*, (7th edn, OUP 2010).

law, where the underlying policies and principles of English law in the investigated matters are also evident in the principles of Jordanian law. However, a socio legal study by empirical work was also conducted to further inform and validate the Jordanian functional doctrinal positions.

1.3.16 Functional comparison. Fourthly, a doctrinal functional comparison between English common law and Jordanian law is undertaken to compare both the interconnected abstract doctrines and the judicial decisions as responses to real life situations.[76] Such a method aims to reveal the functional equivalence and dissonance of English and Jordanian laws particularly in their reception, interpretation and application of UCP 600. This identifies the functions which are transferred into objective needs and interests informing the conceptual model and being tested by the model.[77]

Empirical Design

1.3.17 General overview. The fifth step is the empirical study which is designed as an inductive qualitative research for it aims to acquire insight into the commercial and legal practices.[78] The main objectives of the empirical study are as follows:

1- Informing the Jordanian critical doctrinal analysis as required in the doctrines of trade usage and the criteria for experts in the Jordanian Civil Procedures for expert evidence. Thus the empirical study intends to represent the banking practices on documentary credits in Jordan. This informs the doctrinal comparative study.

[76] Michaels, The Functional Method of Comparative Law, in Reimann and Zimmermann (eds), *The Oxford Handbook of Comparative Law*, (1st edn, OUP 2006) ch 10; Zweigert and Kǒtz, *Introduction to comparative law* (3rd edn, Clarendon Press 1998).
[77] Zweigert and Puttfarken, *Critical Evaluation in Comparative Law* [1973-76] 5 Adelaide Law Review 343.
[78] 6 and Bellamy, *Principles of Methodology*, (1st edn, Sage 2012).

2- Informing directly the application of the conceptual model on UCP 600 by gaining insight as to the approaches of bankers in understanding and interpreting both the pillars of documentary credits and the UCP 600.

3- Informing Jordanian critical analysis and the functional comparison by revealing the approaches of judges and bankers in understanding and interpreting both the pillars of documentary credit and UCP 600.

4- Informing directly the conceptual model by revealing the reaction of the Jordanian government as to the introduction of UCP 600.

5- Informing the critical doctrinal analysis as to the significant issues that affect Jordanian traders in the use of documentary credits subject to UCP 600.

The selection of cases (i.e. subjects of investigation in the empirical study) is firstly addressed, and then followed by the method of the empirical study (i.e. elite interviews).

SELECTED CASES

1.3.18 Banks. To address the first three objectives outlined above banks were selected as the cases for investigation. There are fifteen Jordanian banks in Jordan and a further nine foreign branches of banks in Jordan.[79] Six banks were selected in the study including:

- "Central Bank", which is the Jordanian governmental bank.
- Three Jordanian banks that are regarded as the main players in the Jordanian economy, namely: Arab-Bank, which is one of the leading banks in the Middle East;[80] Bank A (identity is concealed) which is considered to be the most effective domestic

[79] http://www.cbj.govjo/pages.php?menu_id=34.

[80] http://www.gfmag.com/archives/175-may-2013/12485-worlds-best-banks-2013-middle-east.html#axzz2bNfmUOz0.

bank in providing credits; and Bank B (i.e. identity is concealed) which is regarded as having the most advanced technological banking services in Jordan.[81]

- "Alitihad Bank", which is the Jordanian bank that represented Jordan and the Middle East in the revision of UCP 600 in the ICC.
- "BLOM Bank, which is a Lebanese bank that is a leading foreign bank in Jordan.

1.3.19 The selected representatives of each bank were respectively the heads of the documentary credit department in their bank, as they are the experts and the decision makers on documentary credit transactions of their banks. Given the fact that the selected cases of Jordanian banks constitute around 30% of Jordanian banks (i.e. the relevant "population"), it is plausible to claim that the selected cases are representative of the Jordanian banking sector transacting documentary credits in Jordan and the foreign branch bank BLOM is a typical case for foreign banks in Jordan having similar conditions to the other foreign banks.[82] There is, however, no need to select additional representatives to the head of a documentary credit department in the banks, as he or she is the one who gets involved in every disputable documentary credit matter in the bank. He or she, except in the Arab- Bank, determines and implements the interpretation of UCP 600 in the bank.[83]

1.3.20 **Judges.** The cases for the above third objective, in addition to bankers, were the High Court Judges who are well renowned for their experience in dealing with documentary credit cases. There are few Jordanian judges with this experience, so the selection of three judges is sufficient to grasp a general understanding of the actual approaches of Jordanian judges to the pillars of documentary credits.

[81] http://www-03.ibm.com/press/us/en/pressrelease/41409.wss.
[82] http://www.cbj.govjo.
[83] For case selection: Henn, Weinstein and Foard, *a Critical Introduction to Social Research,* (2 edn, Sage 2009), 70-73.

1.3.21 **Ministers.** The present and a previous Minister of Industry and Trade were the selected cases to address the above fourth objective. The present Minister was selected as he is able to represent the views of the Jordanian government regarding UCP 600. The previous Minister was also selected as he currently holds the position of the head of ICC in Jordan. Thus he is able to reveal the relationship between UCP 600 and the Jordanian government.

1.3.22 **Traders.** The selected cases for the last objective were three traders. Unlike the banking sector, the trading sector is a huge one both numerically and in its diversity. Any trader who is involved in export and import is expected to use documentary credits. There are many variables such as business size of traders and foreign branches. The documentary credit transaction is very complex in nature and this is one of its disadvantages. Given the fact that most of traders who are involved in export and import in Jordan are small enterprises,[84] it would not have been appropriate to assume any technical expertise on the part of traders as to the operation of UCP 600. This indicates that selecting more traders - even if it is based on different variables - would not substantively provide more insight, given the fact that the aim of qualitative study is to build a depth of understanding rather than claiming generalisability.[85] Thus three traders were selected as being typical for Jordanian traders using documentary credits. One is a trader who is involved in import transactions. The other is a trader who has a foreign branch in the import country. The last one is involved in import and export and is a well-known trader as he is the head of the Industry Chamber in Jordan.

1.3.23 **Justification for not interviewing other actors.** Although practices of insurers and carriers in the insurance and shipping industries affect the documentary conformity in documentary credits, these actors are not the main players in

[84] http://www.ammanchamber.org.jo. /node/studies.aspx.
[85] For illustration of the selection of typical cases: Henn, Weinstein and Foard, *a Critical Introduction to Social Research,* (2 edn, Sage 2009).

documentary credits as they are not the parties who enter into the autonomous documentary credit arrangements. Thus the practices of such actors in relation to documentary credits can be seen as being irrelevant for the interpretation of documentary credit arrangements except to the extent that they might comprise part of the factual matrix that judges need to take into account in deciding cases (the English case of *Homburg Houtimport BV v Agorsin Private Ltd (The Starsin)*[86] is a nice example of that tangential effect in another contractual context since in that case Lord Hoffman took account of banking practice[87] in deciding who was the contractual carrier under a bill of lading for the purposes of the English legal orders adjudication of a claim under the carriage contract).

THE METHOD OF EMPIRICAL STUDY

1.3.24 The most plausible method to address the objectives in the context of the selected cases was considered to be qualitative in depth, face–to-face and one-to-one interviews, because the inquiry was exploratory in nature aiming to investigate an uncharted environment. Indeed such interviews enabled the researcher to enter into dialogue with the interviewees to explore issues in detail through the use of, as put by Henn and others, *"probes, prompts and flexible questioning styles"*.[88] The semi-structured open ended interviews maximised the researcher's understanding of the commercial and legal viewpoints of the interviewees as to both the pillars of documentary credits and the operation of UCP 600 and ensured the researcher to convey the complex doctrinal concepts to the interviewees and to check both his understanding and that of interviewees.

1.3.25 **Elite interviews.** Thus interviews were conducted with bankers, judges, ministers, and traders. Such interviews are known as elite interviews which can loosely be

[86] [2004] 1 AC 715.
[87] [2004] 1 AC 715, [74]-[78].
[88] Henn, Weinstein and Foard, *a Critical Introduction to Social Research,* (2 edn, Sage 2009), 187.

defined as interviewing individuals with particular expertise.[89] Exception must be made to the traders as they should not be regarded as experts in documentary credits, but they are experts in export and import transactions. Given the fact that bankers had the most expertise amongst the other interviewees in documentary credits, most bankers were passionate – but some of them were anxious - to convey their many various ideas in respect of documentary credits and other related transactions making it difficult to keep the dialogue with most bankers within the themes of the interviews. This was mainly tackled by giving the interviewed bankers the opportunity to speak without any interruption for the first five to ten minutes and then reconfirming and emphasising the subjects that the researcher needed to discuss.

1.3.26 **Ethics.** All the interviews were conducted according to Nottingham Trent University Research Ethics policy.[90] Each interview was preceded by a participants' information sheet, a brief explanation of the ethical issues, and a consent form. Since the subject is in relation to the doctrines of law and to the banking practices the ministers and traders agreed to disclose their identity. However only two out of the six interviewed bankers and all the interviewed judges required the researcher to conceal their identity. The necessary steps to secure anonymity of those who selected the option to conceal the identity was undertaken, including that the recordings and transcripts of interviews were only handled by the principal investigator.

1.3.27 **Risks in warranting results.** The main risks in the method of interviews primarily related to bankers. There was a risk that the interviewee banker might either be affected by the opinion of the researcher or else convey an opinion instead of a fact. This was tackled by designing suitable questions focussed on the particular practices

[89] Morris, *The Truth About Interviewing Elites*, [2009] Politics 29 (3), 209; Burnham and others, *Research Methods in Politics*, (1st edn, Palgrave 2004).
[90] http://www.ntu.ac.uk/research/document_uploads/81937.pdf.

of themselves and their banks. In addition to the subjectivity risk, some bankers, in the event of the interview, were wary about their answers as they did not want to appear as non-experts. The researcher tackled this issue by emphasising that there was an option for the concealment of identity in the consent form. The researcher used the Jordanian Arabic accent rather than Classic Arabic as it sounded friendlier with bankers, ministers and traders, but Classic Arabic was used with judges as it is perceived by them as the appropriate mode of communication to discuss legal issues. The researcher praised the experts and assured them that no personally negative observation would be noted. A further risk was that some of the interviewees did not perceive the interview as having a high value, as the researcher lacks power relative to elites.[91] Accordingly, the researcher represented himself in a professional way, emphasising the importance of the results and used technical terms to demonstrate his knowledge.[92] The researcher represented himself both as a researcher and a lawyer in such a way that he might be perceived as being both an insider (e.g. in terms of banking) and an outsider (e.g. in terms of being not a rival).[93]

ANALYSIS OF FINDINGS AND COMPARATIVE STUDY

1.3.28 **Bankers.** As to the sixth methodological step of the research as set out in Diagram 3, that part of the empirical data generated by interviewing bankers which related to the establishment of banking practices was read from the realist social science approach as such data is evidence of external events.[94] For instance, whilst five of the bankers confirmed that the period of the examination of documents in documentary credits is two banking days that data was not treated as being represented of the perspective of bankers, but as being declarative of the actual

[91] Bygnes, *Interviewing People-Oriented Elites,* [2008], Eurosphere Online Working Paper Series, Bergen: University of Bergen.
[92] Herod, *Reflections on Interviewing Foreign Elites: Praxis*, *Positionality, Validity, and the Cult of the Insider*, [1999] Geoforum 30(4), 321.
[93] For insider or outsider status of the researcher in elite interviews: Herod, *Reflections on Interviewing Foreign Elites; cf;* Praxis, *Positionality, Validity, and the Cult of the Insider*, [1999] Geoforum 30(4), 315.
[94] Silverman, *Doing Qualitative Research: A Practical Handbook,* (2nd edn, Sage 2005), 154, *cf*: Henn, Weinstein and Foard, *a Critical Introduction to Social Research,* (2 edn, Sage 2009), 186.

banking practice. The realist approach was essential to integrate the data into the doctrinal analysis of Jordanian law and ultimately for the functional comparative study, in order to reveal the effects of the Jordanian legal doctrines. The remaining empirical data from bankers was read by a narrative approach,[95] as it represented the bankers' own interpretations in relation to UCP 600. Nevertheless, such interpretations were accepted as being representative of those of the bank in which the expert banker worked, since he implements his own interpretations of UCP 600 in the practices of that bank. There was no risk of subjectivity, because the interpretation of UCP 600 is always applied in a particular transactional context. Such analysis directly informed the conceptual model as to whether the intended meaning of UCP 600 terms are uniformly apparent to the bankers and in respect of the objective needs and interests of bankers in Jordan.

1.3.29 **Judges.** The data regarding the approach of Jordanian judges as to the documentary credits were read in the narrative approach to inform both the Jordanian doctrinal analysis and the functional comparative study.

1.3.30 **Ministers**. The collected data from the ministers were analysed by both the realist approach where the minister described a social event such as that there is ongoing discussion to amend the law. Other collected data from the ministers were analysed by the narrative approach where the minister provided his view regarding the social events.

1.3.31 **Traders.** Finally, the data from traders were read in the narrative way to inform the commercial perspectives of the traders regarding some of the significant articles in

[95] Silverman, *Doing Qualitative Research: A Practical Handbook,* (2nd edn, Sage 2005), 154, *cf*: Henn, Weinstein and Foard, *a Critical Introduction to Social Research,* (2 edn, Sage 2009), 186.

UCP 600. Such analysed collected data informed the evaluative standpoint as to the objective needs of traders.

Contribution

1.4.1 The developed conceptual model in this thesis is novel not only because of its main functions (i.e. enhancing the understanding as to the functional nature of documentary credits; providing a framework to the documentary credits community on how to design effective terms governing documentary credits; and assessing the efficacy of UCP 600 within the context of the English legal order and Jordanian legal order and Jordanian commercial practices) and the fact that there is currently no other conceptual model in the literature review facilitating how documentary credits can be regulated effectively, but also because it is close to the sociological reality of documentary credits, since its perspective is based on the sociological value of documentary credits that is rationally deducted from the functions of the embedded usages of documentary credits.

1.4.2 The research also provides an original doctrinal contribution to the analysis of UCP 600 and English common law positions on documentary credits. It provides doctrinal and empirical analysis aiming to establish the functional positions of Jordanian law on documentary credits. This research has the capacity to strongly influence both Jordanian courts and Jordanian bankers in their application of UCP 600 in the context of Sharia law and Civil law system in the Middle East. The research will assist different legal orders in the interpretation of the UCP. Furthermore, the investigation as to the nature of the embedded usages, pillars, of documentary credits will assist the international discourse as to the nature of transnational commercial law. It is intended that the design, by combining traditional legal doctrinal study with empirical study, will make a genuine contribution to the method of doctrinal legal study for

issues of transnational commercial law. The articles published in the leading international law journal in banking law[96] and the presented papers at academic conferences [97] as part of the research indicate the originality of the research.

[96] Hwaidi and Harris: *The Mechanics of Refusal in Documentary Letter of Credits: An Analysis of the Procedures Introduced in Article 16 UCP 600,* [2013] J.I.B.L.R 28(4), 146-155; Hwaidi, *The Story of The English Strict Compliance Principle in Letters of Credit and its Consistency with the UCP*, [2014] J.I.B.L.R 28 (2), 71-81.

[97] Hwaidi and Ferris, "The promise and problems for elite interviews in legal and commercial practices in the context of documentary credits, presented paper at the Annual conference of Socio Legal Study Association (SLSA) at University of York (26-28/03/2013): <http://www.conference.legalscholars.ac.uk/edinburgh/paper.cfm?id=107>.

CHAPTER 2: THE NATURE OF DOCUMENTARY CREDITS

GENERAL VIEW

2.1.1 The substance of a documentary credit transaction is based on, what would in sociological discourse be referred to as its "value",[98] the critical balancing of the distinct archetypal security needs of each of the four groups of contracting parties who typically transact documentary credits (i.e. issuing banks, confirming banks, applicants and beneficiaries). It is the fact that maintenance of this critical balance is essential to the value of the transaction that triggers the embedded trade usages (referred to in chapter 1),[99] since those embedded trade usages collectively operate to functionally maintain that balancing of the contested needs of the transacting parties and constitute the main part of the developed conceptual model. It is because these embedded trade usages are essential to the value of the transaction that it is proposed in this thesis that English and Jordanian laws, and those of other Municipal legal orders, ought to explicitly recognise embedded trade usages as a category of customary law that operates at a higher normative level than that of other trade usages. The second, and main, part of this chapter addresses the above questions. The third part deals with the nature of the UCP and the perspectives of the English and Jordanian legal orders as to the reception and interpretation of the UCP. It is essential, however, to give account to the broad context of documentary credits before dealing with the above issues. The first part addresses therefore the process of documentary credits and their historical development.

The Process Of A Documentary Credit

2.1.2 **Essential steps in a documentary credit**. Under a documentary credit transaction a buyer (i.e. the applicant) approaches a bank (i.e. the issuing bank which is usually

[98] Alder, *The Value Concept in Sociology*, [1956] American Journal of Sociology, 27:272-279.
[99] Para 1.2.10-14.

domiciled in the buyer's country) to open a documentary credit for the seller (i.e. the beneficiary). By such an instrument the issuing bank undertakes an obligation to make a payment to the beneficiary (i.e. the principle of irrevocability) on the bank's receipt of certain documents stipulated by the documentary credit (e.g. a bill of lading evidencing the shipment, and affording constructive possession of the goods, to the applicant). The issuing bank needs to certify that the presented documents are in conformity with the terms and conditions of the documentary credit, otherwise the bank is not entitled to reimbursement by the applicant (i.e. the principle of conformity).[100] In checking the conformity of the presented documents, the issuing bank shall not inquire into the actual facts that are presented by the documents (i.e. the presumption of appearance). Furthermore, the issuing bank's payment obligation is not contingent on any disputes arising between the seller and buyer in the underlying trading relationships (i.e. the principle of autonomy).[101]

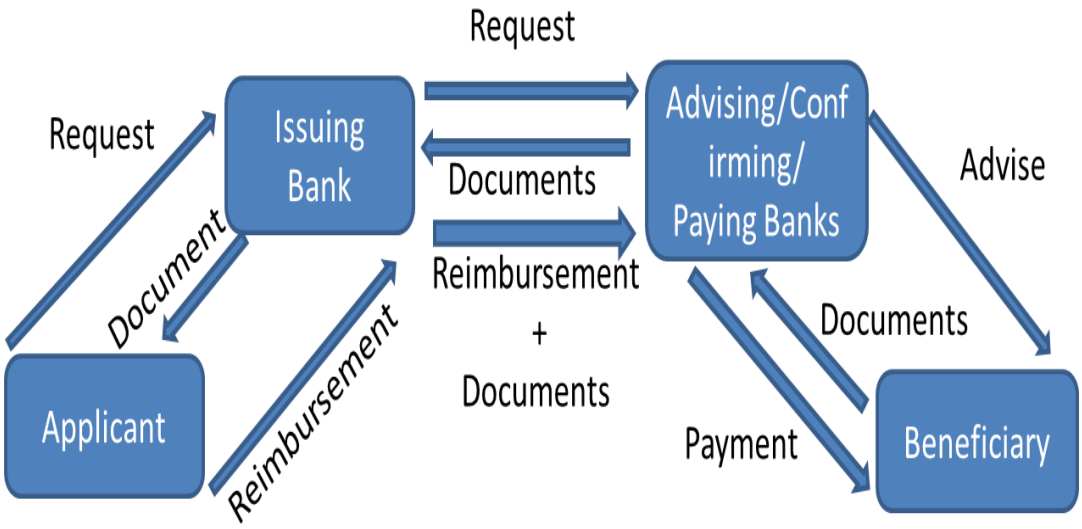
2.1.3 **Banking roles.** In most cases issuing banks use the service of another bank (i.e. a correspondent bank), most frequently in the beneficiary's country, to advise the beneficiary as to the opening of the documentary credit. The correspondent bank in this role is known as the "advising bank". If the correspondent bank, which will frequently be the advising bank, is required by the terms of the documentary credit to confirm the documentary credit and that bank agrees to confirm it, such a correspondent bank will become a "confirming bank" which endures the same liabilities and undertakes the same obligations as the issuing bank.[102] Documentary credits can also be made available to be paid or negotiated by a correspondent bank other than the confirming bank. Such a bank has the option to pay or negotiate the credit. It is known in this role as the "paying bank", or "negotiating bank" as the case may be but UCP 600 adopts the term "nominated bank" to refer to the paying

[100] Chapter 3.
[101] Chapter 5.
[102] The obligations of the confirming bank towards the beneficiary are the same as those of the issuing bank; however the latter is obliged to reimburse a confirming bank that pays the beneficiary against the presentation of conforming documents: articles 7 and 8 UCP 600.

bank, negotiating bank, the bank which accepts the bill of exchange annexed to documents, and sometimes the confirming bank. Thus a correspondent bank can take the role of merely advising, merely confirming, advising and confirming, merely paying or negotiating, accepting the documents, or advising and paying or negotiating the credit.

2.1.4 **Reimbursement.** Upon making payment against presented documents that are in conformity with the credit, the paying bank will be entitled to reimbursement by either the confirming bank or the issuing bank. The confirming bank will be reimbursed by the issuing bank and the latter will be reimbursed by the applicant. This process is illustrated in diagram 6 below.

Diagram 6



2.1.5 **Traveller letters of credit.** It is generally believed that documentary credits were evolved from traveller letters of credit which were also known as open, clear or uncovered letters of credit.[103] The purpose of traveller letters of credit is substantially different from the aim of documentary credits. Traveller letters of credit intended to raise funds for a travelling merchant in a foreign country in which the merchant sought to buy goods. Under such an instrument, a merchant (i.e. the applicant), who intended to travel to a foreign country without carrying cash with them, requested from a merchant-banker in his own country a letter of credit whereby the merchant-banker (i.e. the issuer) promised the foreign addressees of the letter of credit (i.e. the beneficiaries) to fully repay to them the amount of the bill of exchange if they paid or accepted liability to pay the bill to the applicant.[104] Thus the promise to pay to merchants or bankers who would advance funds to the travelling merchant the amount of the credit was unconditional and its purpose was the raising of funds for the applicant.

2.1.6 By contrast, the promise of payment in documentary credits is conditional upon the presentation of documents conforming to the terms of the credit and has the purpose of providing an assurance of payment to the seller prior to the shipment of goods, or the performance of services, under a supply contract, rather than merely raising funds for the applicant. However, both instruments share the function of being an assurance of payment. Given technological and transactional advancements in inter-bank payment mechanisms, traveller letters of credit fell out of use in the twentieth century in international trade.

[103] McCurdy, *Commercial Letters of Credit*, [1922] Harvard Law Review Association 539.
[104] Story, *Commentaries on the Law of Bills of Exchange, Foreign and Inland as Administered in England and America*, (2nd edn, Little and Brown 1860) ch XIII par 459.

2.1.7 **Brief history.**[105] Many traveller letters of credit were used in conjunction with bills of exchange to the effect that the issuing of the traveller letter of credit was to guarantee an anticipatory acceptance of a bill of exchange.[106] It seems that the idea of undertaking to accept bills of exchange was the trigger for the development of the documentary letters of credit instrument, by which a banker or a well-respected merchant issues a letter to a seller promising to accept the bill of exchange if the seller presents the required documents that fulfil the terms of the letter.[107] Thus the new form of letters of credit became known as documentary credits, in that the "honour"[108] of the credit was conditional upon conforming documents being presented by the beneficiary.

2.1.8 Documentary credits were developed in the nineteenth century in connection with Anglo-American trades.[109] They became well established and viable in international trade after the end of the First World War.[110] The post-war instability of the international trade market caused new and experimental markets to evolve. Thus the use of documentary credits became necessary as a secure means of payment for both sellers and buyers. Sellers in hegemonic countries such as the USA started to export to new and strange buyers in evolving markets and developing countries. These sellers found it convenient for their security to demand either cash with order or confirmed documentary credits, as they would be assured of payment by a bank in their country prior to the shipment of the goods.[111] The empirical findings for the present research confirm that sellers dealing with buyers in developing countries such as Jordan continue to demand confirmed documentary credits.[112] Nart Lambaz

[105] For a thorough history of documentary credits: Elinger, *Documentary Letters of Credit: A Comparative Study,* (1st edn, Singapore Press 1970) ch II.
[106] *Maitland v The Chartered Mercantile Bank of India, London and China* (1865) 2 H. & M. 440.
[107] There are fair amount of reported American cases in the very early of the nineteenth century in the USA involving documentary credits that were issued by banks as an assurance of payment of the bill of exchange against documents: McCurdy, *Commercial Letters of Credit*, [1922] Harvard Law Review Association 539.
[108] This concept is used in UCP 600 and is defined as pay, negotiate or accept to pay the credit.
[109] Hershey, *Letters of Credit*, [1918] Harvard Law Review Association, 1 (Nov).
[110] Elinger, *Documentary Letters of Credit: A Comparative Study,* (1st edn, Singapore Press 1970), 29.
[111] Hershey, *Letters of Credit*, [1918] Harvard Law Review Association, 1 (Nov).
[112] Annex I, para 6.

stated:

"First time sellers prefer to use documentary credits. Big companies prefer documentary credits with traders in developing countries. A documentary credit can also be a financial tool".

2.1.9 Most importers in that new international market did not own or control ships. It was therefore essential for their security to receive documentary evidence of the shipment of the goods prior to the payment.[113] Documentary credits were clearly recognised by English courts in 1854.[114] The first attempt in Jordan to shape the transaction of documentary credits in an authoritative legal form by courts was in 1975.[115]

Regulating Documentary Credits And The Source Of Their Law

2.1.10 Traveller letters of credit, which were a facility for raising funds in a foreign country, did not contravene with the fundamental doctrines of contract law under common law. The promise of the merchant-banker to reimburse, and to pay the extra fee, the addressee is an offer of a unilateral contract that is only binding on the promisor once the addressee acts on the promise,[116] and accordingly consideration moves from the addressee to the promisor (i.e. the promisor becomes bound to reimburse only when the promissee accepts to undertake payment). Once the addressee accepts the bill of exchange annexed to the traveller letter of credit, the offer cannot be withdrawn as the addressee unequivocally begins the performance of the act (i.e. the undertaking to pay the beneficiary).[117]

[113] Hershey, *Letters of Credit*, [1918] Harvard Law Review Association, 1 (Nov).
[114] *Gurney v Behrend* (1854) 3 E1. & B1. 622; *Maitland v The Chartered Mercantile Bank of India, London and China* (1865) 2 H. & M. 440.
[115] Court of Distinction (Civil), *152/1975*, Adalah Programme.
[116] *Rogers v Snow* (1573) Dalison 94; *Great Northern Ry v Witham* (1873) Law Report 9 C.P. 16, 19.
[117] For unilateral offer: Beale and others (eds), *Chitty on Contracts* (31st edn, Sweet and Maxwell 2010) para 2.083.

2.1.11 **English law.** By contrast, the undertaking to make a payment under documentary credits is addressed to the seller of goods, who is usually domiciled in a foreign country, and it is a binding undertaking upon the issuing bank once it is issued (embedded trade usage of irrevocability), regardless of the fact that it violates the common law requirement that consideration be reciprocal. The source of the law of the issuing and confirming bank's undertaking in documentary credits is the practice of bankers and traders rather than contract law. Jenkins LJ stated the position in *Hamzeh Malas Sons v British Imex Industries Ltd:*[118]

"An elaborate commercial system has been built up on the footing that bankers' confirmed credits are … [binding] … and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice".

2.1.12 **Jordanian law**. Consideration is not a requirement for the formation or enforceability of contracts under Jordanian law. The Court of Distinction did not, therefore, elucidate the source of the issuing and confirming banks' duty to honour documentary credits, when the Court recognised the irrevocable obligation of the issuing bank to honour the issued credit.[119] The Court of Distinction did not however require an expert evidence to prove the usage of irrevocability, so the inference should be that the embedded usage of irrevocability is well known law.

2.1.13 **Contract law.** As a matter of genesis, documentary credits have been evolved by mercantile usage[120] to provide sellers, buyers and banks with a secure facility of payment as a response to the lack of trust between parties in international trade.[121]

[118] [1958] 2 Q.B. 127, 129.
[119] Court of Distinction (Civil), *152/1975*, Adalah Programme.
[120] *Hamzeh Malas Sons v British Imex Industries Ltd* [1958] 2 Q.B. 127, 127 per Jenkins LJ where a documentary credit was described as a commercial system.
[121] *United City Merchants (Investments) Ltd v Royal Bank of Canada*[1983] 1 AC 168, 183 per Lord Diplock where his Lordship clearly stated that documentary credits are methods of payment that are based on the assurance of the payment to the seller; McCurdy, *Commercial Letters of Credit*, [1922] Harvard Law Review Association 539, 543; Malek and Quest, *Jack: Documentary Credits,* (4th edn, Tottel 2009) paras 1.2 and 1.3; Elinger and

The beneficiary, seller, under the credit is entitled to enforce the performance of the credit on the basis of mercantile usage. It is suggested by Professor Goode that such a distinctive feature of documentary credits does not make it inappropriate to treat them as contractual in nature, since parties proceed on the basis of the protection of the expectation of the beneficiary as to its entitlement to the performance of documentary credits and hence contractual remedies are applicable.[122] Under Jordanian law, the fact that custom is a source of law does not bar its consequences to be treated according to the conventional contract law rules, to the extent that the rules of contract law are consistent with custom.[123] Moreover, the relationships between documentary credit parties, except the binding undertaking by the bank to the beneficiary under common law, are contractual in nature under both English and Jordanian laws.

2.1.14 Need for uniformity. The relationship between the distinct documentary credit and supply transactions and between the parties to those transactions generates many legal complexities as does the engagement of the different jurisdictions and laws applicable to the enforcement of the various contracts and relationships constituting those transactions. It was in consequence of that complexity that the UCP were introduced in 1922 by the International Chamber of Commerce (ICC) in Paris.[124] The UCP were first introduced in parallel with the establishment of the ICC in the spirit of uniformity: the main aim of the ICC being to alleviate the confusion caused by national laws on commercial transactions across borders. To achieve such an aim on the transaction of documentary credits, the ICC promulgated a set of regulations on documentary credits to establish uniformity in practice.[125]

Neo, *The Law and Practice of Documentary Credit*, (1st edn, Hart 2010), 1; for banking security and risk assessment: Hassan, Lai and Yu, *Market Disciple of Canadian Banks' Letters of Credit Activities: An Empirical Examination,* [2002] The Service Industries Journal, (22) Oct 187-208.

[122] Goode, *Abstract Payment Undertakings And the Rules of The International Chamber of Commerce*, [1995] 39 Saint Louise University Journal, 725, 732.

[123] Article 2 Civil Code (1976); article 3 Commercial Code (1966).

[124] Taylor, *The Complete UCP*, (1st edn, ICC 2008), 27.

[125] UCP 600, Foreword.

2.1.15 **UCP.** The first formal version of the UCP was promulgated in 1933 by the 7th Congress of the ICC in Paris. It was adopted by banks in a number of European countries and by some banks in the United States.[126] In 1951 the 13th Congress of the ICC promulgated a revision of the UCP which was adopted by banks in Asia, Africa, Europe and the American continent including the United States.[127] The 1951 code, however, was rejected by banks in the United Kingdom and most banks in the Commonwealth of Nations which resulted in a division between the British and the UCP practice on documentary credits.

2.1.16 Nevertheless, British banks were represented in the ICC's Committee in the process of revising the 1951 UCP version. This resulted in the promulgation of the 1963 version of the UCP which was adopted by the British Banks and the entire Commonwealth of Nations.[128] This version was later revised by the ICC resulting in the promulgation of another revision of the UCP in 1974. The code was revised again by the ICC in 1983 resulting in the promulgation of UCP 400. The other revision of the UCP was in 1993 and known as UCP 500. The latest revision of the UCP is known as UCP 600 which was promulgated by the ICC in Paris and became effective in July 2007.[129] The vast majority of documentary credits are subject to the UCP.[130] The empirical findings of the present research confirm that it is standard for banks in Jordan to issue documentary credits that are subject to the UCP.[131] The UCP aim to achieve a certain legal environment in a changing world and therefore they are regularly revised to adopt the ongoing changing practices and indeed to envisage new practices in order to solve common problems.[132]

[126] ICC Brochure 82.
[127] Ellinger, *The Uniform Customs and Practice for Documentary Credits (UCP): their development and the current revisions*, [2007] L.M.C.L.Q. 2 (May), 152- 180, 153, ftn 10.
[128] ICC Brochure 222.
[129] ICC, *Uniform Customs and Practice for Documentary Credits "UCP 600",* (2007).
[130] UCP 1962, Introduction.
[131] Annex I, para 12.
[132] Below para 2.3.1.

EMBEDDED TRADE USAGE OF THE PILLARS OF DOCUMENTARY CREDITS

2.2.1 The existence of international trade usage or custom in the handling documentary credits is a matter of importance for international trade, and a matter of great interest for our understanding of the nature of law. Such trade usage or custom has been identified as the classic example of the new *lex mercatoria* of our globalised age.[133] It may feature in Municipal laws, arbitrations, national litigation, or the non-contentious understanding of parties to international contracts.

2.2.2 A first and unavoidable problem in any attempt in investigating the dynamic nature of international trade usage is that domestic laws interpret trade usage discretely from one another.[134] Transnational law holds an ever-present potential for fragmentation into national or regional self-contained autopoietic systems of law. Even if a trade usage were universally recognised this risk of fragmentation through the internal communications of legal doctrine within each such legal system would continue to exist. Thus the rules of transnational law are perceived by Municipal legal systems as external stimuli to be communicated with the internal communications of each legal system and as such the stimulus might either be accepted or rejected by the internal communications of each system.[135]

2.2.3 A second problem is that of linked meanings: thus, trade usage *de facto* is a matter of sociological fact; trade usage *de juris* is a matter of legal doctrine (i.e. it is received within the English and Jordanian legal orders as a matter of fact that in order to be effective it must fulfil the criteria that are laid down by a certain legal doctrine under

[133] Goode, *Rule, Practice, and pragmatism in transnational commercial law* [2005] International & Comparative Law Quarterly 539, 547. The discoverers of the new *lex mercatoria* are Clive Schmittoff and Berthold Goldman: Schmitthoff, *The sources of the law of international trade: with special reference to East-West trade,* (1st edn, Stevenson and Sons 1964); Goldman, *La Compagnie de Suez, societee' internationale'*, [1956] Le Monde, 4 October, 3.
[134] Ly, *International Business Law and Lex Mercatoria*, (1st edn, North Holland 1992).
[135] Annex I, para 7: Luhmann, *Law as a Social System*, (1st edn, OUP 2004) translated by Klaus Ziegert.

English or Jordanian laws). The two may or may not coincide in any particular instance. However, the embedded aspects of trade usage as *de facto* and *de juris* will always be connected in any rational legal system, and are very likely to have a dynamic and reflective relationship.

2.2.4 A third and crucial problem is the failure to distinguish between what it is termed below "embedded" and "peripheral" trade usage. Although it is generally unwise and confusing to coin terms, other potential synonyms are already loaded with unwelcome and confusing semantic baggage. Some distinction is needed, as a failure to make the conceptual distinction generates confusion in the role of international trade usage across borders and the application of self-regulatory rules claiming to reflect usage and practice. The distinction the research is trying to establish is one of function rather than merely one of genesis – embedded trade usage is essential to the particular function embodied by a particular category of transaction, whilst peripheral trade usage is relative to factors other than transactional function such as time and place. Thus, embedded usage may be codified, or not, and any codification may be by international governmental or non-governmental organisations or national legislature. The issue is not one of power or sovereignty. There is no argument that the current structures of Municipal legal orders could not change an "embedded" aspect of trade usage as a matter of national law. However, the consequence of such a change would be that the very nature of the underlying transaction as seen by that legal order would be altered. The idea is that the embedded aspects are *constitutive* of the commercial institution in point. The pillars of documentary credits offer a major account of embedded trade usage.

Usage, practice and usage as lex mercatoria

2.2.5 **Usage and practice.** Trade usage *de facto* might be defined as: a common observance of a regular practice or set of practices that is or are well known and

adopted amongst traders in a particular trade, and which generates a sense of commercial order in the context of particular trades. Thus, it is how things are done and variation from the practice is viewed by members of the community of practice as discreditable. Trade practice *de facto* share the same definition in that the common observance of a regular practice which generates expectations of repetition and reciprocation that have some normative force but not a sense of being binding in the relevant particular trade.

2.2.6 Empirical findings. The empirical findings of this research confirm the existence of such a distinction between usage and practice. Thus, Qhaleb Joudeh stated that the UCP is not considered as law in the sense of *de jure*, but as a matter of fact it is law for banks as the bank which deals with documentary credits not subject to the UCP might suffer negative consequences the harshest of which is the exclusion from the documentary credit business community. In this respect he said "*we exclude some of the UCP terms but we cannot actually dare to exclude its essence or spirit"*. Four other bankers stated that their *"banks are obliged"* to apply the UCP and that the banks cannot entirely exclude the application of the UCP, but they can merely exclude and change some of the UCP terms. [136] So there is a common sense that the application of the UCP is binding upon banks, namely it is a trade usage and not a mere trade practice. There is also market practice (e.g. the period of examining documents in documentary credits is three banking days by the vast majority of banks)[137] that is commonly and regularly adopted by the majority of banks without the sense of being binding, although such practice might create an expectation of repetition. Qhaleb Joudeh stated that as a matter of good practice the bank needs to examine the documents in a maximum of three banking days, even though it has a five banking days period for examination pursuant to UCP 600.[138]

[136] Annex I, para 12.
[137] Annex I, para 33.
[138] Annex I, para 33.

2.2.7 **Acclamation.** The normativity force of practice and usage is generated by acclamation, namely, spontaneous regular adoption with observance of acceptance. Practice and usage are, therefore, the spontaneous creation of actors in a particular trade and therefore they are particular in the sense of being associated to a particular trade[139] or locality. Generally speaking the more particular the usage the more certain it is.

2.2.8 ***Lex mercatoria***. Under systems theory, Teubner proposes that one can speak of law when (1) conflicts are defined by an institutionalised conflict resolution as a divergence of expectation, and (2) conflicts are resolved by the use of the code legal/illegal (acceptance/rejection).[140] According to Teubner, *lex mercatoria* can be a socially diffuse law or even a partially autonomous legal system. By *lex mercatoria,* Teubner must mean trading rules that have an institutionalised process of conflict resolution (e.g. disputes are invariably referred to the same arbitral body) testing the disputed state of affairs against the common practice and usage of traders and using the code legal/illegal (acceptance/rejection) accordingly. This type of institutionalised *lex mercatoria* (of which there are many examples viz. the trading rules of the Grain and Free Trade Association and the International Cotton Association to name but two), is a socially diffuse law as it is still produced by reference to external factors (i.e. practice and usage) as trading expectations are based on them. This *lex mercatoria* recognises its own components: process (conflict), element (action), structure (social norm) and identity (world-view).[141] Such *lex mercatoria* might develop into a partially autonomous system once it elevates itself to the level of being self-referential in the determination of its decisions, particularly by developing its own internal structure for the development

[139] Goode, *Rule, Practice, and pragmatism in transnational commercial law* [2005] International & Comparative Law Quarterly 539, 547-548.
[140] Teubner, *Law As An Autopoietic System,* (1993, The European University Institute) p.38.
[141] Teubner, *Law As An Autopoietic System,* (1993, The European University Institute).

of legal norms (i.e. similar to the Hartian rule of recognition concept). The issue here is that the conceptual models of Luhmann and Teubner in systems theory would perceive practice and usage as being non-binding social norms that are distinct from the normatively binding concepts of such institutionalised *lex mercatoria*. It is the latter (rather than practice or usage *per se*) that can constitute a socially diffuse law and eventually develop into a partially autonomous legal system within the conceptual models of Luhmann and Teubner.

2.2.9 Usages as *lex mercatoria*. It is however argued in this thesis that to consider usage as law (i.e. *lex* or socially diffuse law) it is neither necessary to have an adjudicating body to determine disputes nor an institutionalised resolution process. Instead it is contended that, free actors (such as traders, bankers or insurers)[142] who resolve controversial behaviours by firstly testing them against their own usages and secondly, by their actions, classifying them as being acceptable or unacceptable (through the use of the code acceptance/rejection) are essentially creating socially diffuse law. The element of the 'sense of being binding' in usages is essential for the operation of the code acceptance/rejection. Without such an element, a state of affairs might be generally accepted although it contravenes the expectation of repetition. A mere practice, therefore, must become usage in order to elevate to the level of law. A classic example of usage as being a socially diffuse law (*lex mercatoria*) is the acceptance or rejection of a state of affairs in a particular port by carriers, consignors and consignees according to the usages of that port. The observable application and normative force of such usage is apparent to those operating at that port and particular to the location of that port and will have the sense of being binding thereby creating behavioural expectations amongst traders in that locality.

[142] On the basis of exchange on intangibles in social groups under a system of exchange in the free market: Coleman, *Foundations of Social Theory*, (1st edn Harvard University Press 1990) ch 2.

2.2.10 The effect of the normative force of usages (generated by acclamation and adherence) in a particular context (i.e. either a particular locality for *lex mercatoria* or a particular transnational transaction for international *lex mercatoria* as explained below) is not only that usages become social norms constituting normative propositions (in the sense of being binding), but such normativity also generates further structural components. These further structural components are that of: (1) a process where controversial behaviours are tested as a divergence of expectation against the norms; (2) a decision whereby the actors by their actions in either rejecting or accepting a state of affairs develop new practices; and (3) an identity whereby the particular social group operating those practices become distinct. This *lex mercatoria* operates when usages are associated to a particular transaction or locality, because such usages are generally certain (i.e. some means of functional coherence at a particular time and having the above components)[143] due to the fact that outsiders have alternative localities and this alleviates constant challenges to such usages. The inquiry is therefore whether usages can operate as *lex mercatoria* on an international or delocalised level. Given various autopoietic legal systems and the variability of economic and political factors worldwide, the question is whether usages can ever be commonly applied with some means of functional coherence (having the above social components at a particular time) by both free actors (e.g. traders) across the borders and adjudicating bodies (e.g. courts) of various Municipal legal orders?

2.2.11 The conventional view is that usages only become internationally *de juris* when they are recognised, explicitly (i.e. by declaring the usage as law) or implicitly (i.e. by the fact that the usage fulfils the external criteria to become binding under the relevant legal order) under many different legal orders each of which operates as a distinct autopoietic system. According to this view, trade usage *de juris* varies across legal

[143] Goode, *Usage and its reception in transnational commercial law* [1997] International & Comparative Law Quarterly 1, 14.

orders and its recognition depends on the reception of trade usage *de facto* by the relevant legal order. [144] It is submitted in this thesis that international usages only exist, as *de facto* and *de juris*, if they are embedded in a particular transaction which is inherently transnational, and that the rejection by a Municipal legal order to recognise an embedded usage of a particular transaction would functionally lead to a rejection of the whole transaction. This is because in relation to a particular transaction the normative propositions developed by usages, referred to in the previous paragraph, generate the above structural components (i.e. process, decision and identity) in addition to the component of embedded usages or overriding norms of the transaction (as the particular context must be a transaction vis–a-vis a place). For a particular transnational transaction, the process is that controversial behaviours are tested as a divergence of expectation against the embedded usages. Also, the normativity force of international embedded trade usages has the potential of being part of the structure (i.e. having the highest order in the doctrines or components of an autopoietic legal order)[145] of many Municipal legal orders world-wide. Therefore, as illustrated below in the embedded usage of irrevocability under English law, international embedded usages have the normativity force to even override mandatory law under autopoietic Municipal legal orders, but their normative force is subject to the overriding mandatory law (i.e. a prohibition by a national parliament of certain activities: the norm of the parliamentary sovereignty has a very high hierarchical status in the structure of many Municipal legal order) that is perceived by the state or the legal order as fundamental to the structure of the legal order. [146] Also the normative force of international embedded usages is subject to the freedom to contract which is a transnational overriding mandatory law as it is driven from the ideology of free market.

[144] Goode, *Rule, Practice, and pragmatism in transnational commercial law* [2005] International & Comparative Law Quarterly 539.
[145] The component of structure in legal orders has the highest hierarchal level: Teubner, *Law As An Autopoietic System*, (1edn 1993, Blackwell Publishers) ch 2 & 3.
[146] Carter, *The Role of Public Policy in English Private International Law*, [1993] ICLQ, 42, 1 Jan 1-10; *Kuwait Airways Corp v Iraqi Airways Co* (No.6) [2002] 2 A.C. 883.

Embedded And Peripheral Trade Usage[147]

2.2.12 When a particular transaction, institution or instrument – which is usually problem orientated - becomes so well known, whether locally, regionally or internationally, by virtue of trade usage it conveys with it, as submitted, "embedded" and "peripheral" aspects of trade usage.

2.2.13 **Embedded usages.** Embedded trade usages are those constitutive or fundamental principles[148] that are necessary to give sense to the commercial transaction, institution or instrument, so that the non-recognition of any of these principles threatens the viability of the commercial transaction, institution or instrument. Such trade usages are characterised in this research as embedded because they are associated with the existence of the underlying commercial transaction, institution or instrument. Embedded trade usages are implicitly recognised as law – in relation to commonly accepted particular commercial transactions - by both merchants and courts and they can be international *lex mercatoria*. Once a particular commercial transaction (e.g. bills of exchange or documentary credits) is recognised by a legal order, embedded trade usages of such a transaction are, and must be, recognised by that legal order as a matter of rational deduction to the effect that the communicated embedded trade usage *de facto* generates an internal communication within the legal order to give *de jure* effect to that trade usage within the autonomous constraints of that legal order.

[147] They are called "unchangeable" and "changeable" in a previous paper presented at the annual conference of the Society of Legal Scholars: Hwaidi and Ferris 'The Existence of International Unchangeable and Changeable Trade Usage' (SLS Conference, Edinburgh, September 2013) <http://archive.legalscholars.ac.uk/edinburgh/restricted/paper.cfm?id=107>.

[148] Principles are distinct from rules in terms that the former represent the underlying purposes and policy of law, whereas the latter are more specific and technical that enjoy far more formal realisability: Kennedy*, Form and Substance in Private Law Adjudication,* [1976] 89 Harvard Law Review 1685.

2.2.14 Peripheral usages. By contrast, peripheral trade usages are that usage the absence of which does not threaten the existence of the underlying commercial transaction, institution or instrument, they are the usages that do not reflect the concrete nature of the underlying transaction and they rather reflect the interests of internal actors which are changeable from place to place and, time to time. Peripheral usage is a distinctive creature of a particular locality or community. Peripheral usage therefore cannot be internationally certain as it reflects the interests of the actors in a locality or a particular community which differ from the interests of actors in other localities or communities. Peripheral usage might therefore be rejected or dramatically changed by other communities and legal systems since it is not fundamental to the underlying transnational transaction. Peripheral usages are *lex mercatoria* in their locality (e.g. Jordanian banking community) but are not international *lex mercatoria*.

2.2.15 Illustrations. The usage of applying the UCP to documentary credits in Jordan, as clarified by the empirical findings,[149] is an example of peripheral usage. Thus in countries such as the UK, documentary credits prior to 1963 used to be issued without being subject to the UCP and that did not threaten the existence of documentary credits. Similarly, if we suppose that the period of three banking days in examining documents in documentary credits was usage, and not a mere market practice,[150] in Jordan, here such usage would clearly be peripheral because it would solely be the creation of the Jordanian banking community and it might thus substantially differ in other countries without affecting the viability of documentary credits. By contrast, the norms of irrevocability, autonomy and conformity are embedded usages in documentary credit as elucidated below.

[149] Annex I, para 12.
[150] Annex I, para 23.

IRREVOCABILITY

2.2.16 One of the embedded trade usages of documentary credits is that the bank which issues the credit is under an obligation from the moment of issuing the credit, or the moment that the beneficiary has received the advice of issuing the credit, to make payment to the beneficiary who presents the required documents, and such an obligation of payment cannot be revoked without the acceptance of the beneficiary.[151] If the bank were not obliged to make payment then sellers would not accept the documentary credit as a form of payment, simply because it would not be a secure method of payment and therefore it would be useless.[152]

2.2.17 Unsurprisingly, the irrevocable obligation to make payment in documentary credits was implicit in the first attempt to promulgate banking "regulation" for uniform practices in documentary credits: "Regulations Affecting Export Commercial Credits".[153] Documentary credits are presumed irrevocable under common law[154] and Jordanian law[155] unless otherwise expressed.[156] Surprisingly, the first version of the UCP attempted to relieve the banks from the obligations of irrevocability, by providing that a documentary credit was assumed revocable (i.e. the issuing bank has the right to cancel or amend the revocable credit at any time and without prior notice to the beneficiary)[157] unless the credit was made expressly irrevocable.[158] This

[151] "Regulations Affecting Export Commercial Credits", New York Bankers Commercial Credit Conference (1920); Article 6 UCP 500; Articles 2, 7, 8 UCP 600; English law: *Hamzeh Malas Sons v British Imex Industries Ltd* [1958] 2 Q.B. 127, 127 per Jenkins LJ; USA: *Foglino & Co v Webster*, 216 N.Y.S. 225 (1926); *West Virginia Housing Dev Fund v Sorka* 415 F Sunn1107 (1976); *cf*; Sarna, *Letters of Credit The Law and Current Practice*, (3rd edn, Carswell 1992) para 1.8.1; UCC, S. 2 (325) (3); s. 5 (106) (a) of the revised UCC now states that *"a letter of credit is revocable only if provides so"*; McCurdy, *Commercial Letters of Credit*, [1922] Harvard Law Review Association 539, 556; Germany: Oelofse, *The Law of Documentary Letters of Credit in Comparative Perspective,* (1st edn, Interlegal 1997) 30; Jordan: Court of Distinction (Civil) *152/1975* Adalah Programme.
[152] *Cape Asbestos Co Ltd v Lloyds Bank Ltd* [1921] WN 274, *obiter*, per Mr. Justice Bailhache: the judge used the term "unconfirmed" as a synonym for revocable.
[153] Adopted by the New York Bankers Commercial Credit Conference of 1920.
[154] *Giddens v Anglo-African Produce Company Ltd* (1923) 14 Lloyd's L. Rep 230; in USA: UCC s. 2-325 (3).
[155] Court of Distinction (Civil), *152/1975*, Adalah Programme.
[156] This is also the position in Germany: Oelofse, *The Law of Documentary Letters of Credit in Comparative Perspective,* (1st edn, Interlegal 1997) 30.
[157] For the meaning of revocable documentary credits: article 8 UCP 1974; *Cape Asbestos Co Ltd v Lloyds Bank Ltd* [1921] WN 274; *Panoutsos v Raymond Hadley Corporation of New York* [1917] 2 K.B. 473.
[158] Article 3 of UCP 1933, Brochure 82, ICC.

remained the UCP position until 1993 when UCP 500 was promulgated.[159] Despite the widespread adoption of the earlier versions of the UCP by bankers and traders the revocable credit was never widely used.

2.2.18 In practice, almost all banks and traders expressly contracted for irrevocable documentary credits between 1933 and 1993.[160] This fact is evidence of the existence for *de facto* embedded trade usage of irrevocability. The UCP preference for revocability was impotent against the normative force of the embedded aspect of usage. Even where parties chose to incorporate the heterodoxical UCP into their contract they amended it in this respect. The UCP presumption of revocability was replaced by a presumption of irrevocability by UCP 500;[161] and finally in 2007 UCP 600 declared that documentary credits can only be irrevocable.[162] The ICC thus spent over half a century in a futile attempt to shift trade usage or custom on the nature of the payment obligation in documentary credits. The victory of embedded trade usage and the underlying understanding, expectations, and norms, is now complete, and documentary credits are irrevocable under UCP 600. Indeed being responsive to the norms materialising the underlying policy of documentary credits is essential not only for the commonality of any rule but also for its survival.

2.2.19 The irrevocability principle is enforceable under English law even though it violates the Common law requirement that consideration be reciprocal. Jenkins LJ stated the position in *Hamzeh Malas Sons v British Imex Industries Ltd:*[163]

[159] Taylor, *The Complete UCP*, (1st edn, ICC 2008).
[160] Goode, *Usage and its reception in transnational commercial law* [1997] International & Comparative Law Quarterly 1, 14.
[161] Article 6 UCP 500.
[162] Articles 2, 7, 8 UCP 600.
[163][1958] 2 Q.B. 127, 129.

"An elaborate commercial system has been built up on the footing that bankers' confirmed credits are … [binding] … and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice".

Here the "commercial system" is recognised as being capable of infringing the doctrines of Common law by way of being treated as an exception and the source of undertakings. The result must be correct, but the explanations of the result are inadequate whilst there is a lack of a clear recognition of embedded trade usages.

CONFORMITY

2.2.20 The second embedded trade usage in documentary credits is the principle of conformity. Indeed documentary credits were evolved from letters of credit on the basis that the payment in the credit is conditional upon presenting documents that are in compliance with the terms of the credit.[164] The principle of conformity or compliance of documents is described as regular order by international banking community,[165] strict compliance under Common law[166] and absolute compliance under Jordanian law.[167] The law was stated by Viscount Summer in *Equitable Trust Co of New York v Dawson Partners Ltd:*[168]

"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 authorized to accept are in the matter of the accompanying documents strictly observed".

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[164] Above: para 2.1.9.
[165] Draft Uniform Regulations on Export Commercial Credits (1927) presented to ICC's fourth Conference: Taylor, *The Complete UCP*, (1st edn, ICC 2008), 30. See also: article 10 UCP (1933) No. 82 and article 9 UCP (1951) No.151.
[166] *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Lloyd's Rep 49, 52.
[167] Court of Distinction (Civil), *316/1988*, Alkustas programme.
[168] (1926) 27 Lloyd's Rep 49, 52; *Gian Singh & Co Ltd v Banque de l'Indonchine* [1974] 1 W.L.R. 1234, 1240: *"This oft-cited passage has never been questioned or improved upon"* per Lord Diplock; *English, Scottish and Australian Bank Ltd v Bank of South Africa* (1922) 13 Lloyd's Rep 21, 24.

2.2.21 Accordingly, it was not only that this embedded trade usage fulfilled the common requirements for trade usage, there was a "common sense" that the documentary credit could not be workable if this embedded trade usage did not exist. The buyer would be entirely vulnerable if the principle of conformity 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 the principle.[169]

AUTONOMY[170]

2.2.22 The third embedded trade usage in documentary credits is the norm of autonomy in documentary credits: the requirement that the documentary credit contract is independent from any underlying sale contract and from the actual facts.[171] It was described by Lord Diplock in *United City Merchants (Investments) Ltd v Royal Bank of Canada*[172] as a "trite law" that this principle applies, he further elucidated:

"The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment." [173]

[169] This is the dichotomy between traveller letters of credit and the modern documentary letters of credit: Elinger, *Documentary Letters of Credit: A Comparative Study,* (1st edn, Singapore Press 1970), 24-38.
[170] Chapter 5.
[171] Jordanian law: Court of Distinction (Civil), *1050/2006,* Adalah Programme; UCP: articles 4, 5 UCP 600; articles 3, 4 UCP 500; article 1"Regulations Affecting Export Commercial Credits", New York Bankers Commercial Credit Conference (1920).
[172] [1983] 1 AC 168, 182.
[173] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, 183.

The House of Lords in this case relied on both logic and trade usage to recognise that the trade usage is so fundamental that it constitutes the "whole commercial purpose" of the transaction. Thus it is embedded usage to the transaction.

HIERARCHY AND CONCEPTUAL MODEL

2.2.23 The above three examples of principles derived from trade usage should be regarded as embedded within the nature of documentary credit transactions. They can be recognised as capable of having the effects of law (i.e. international *lex mercatoria*), by for instance being judicially noticed without the need of proof by expert evidence,[174] whenever a legal system recognises the use of documentary credits. Embedded trade usages need to be demarcated from peripheral trade usage and accorded a higher status in the hierarchy of legal norms than mere peripheral trade usage in order that the integrity of the transaction they support is maintained both across legal orders and over time.

2.2.24 Due to the freedom of contract that is caused by the ideology of a free market, it is essential for legal orders to be reliable in their delivery of conceptually useful tools and outcomes to facilitate the realisation of the parties' objectively intended bargain lest parties chose other legal systems to give effect to their transnational transactions. Therefore, it is important for a Municipal legal order to accept embedded usages of transnational transactions and not to reject or dramatically change an embedded usage in a transnational transaction, otherwise the legal order would be perceived as rejecting the whole transaction and that would affect its reputation as a useful legal order. Given the force of globalisation the embedded usages of transnational transactions are becoming part of the social component of "structure" in Municipal legal orders and such a component has the highest order

[174] *Hamzeh Malas Sons v British Imex Industries Ltd* [1958] 2 Q.B. 127; *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168.

amongst the other social components (i.e. process, element and identity) that enables a legal order to successfully operate as a fully functioning social system.[175] As illustrated above the embedded usage of irrevocability in documentary credits was accepted under Common law regardless of the fact that it contravened its mandatory legal doctrine that consideration be reciprocal.[176] Accordingly, it can be contended that there is already an implicit recognition that internationally embedded usages (international *lex mercatoria*) is becoming part of what is regarded under systems theory the structural component (similar to constitutional law) of the Common law social system. Therefore such an international lex mercatoria binds even mandatory law under autopoietic Municipal legal orders, but it is subject to overriding mandatory law (i.e. a prohibition by a national parliament of certain activities: the norm of the parliamentary sovereignty has a very high hierarchical status in the structure of many Municipal legal order)[177] and freedom to contract.

2.2.25 A regulator of documentary credits must therefore give effect to the embedded usages of irrevocability, autonomy and conformity. The underlying need and the function of the principle of irrevocability is the security of payment to sellers as logically deducted in *Cape Asbestos Co Ltd v Lloyds Bank Ltd*[178] where Justice Bailhache stated that without the irrevocability principle documentary credits would be useless. The underlying need of assurance of payment for sellers and banks is made concrete by the function of the autonomy principle whereby the bank is not entitled to examine any of the underlying transactions. The principle of conformity functions as a documentary proof of the shipment of the required goods in order to fulfil the need of buyers for an assurance of delivery against payment.[179]

[175] In contrast Teubner argued that international trade usages as part of globalisation break the frames of the boundaries of autopoietic Municipal legal systems: Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems,* [1997] The American Journal of Comparative Law (45) 149.
[176] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168, 182 per Lord Diplock
[177] Carter, *The Role of Public Policy in English Private International Law*, [1993] ICLQ, 42, 1 Jan 1-10; *Kuwait Airways Corp v Iraqi Airways Co* (No.6) [2002] 2 A.C. 883.
[178] [1921] WN 274.
[179] As this is the dichotomy between traveller letters of credit and the modern documentary letters of credit: Elinger, *Documentary Letters of Credit: A Comparative Study,* (1st edn, Singapore Press 1970), 24-38.

English Law

2.2.26 **Three categories of practice.** English law distinguishes between three categories of trade practice, namely: (1) trade usage which is a synonym for trade custom[180] embracing both embedded and peripheral trade custom; (2) the market practices of traders in the context of the recognition of their settled and established trading practices; and (3) the established course of dealing of particular traders in the context of their particular trades.

2.2.27 **Trade usage***.* The term trade usage is a synonym for "trade custom" but the latter is usually used in relation to a particular place (e.g. custom of a port).[181] For the practice to amount to a recognised usage by English law, it must be[182] (i) certain, in the sense that the practice is uniform and clearly established;[183] (ii) notorious, in the sense that the practice is so well known in the market in which it is alleged to exist, so everybody in the particular trade enters into a contract with that usage as being an implied term that does not need to be expressed;[184] (iii) binding, in so far as being perceived as having binding effects upon any person involving in the particular trade in which the practice operates;[185] (v) reasonable,[186] although if a party knows of the unreasonable practice and agrees to it then, though unreasonable, he is bound by it unless the practice contravenes mandatory law or public policy.[187]

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[180] *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 S.C. (H.L.) 134, 136 per Lord Chancellor; *Exxonmobil Sales and Supply Group v Texaco* [2003] EWHC 1964 Com 24.
[181] *Smith & Service v Rosario Nitrate Company, Limited* [1894] 1 Q.B. 174.
[182] *Nelson v Dahl* (1879) 12 Ch. D. 568, 575 per Sir George Jessel; *Cunliffe-Owen v Teather* [1967] 1 W.L.R. 1421, 1437 per Ungoed-Thomas J; *Rutherford v Seymour Pierce Ltd* [2010] EWHC 375 (Q.B.), [19].
[183] *Cunliffe-Owen v Teather* [1967] 1 W.L.R. 1421, 1437 per Ungoed-Thomas J; *Nelson v Dahl* (1879) 12 Ch. D. 568, 575 per Sir George Jessel who stated: *"certain as the written contract itself".*
[184] *In Re Goetz, Jonas & Co* [1898] 1 Q.B. 787; *Moult v Halliday* [1898] 1 Q.B. 125.
[185] *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 S.C. (H.L.) 134, 141 per Lord Shaw.
[186] *Joseph Tucker v Joseph Linger* (1883) 8 App. Cas. 508; reasonableness is assumed where the practice is accepted practice and well known: *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 S.C. (H.L.) 134, 136 per Lord Chancellor.
[187] *Perry v Barnett* (1885) 15 Q.B.D. 388, 397 per Bowen LJ.

2.2.28 Generally speaking trade usage is effective through contract under English law.[188] Thus trade usage has the effects of being an implied term to contracts in a particular trade[189] or an interpretive aid to contractual terms (i.e. usage might change the ordinary meaning of a contractual term if it is so notorious).[190] Trade usage cannot be annexed to a contract where it causes insensibility or inconsistency to the terms of the contract.[191] To be effective trade usage must not be in defiance to mandatory law to usage that has been judicially noticed and has become part of Common law.[192] Usage is treated as a matter of fact until eventually, after generally being proved so often in courts, it becomes so well understood that the courts take judicial notice of it.[193] The existence of embedded trade usage is the focus of this thesis as it is the main element in the conceptual model, and therefore English cases as to the role of peripheral usage in the interpretation of contractual terms are not analysed.

2.2.29 *Implicit recognition of embedded usage.* However, where usage is so notorious, by being as submitted *embedded*, and not *peripheral*,[194] to the particular notorious commercial institution then usage can be a source of law creating rights and duties on parties who are privy to a contract and thus such usage is effective even if it contravenes mandatory law, except public policy and public morality, and it would be regarded as an exception - and not a replacement – to that mandatory law.[195] As explained above the embedded usage of irrevocability provides a stark example for the recognition of embedded usage as a source of undertakings rather than contract

[188] McKendrick (ed), *Goode on Commercial Law*, (4th ed, LexisNexis 2009), 14.
[189] *Nelson v Dahl* (1879) 12 Ch. D. 568, 575 per Sir George Jessel; *Cunliffe-Owen v Teather* [1967] 1 W.L.R. 1421, 1437; *Rutherford v Seymour Pierce Ltd* [2010] EWHC 375 (Q.B.), [19].
[190] *Nielsen & Co. v Wait, James & Co* (1885) 16 Q.B.D. 67; *Andressen v Shields & Brown* (1897) 5 S.L.T. 52; *Jacobsen, Sons & Co. v Underwood & Son (Limited)* (1893) 1 S.L.T. 422; different witness opinions will not be taken into account if they were in conflict: *Birrell and Others v Dryer and Others* (1884) 9 App. Cas. 345.
[191] *Joseph Tucker v Joseph Linger* (1883) 8 App. Cas. 508; *Palgrave Brown & Son, Ltd. v Owners of S.S. Turid* [1922] 1 AC 397; *Aktieselkab Helios v Ekman & Co* [1897] 2 Q.B. 83.
[192] *Goodwin v Robarts* (1875) LR 10 Exch 337 at 357, Ex Ch, per Cockburn CJ; *Brandao v Barnett and Others (1846) 3 Common Bench Reports* 519, 136 E.R. 207, [530] per Lord Campbel; *Halsbury's Laws of England,* (2012) volume 32.2. para 61.
[193] *Universo Insurance Company of Milan v Merchants Marine Insurance Company, Limited* [1897] 2 Q.B. 93, 96 per Lord Esher; *Moult v Halliday* [1898] 1 Q.B. 125; *Brandao v Barnett and Others (1846)* 3 Common Bench Reports 519, 136 E.R. 207, [530] per Lord Campbel: "*when a general usage has been judicially ascertained and established, it becomes part of the law-merchant".*
[194] Below para 2.2.5.
[195] *Goodwin v Robarts L. R. 10 Ex. 337*; *Rumball v Metropolitan Bank 2 Q. B. D. 194; Bechaunaland Exploration Company v London Trading Bank, Limited* [1898] 2 Q.B. 65.

law regardless of the fact that it contravened with the Common law doctrine that consideration be reciprocal.[196]

2.2.30 A second example of embedded trade usage under English law is the negotiability of bills of exchange being an exception to mandatory law that a party to a contract is not permitted to transfer his right under the contract to another person.[197] Thus the embedded trade usage of negotiability faced rejections by the legal communications of Common law and pleaders in the seventeenth century used to plead the negotiability of bills of exchange on immemorial local custom.[198] Bowen LJ in *Picker v The London and County Banking Company, Limited*[199] used the phrase "*well known to law merchants"* to signify the effect of the trade usage of the negotiability of bills of exchange as an exception to mandatory Common law. Such a phrase was later interpreted by Kennedy J in *Bechaunaland Exploration Company v London Trading Bank, Limited*[200] as denoting the modern law merchant or trade usage and not merely the ancient law merchant.[201] The usage of negotiability has become part of the structure (in addition to the embedded usage that bills of exchange are orders of payment) of the commercial viability of bills of exchange and it is therefore *lex mercatoria* (i.e. being used as a reference to the code of legal/illegal by actors in testing a controversial behaviour in connection to bills of exchange).

2.2.31 A third example emanates from the transaction of bills of lading.[202] A bill of lading functions as evidence to the delivery and shipment of goods. This embedded usage is part of the structure of bills of lading and its non-recognition under a legal order

[196] Para 2.2.19.
[197] *Picker v The London and County Banking Company, Limited* (1887) 18 Q.B.D. 515, 520 per Bowen LJ; Lord Irvine, *The Law: An Engine for Trade*, [2001] Modern Law Review, May 64 (3) 333, 339; *cited*; *Three Rivers v Bank of England* [1996] QB 92.
[198] Pleaders in the seventeenth century used to plead the negotiability of bills of exchange on immemorial local custom: *Halsbury Laws of England,* (5th edn, 2012), 32 para 62.
[199] (1887) 18 Q.B.D. 515, 520.
[200] [1898] 2 Q.B. 658, 668, 674.
[201] The concept of ancient law merchants denotes the usage from immemorial time or the usage that was recognised by the courts of merchants.
[202] Harris, *Ridley's Law of the Carriage of Goods by Land Sea and Air,* (8th edn, Sweet & Maxwell 2010) para 3.2.3.

would lead to the collapse of the transaction of bills of lading under that legal order. The other usage is the treatment of a bill of lading as a document of title. Such usage started to develop around the eighteenth century and has become embedded in the modern trade. The evolutionary process of bills of lading was elucidated in *the Rafeala* by Lord Steyn:

"One must start with the function of the bill of lading in international trade. Through the centuries that role has changed. What started as a bailment receipt of goods developed into a receipt containing the contract of carriage, and in the course of time acquired a third characteristic, that of a negotiable document of title. In modern commercial usage the bill of lading is one of the pillars of international trade, providing the credit necessary for the financing of mercantile trade."[203]

2.2.32 By the embedded usage of documentary title a bill of lading is symbolic of the right of the possession of goods and it can be freely transferred to third parties. The carrier is obliged to deliver the goods, and thus the possession of the goods,[204] only to the person who presents the bill of lading. Such trade usage was elegantly described by Bowen LJ in *Sanders Bros v Maclean & Co*:[205]

"A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolic delivery of the cargo".

[203] J *I Macwilliam Co Inc v Mediterranean Shipping Co SA ("the Rafaela")* [2005] 2 A.C. 423, 453 -454.
[204] Harris, *Ridley's Law of the Carriage of Goods by Land Sea and Air,* (8th edn, Sweet & Maxwell 2010) para 3.2.3.4.3: "the real significance of the bill of lading lies in the right which it embodies to possession of the goods from the carrier".
[205] (1883) 11 QBD 327.

As the trade usage of documentary title has become part of the structure of bills of lading, it was recognised under Common law regardless that it had contravened with the traditional Common law doctrine that contractual rights cannot be transferable.[206] Accordingly, a bill of lading was founded on the embedded usage that it is a receipt of goods, so the absence of such usage leads to the collapse of the transaction of bills of lading. But such a structure was developed by the spontaneous practices of traders, so the new usage of document of title became part of the structure when it had been accepted and applied by most traders and legal orders across borders. Therefore, a non-recognition of the embedded usage of document of title by a legal order would threaten the viability of bills of lading under that legal order.

2.2.33 Market practice. The second category is market practice which is distinguished from trade usage, by the words of Lord Shaw:

"The distinction should be made plain between a settled and established practice in the general sense of the mere occurrence of instances (many of which may have sprung from express contract), and a settled and established practice which amounts to the acceptance of a binding obligation of a custom apart from particular bargain".[207]

The role of market practice became important after the new approach of the test of a reasonable reader against the matrix of fact,[208] and where there is more than one possible construction the court takes the one that is consistent with business common sense, in the interpretation of contracts under English law.[209] Thus market

[206] *Lickbarrow v Mason* (1794) 5 T.R. 683.
[207] *Strathlorne Steamship Co Ltd v Hugh Baird & Sons Ltd* 1916 S.C. (H.L.) 134, 141.
[208] *Rainy Sky SA v Kookmin Bank* [2011] 1 W.L.R. 2900.
[209] *Prenn v Simmonds [1971] 1 W.L.R. 1381*, 1383 per Lord Wilberforce; *Reardon Smith Line Ltd. v Yngvar Hansen-Tangen [1976] 1 W.L.R. 989 per Lord Wilberforce; American Airlines Inc v Hope [1974] 2 Lloyd's Rep 301,* 305 per Lord Diplock; *Reasonable reader: Attorney General of Belize v Belize Telecom Ltd [2009] 1 W.L.R.*

practice is part of the matrix of fact of a contract where the parties are internal actors of the relevant market, and as such market practice has usually the same effects of trade usage.[210] The difference is that there is no requirement for the validity of the practice to be perceived as being binding and rather it is sufficient that the practice is regular in the sense of generating an expectation of repetition. Still for market practice to be considered part of the matrix of fact the practice must be proved and that the parties must take notice of it in the particular bargain, and that would be presumed where the parties are internal actors. But, unlike practice, trade usage applies whether or not the parties are internal actors in the relevant market since usage is perceived as both being binding on its relevant institution, marketplace or locality. Of course, market practice cannot contravene mandatory law unless – subject to the rules of public policy and public morality - it is clearly proved that the contractual parties intend to adopt the practice instead of the default rule of law.

2.2.34 **Previous course of dealing***.* The third category is course of dealing which is what is adopted consistently on similar occasions between the same parties. Contractual terms are incorporated on the basis of the previous course of dealing between the parties.[211] An applied mode of dealing of a particular firm in a particular trade cannot be imposed on another party unless it is proved that it has actually taken notice of it.[212]

1988 per Lord Hoffman; *Investors Compensation Scheme LTD v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912 per Lord Hoffman; *Rainy Sky SA v Kookmin Bank* [2011] 1 W.L.R. 2900.

[210] *Lloyds TSB Bank Plc v Clarke (Liquidator of Socimer International Bank Ltd)* [2002] 2 All E.R. (Comm) 992 ; *Crema v Cenkos Securities Plc* [2011] 1 W.L.R. 2066.

[211] *Henry Kendall & Sons v William Lillico & Sons Ltd [1969] 2 AC 31.*

[212] Beale and others (eds), *Chitty on Contracts* (31st edn, Sweet and Maxwell 2010) para 13.022.

2.2.35 Two categories of practice. Jordanian law explicitly distinguishes between two categories of practice being trade usage or custom, and practice or occurrence of instances.

2.2.36 Trade usage. Custom or usage must be notorious, longstanding, certain, consistent and should not contravene mandatory law[213] or public policy or public morality.[214] There is no authority in Jordan suggesting that the meaning of longstanding refers to time immemorial, as under English law in respect of custom in land law, but such a term denotes that usage must be well established for many years in the sense of it being well known. Unlike English law, for a practice to amount to trade usage it does not need the requirement of being perceived as having binding effects.[215] Also usage is regarded as a source of law under Jordanian law where there is lacunae in Jordanian codes.[216] It is submitted, however, that usage has the effect of law as long as it is the prevailed concurrent usage.[217]

2.2.37 Practice including course of dealing. The second category is what is known as practice or occurrence of instances which is given effects ancillary to contracts, by being interpretative aids or incorporated terms to contracts. Practice, whether it is general or particular,[218] needs to be a consistent occurrence of instances or be notorious and common in order to have effect.[219] Practice is not recognised if it contravenes written law.[220] Particular practice does include a particular course of

[213] Article 4 Commercial Code (1966); custom in civil and not commercial matters should not contravene written law: article 2 (1) Civil Code (1976).
[214] Article 2 (3) Civil Code (1976).
[215] Article 2 (3) Civil Code (1976).
[216] Article 2 Civil Code (1976); article 3 Commercial Code (1966).
[217] Article 4 of Commercial Code (1966) employs the word "saad" which denotes notorious, concurrent and prevailing usage.
[218] Article 220 (1) Civil Code (1976).
[219] Article 220 (2) Civil Code (1976).
[220] Article 2 Civil Code (1976).

dealing between the same parties. As practice is not law, it cannot be regarded as a source of law and must thus be proved before courts in each case.

2.2.38 **Implicit recognition of embedded usage.** The Court of Distinction recognised the transaction of documentary credits as an irrevocable binding promise that is independent from underlying transactions. Although there was no explicit reference to trade usage, it can be clearly inferred that the recognition of the autonomy principle was based on international *lex mercatoria* as the Court did not take into account the fundamental doctrine in contract law that a binding promise must have a legal cause.[221] The negotiability character of bills of exchange is recognised as an essential part of bills of exchange under Jordanian law.[222]

EMPIRICAL FINDINGS

2.2.39 The distinction by English law between trade usage and market practice is not a fiction, since such segmentation is also reflected *de facto* by Jordanian bankers in that trade usage generates the sense of being legally binding where practice generates a mere expectation of repetition.[223] It follows that the lack of imposing the sense of being binding for the recognition of usage under Jordanian law does not reflect the sociological facts.[224] Thus such an element is decisive to distinguish usage from practice in terms that it might be the justification of treating usage as having a higher hieratical level than market practice primarily under Jordanian law as usage is regarded as law, unlike practice, and operates independently from contract. As explained above, for practice to become *lex mercatoria* it must evolve to usage by having the element of the sense of being binding. When one speaks of international

[221] Court of Distinction (Civil), *152/1975*, Adalah Programme.
[222] Article 141 Jordanian Commercial Code (1966).
[223] Above para 2.2.6; Annex I, 12.
[224] As the empirical findings are based on a qualitative study conducted on small pattern of selected cases, in the context of trade usage, a claim for generalizability or even external validity cannot be warranted for the findings.

lex mercatoria the practice should not only be usage but also embedded to the transaction by being part of the structure, so it can resist a dramatic change under a particular legal order. Hence, a state of affair is tested (by the use of code acceptance/rejection) by actors (traders and legal orders) against the structure of the transaction across borders.

THE NATURE OF THE UCP

2.3.1 Self-regulatory rules. The International Chamber of Commerce (ICC),[225] being a formulating agency of rules, is one of the most powerful international private organisations in facilitating the transaction of businesses in international commerce. The ICC publishes "self-regulatory rules"[226] endeavouring to create certain legal environment in a particular transactional field of international trade. Prominent among these rules is the UCP which purport to be declarative of pre-existing and current practice relative to documentary credits. The Drafting Group of the UCP also tries to envisage future evolution of documentary credit practices.[227] Given the ICC Opinions and other interpretative aids aiming to provide coherence in interpreting the UCP by using the code legal/illegal it is appropriate to perceive the UCP as a partially-autopoietic system. What differentiates the UCP from international and Municipal legal orders is that they are more exposed to external communication as the "formal realisability" of the UCP is contingent upon both the legal order that it operates within and the trading communications for which it operates. To maintain the soft-power of the UCP the internal communication of the UCP (i.e. the terms of the UCP and their interpretations as perceived by the ICC or the Banking community) must accept external facts (e.g. legal doctrine in a Municipal law or trading needs) that are commonly shared amongst legal orders or with trading communities.

2.3.2 Acclamation. The new paradigm in law-making known as privatisation in law-making[228] generates a shift in the creation of many modern international trade usages. International trade usage is no longer solely a spontaneous-creation. The self-regulatory rules published by private organisations envisage expected future

[225] http://www.iccwbo.org.
[226] Such rules are called as "self-regulatory rules" by: Ly, *International Business Law and Lex Mercatoria*, (1st edn, North Holland 1992) 164; they are also called as "code like" by: Berger, *The Creeping Codification of the New Lex Mercatoria,* (2edn, Kluwer Law International 2010) 38-51.
[227] UCP 600, Introduction.
[228] Berger, *The Creeping Codification of the New Lex Mercatoria,* (2edn, Kluwer Law International 2010) 38-51.

trade usage.[229] So, the evolution of many modern trade usages begins with an express promulgation which acts as an embryonic stage. The second stage is acclamation through acceptance and adoption of the proclaimed usage by traders and other market participants which is an essential step for the envisaged trade usage to qualify as trade usage *de facto*. Thus the scheme of envisaged trade usage needs to be internationally followed by the practice of traders, bankers and the involved parties in order to become international trade usage. To become truly international usage needs to be embedded to the transaction in order to resist a dramatic change under a particular legal order. Accordingly, many modern international trade practices are still treated as organic – not legislated – and whilst the embryonic stage of such organic practice is not spontaneous the birth of international trade usage still requires "spontaneous" behaviours which are in turn the proof as to whether a self-regulatory rule is effective. We must beware of claims to promulgate international banking practice as a trade usage, even if the attempt is temporised by a humility that aspires merely to "reflection",[230] since the validity of trade usage must be a matter of acclamation rather than promulgation. In that context the nature of the UCP involves the communication of the UCP terms within the doctrines of legal orders (i.e. English and Jordanian laws in this research) as to both the legal status of the UCP and the interpretation of the UCP terms.

Legal Status Of The UCP

2.3.3 Public and private law. From the perspective of international public law it is clear that the UCP are neither regarded as a treaty ratified by authorities representing states, nor as customary international law in the sense of being binding custom

[229] For example: see the introduced formalities in article 16 UCP 600 as discussed in Hwaidi and Harris, *The Mechanics of Refusal in Documentary Letter of Credits:An Analysis of the Procedures Introduced in Article 16 UCP 600,* [2013] Journal of International Banking Law and Regulation, 28(4), 146-155.
[230] Such a humility we should recall that was shown by Coke CJKB who asserted the judicial power in the service of declaration of the common-law in the seventeenth century.

between states. It is also clear from the perspective of private law that in most countries the UCP are not legislated as law,[231] but it is not clear whether the UCP have the force of law through the communication of trade custom or usage under legal orders.

2.3.4 Application and terms of the UCP. A dichotomy must be drawn between the status of the applicability of the UCP and the status of the UCP terms. The application of a UCP term might not be regarded as trade usage but the content of a UCP term might be a reflection of existing law or current usage as in the case of UCP 600 articles declaring the embedded trade usages of autonomy,[232] irrevocability[233] and conformity.[234] Or it might be that the application of the UCP is trade usage but the terms of the UCP contradict existing law or usages, as did the proposition of revocability under UCP 400 explained above.[235] Indeed some terms of the UCP endeavour to envisage new practices.[236] Therefore the UCP terms cannot be taken as decisive evidence of current practices but they might be regarded as initial evidence that would give way to contrary expert evidence. It is the general view under English law that the UCP do not have the force of law,[237] in the sense they do not operate independently from documentary credit contracts.

2.3.5 Incorporation. It is suggested by many scholars that the UCP are treated as standard contractual terms where they are incorporated expressly or implicitly (e.g.

[231] The UAE is an exception: UAE Commercial Transaction Law (1993).
[232] Articles 4 and 5 UCP 600.
[233] Articles 1, 7 and 8 UCP 600.
[234] Article 14 UCP 600.
[235] Para 2.2.16.
[236] UCP 600, Introduction.
[237] *M. Golodetz & Co. Inc. v Czarnikow-Rionda Co. Inc* [1980] 1 W.L.R. 495, *dicta*, per Donaldson J that the UCP "have no force of law".

by a previous course of dealing,[238] or tacit understanding so that the failure of making a reference to the UCP was a technical error)[239] in a documentary credit contract.[240]

2.3.6 **Absence of incorporation.** The question is what is the status of the application of the UCP when they are not incorporated into a documentary credit contract? The answer is quite certain under Jordanian law as the empirical findings of this research clarify that it is trade usage in Jordan to apply the UCP to documentary credits.[241] Given the fact that trade usage has the force of law in Jordan the application of the UCP, and thus the terms of the UCP, has the force of law subject to the mandatory law and, as submitted, embedded trade usage.

2.3.7 The position in the UK is less certain as there is no current legal or empirical evidence regarding the practice of the application of the UCP in the UK. However, there is strong indication that the practice of applying the UCP by British banks is very common,[242] so it can be said that it is the market practice in the UK to apply the UCP and such a practice might have become usage if it would be proved before courts that the application of the UCP is perceived as being binding. It is submitted, therefore, that in the absence of a documentary credit contract incorporates the UCP by express words or through course of dealing, the UCP would nevertheless be applied. Either because their application might be considered peripheral trade usage, or because their application might be considered as having been impliedly agreed in the light of the modern approach of interpreting contracts by reference to the appropriate matrix of facts.[243] Except of course where the factual matrix evidences

[238] Malek and Quest, *Jack: Documentary Credits,* (4th edn, Tottel 2009) para 1.28.
[239] Bridge and others (eds) *Benjamin's Sale of Goods* (8th edn, Thompson 2010), para 23.08.
[240] Elinger and Neo, *The Law and Practice of Documentary Credit*, (1st edn, Hart 2010) 43-46; Bridge and others (eds), *Benjamin's Sale of Goods*, (8th edn, Thompson 2010) para 23.8; Malek and Quest, *Jack: Documentary Credits,* (4th edn, Tottel 2009) para 1.23.
[241] Annex I, para 12.
[242] ICC Brochure 222.
[243] *Matrix of facts: Prenn v Simmonds [1971] 1 W.L.R. 1381*, 1383 per Lord Wilberforce; *Reardon Smith Line Ltd. v Yngvar Hansen-Tangen [1976] 1 W.L.R. 989 per Lord Wilberforce; American Airlines Inc v Hope [1974] 2 Lloyd's Rep 301,* 305 per Lord Diplock; *Reasonable reader: Attorney General of Belize v Belize Telecom Ltd [2009] 1 W.L.R. 1988* per Lord Hoffman; *Investors Compensation Scheme LTD v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912 per Lord Hoffman.

a common intention to contract of a documentary credit outside the UCP. Accordingly, the application of the UCP would be ancillary to a documentary credit contract, and not themselves be a source of law, under English law to the effect that, unlike Jordanian law, the UCP are unable to create rights or duties on parties privy to the documentary credit contract. However, it is submitted that the conveyed content of an article of the applied UCP through the usage or market practice, in the absence of their express incorporation in the documentary credit contract, cannot prevail over concurrent peripheral usage.

2.3.8 **UCP 600.** Article 1 states that UCP 600 applies "*when the text of the credit expressly indicates that it is subject to these rules*". The equivalent provision in the predecessor revision provided that UCP 500 applies "*where they are incorporated in the text of the credit*".[244] It is submitted that the addition of the word "expressly" neither denounces the application of the UCP as trade custom or usage, nor does it convey that it is the practice to apply the UCP only where the credit expressly so stipulates. Of course it is the aim of the UCP to be internationally customarily applied since the objective of the UCP is to achieve uniformity in documentary credit practices and regulations.[245] The word "expressly" was added to emphasise the fact that the ICC is a non-governmental organisation that is unable to enact Municipal laws, and thus the UCP may not have the force of law under legal orders as states are sovereigns and some of them may enact laws regulating documentary credits in lieu of the UCP.[246] For example, due to the fact that Tunisia and Kuwait ratified the treaty of UNCITRAL on Independent Guarantees and Stand-by Letters of Credit,[247] the UCP are not automatically applied to stand-by letters of credit in these countries even if the UCP might previously have been customarily applied. Accordingly, it is necessary for the commonality of the UCP to encourage banks around the world to expressly

[244] Article 1 UCP 500.
[245] UCP 600, Foreword.
[246] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (ICC No. 680, 2009), 11.
[247] United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995).

incorporate the UCP in documentary credit contracts in order to contract out of the application of law or rules other than the UCP, given the fact that freedom to contract is a common paradigm of legal orders in the twenty first century.[248] Given the fact that the embedded trade usages of documentary credits represent the fundamental purposes of entering into documentary credit contracts, a mere expression of the incorporation of the UCP as a whole might not give effect to a UCP term that contravenes an embedded trade usage of documentary credits, it would be presumed that it is the intention of the parties to apply such embedded concepts to the documentary credit institution unless it is clearly expressed to contract out of them.

Interpretation Of The UCP

2.3.9 **Interpretative aids.** The ICC publishes interpretative aids to the terms of the UCP demonstrating how the UCP terms should be applied. These aids are the: International Standard Banking Practice for Examination of Documents under Documentary Credits (ISBP),[249] Opinions of the Banking Commission[250] and Rules for Documentary Credit Dispute Resolution Expertise (DOCDEX).[251]

ISBP

2.3.10 The ISBP is promulgated by the ICC Banking Commission in their endeavour to reflect the international standard banking practices on how document checkers

[248] Article 1 (1) UNIDROIT Principles (2010).
[249] For UCP 500: ICC, *International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP)*, (ICC Publication No. 645, 2002); for UCP 600: ICC, *International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP)*, (ICC Publication No. 681, 2008); ICC, *International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP)*, (ICC Publication No. 745, 2013).
[250] Opinions in relation to UCP 500 & 400: ICC Banking Commission, Collyer and Katz (eds), *Collected Opinions 1995-2001* (ICC Publication No. 632, 2002); ICC Banking Commission, Collyer and Katz (eds), *Unpublished Opinions 1995-2004* (ICC Publication No. 660, 2005); Opinions in relation to UCP 600 & 500: ICC Banking Commission, Collyer and Katz (eds), *Opinions 2005-2008* (2009, ICC Publication No. 697); ICC Banking Commission, Collyer and Katz (eds), *Opinions 2009-2011* (ICC Publication No. 699, 2012).
[251] Collyer and Katz (eds), *Collected DOCDEX Decision 1997-2003* (ICC Publication No. 665, 2004); Collyer and Katz (eds), *Collected DOCDEX Decision 2004-2008* (ICC Publication No. 696, 2008).

examine documents for conformity.[252] It was originally created to reduce the large percentage of refused documents on first presentation.[253] The ISBP was first approved by ICC in 2002 and the preparatory work of that version included reviewing the checklists of some 39 ICC national committees on how documents were examined. The task did not report on the practices of banks in individual countries that differed from each other, rather the task aimed to reflect the practices that were commonly adopted by banks.[254] The ISBP was linguistically updated in 2007 to match the language of UCP 600 by making technical adjustments in capitalisation, substituting article references for those of UCP 500 and incorporating changes in ISBP paragraphs necessary to bring the wording in line with wording in UCP 600.[255] The ISBP 2002 was revised for the first time in 2013.[256] The new revision of ISBP covers practices identified by ICC Opinions after the promulgation of UCP 600.

2.3.11 **Binding interpretative aid by incorporation and practice.** In relation to the status of ISBP, the introduction of UCP 600 specifically refers to the application of the ISBP as a binding interpretative aid to the UCP where it states:

"During the revision process, notice was taken of the considerable work that had been completed in creating the International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP), ICC Publication No. 645. This publication has evolved into a necessary companion to the UCP for determining compliance of documents with the terms of letters of credit. It is the expectation of the Drafting Group and the Banking Commission that the application of the principles contained in ISBP, including subsequent revisions thereof, will continue during the time UCP 600 is in force".

[252] *ISBP 2002,* Foreword.
[253] *ISBP 2007,* Foreword.
[254] *ISBP 2002*, Foreword.
[255] *ISBP 2007*, Foreword.
[256] ICC, *International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP)*, (ICC Publication No. 745, 2013).

2.3.12 In this respect ISBP 2013 states that *"this publication is to be read in conjunction with UCP 600 and not in isolation".*[257] Also a reference to the ISBP was made in article 1 and sub-article 14 (d) of UCP 600 but without capital letters as UCP 600 eradicates the use of capital letters. However, it is suggested by Elinger and Neo that a non-capitalisation of the term "international standard banking practice" reflects that there can be an international practice in a particular region other than the ISBP.[258] It is submitted that, under English and Jordanian laws, an incorporation of UCP 600 into a documentary credit contract entails the incorporation of the ISBP as the latter is clearly referred to in UCP 600. Here the incorporated UCP terms are regarded as standard contractual terms and the ISBP as a binding interpretative aid to the UCP, so the ISBP should not contradict the UCP terms. In the case of an absence as to the reference of the application of the UCP in a documentary credit, the empirical findings clarify that it is market practice, if not trade usage, in Jordan to apply the ISBP in checking the conformity of documents.[259] Muhammad Burjaq said:

"The bank is not obliged to apply ISBP as the deletion of the capital letters in UCP 600 in the reference to ISBP signifies this position. But the bank is obliged to apply ICC Opinions as they reflect the international banking practices. The bank must apply ISBP where there is no guidance in the ICC Opinions".

2.3.13 Such a practice and view was not shared by any other bankers regarding the ISBP, as all other bankers stated that their banks apply the ISBP to the examination of the documents along with UCP 600 and they are *obliged* to do so. The reason behind the obligation to apply the ISBP was explained by Qhaleb Joudeh and Koloud Alkalaldeh in terms that the ISBP is part of UCP 600 and moreover, Mr A and B praised the ISBP

[257] *ISBP 2013*, Preliminary Considerations.
[258] Elinger and Neo, *The Law and Practice of Documentary Credit*, (1st edn, Hart 2010), 32.
[259] Annex I, para 14.

for simplifying issues and easing the task for the determination of the status of conformity.

2.3.14 As the subject of the empirical study of this research is Jordan the research is unable to point to the current practice in the UK. Of course the matter as to whether or not it is usage or practice to apply the ISBP, in the case of non-incorporation, will be determined by expert evidence before courts under the English and Jordanian legal orders.[260]

OPINIONS

2.3.15 ICC Opinions represent the view of the ICC Commission on Banking Technique and Practice regarding queries, each based on a given set of facts with no supporting documentation, that are related to the terms of the UCP. Such Opinions reflect how banks would interpret the given set of facts in practice. They serve as guideposts to courts in interpreting ICC rules[261] as they fill *"in the details that the UCP, being more general in nature, cannot always provide"*.[262] The ICC Opinions are a binding interpretive aid as envisaged by the ICC in respect to the UCP in the case of ambiguity.[263] Nevertheless, there is no reference in UCP 600 or the predecessor revision as to the application of ICC Opinions, and as such the incorporation of the UCP does not entail an incorporation of ICC Opinions. Thus the effectiveness of the application of Opinions as interpretative aids to the UCP is contingent on whether or not it is practice to apply them under legal orders.

[260] Jordanian law: Article 2 Jordanian Evidence Code (1952); English law: in *Fortis Bank S.A./N.V, Stemcor UK Limited v Indian Overseas Bank* states [2011] 1 C.L.C. 276, 288-289 the Court of Appeal called the expert evidence to validate the position of international practice.
[261] *Collected Opinions 1995-2001* (ICC No. 632, 2002), Foreword.
[262] Collyer and Katz, *ICC Opinions 2009-2011*, (2012) preface, ICC No 732.
[263] *Collected Opinions 1995-2001* (ICC No. 632, 2002), Foreword.

2.3.16 Empirical findings. The empirical findings indicate that there is no usage but market practice in Jordan to apply ICC Opinions, and that the reasons and situations triggering the application of the Opinions substantially differ between banks and are not as envisaged by the ICC (i.e. the Opinions apply in the case of the ambiguity of a UCP term where the ISBP are silent as to that ambiguity). Thus there is a Jordanian bank that prioritises the application of ICC Opinions over the ISBP to the effect that such bank only applies the latter where there is no guidance in ICC Opinions, because the perception is that the Opinions reflect the international standard banking practice.[264] By contrast, some banks never apply ICC Opinions as to conformity,[265] whilst other banks only apply ICC Opinions where there is a conflict with other banks regarding conformity.[266] Still, some banks only apply ICC Opinions where there is a disagreement regarding conformity between the employees of the same bank.[267] Finally, some banks apply ICC Opinions where there is a lacuna in UCP 600 or ISBP.[268] We might draw an inference that such empirical findings apply to other Arabic countries and might even apply worldwide. Such differences in the application of ICC Opinions might be caused by a lack of clarity in that there is no reference to the ICC Opinions either in the text of or in the introduction to UCP 600 as such. Moreover, there is a problem as to the extent to which ICC Opinions that were issued in relation to predecessor revisions would apply to UCP 600, and a dilemma as to which Opinion would apply in the case of conflict between the Opinions themselves. Problems, or uncertainties, of application give rise to the possibility of inconsistency as to the interpretation of the UCP.

[264] As in Bank Alitihad: Annex I para 14.
[265] As in Central Bank and BLOM Bank: Annex I para 14.
[266] As in Arabic Bank: Annex I, para 14.
[267] As in Bank A: Annex I, para 14.
[268] As in Bank B: Annex I, para 14.

DOCDEX

2.3.17 The rules of DOCDEX were first approved by the ICC in October 1997 as a response to demands for a rapid and cost effective means of dispute resolution. The disputes in relation to the terms of the UCP are presented, with all the supporting documentation, to a panel of three experts who are appointed by the ICC International Centre for Expertise. The experts are anonymous and their decision is not binding on parties. The ICC has the right to publish the decisions without disclosing the identities of the parties. Unlike ICC Opinions the DOCDEX are not approved by the full ICC Banking Commission. This weakens the claim for "external validity"[269] that DOCDEX decisions reflect international practice. The other difference is that under DOCDEX decisions all the supporting documentations in question are presented. By contrast, a Banking Commission Opinion is a snapshot of a given set of facts and it is not based on documentary evidence presented by the disputed parties. It thus represents a less than complete consideration of the circumstances of a case. This in turn affects the validity of considering a Banking Commission Opinion as evidence before courts even in resolving a dispute between the same parties who made a request to the ICC.[270] As with ICC Opinions there is no reference as to the application of DOCDEX in UCP 600. The empirical findings clarify that it is not market practice in Jordan to check DOCDEX in interpreting the UCP.[271]

[269] This term is adopted from the field of social research which means, in the context of this study, that the collected data represent many different cases and can generalise beyond the immediate subjects and circumstances, namely, the experts views represent the international practice: Hen, Weinstein and Foard, *A Critical Introduction to Social Research,* (2nd edn, Sage 2009), 70; 6 and Bellamy, *Principles of Methodology*, (1st edn, Sage 2012), 21-24. In this context, a claim for external validity can be more effective where the views are presented by the full ICC Banking Commission experts if each of whom represents the business and the banking community from the different worldwide regions.
[270] *Collected DOCDEX Decision 2004-2008* (No. 696, 2008) Foreword.
[271] Annex I, para 14.

COMMENTARY

2.3.18 The Drafting Group of UCP 600 have issued the Commentary on UCP 600 to reflect their view, not necessarily of those of the ICC Banking Commission, of the process of promulgating UCP 600 and the reasons underlying the new changes in UCP 600 in order to assist meaningful interpretation.[272] Unlike the ISBP and Opinions, the Commentary is not authorised or published by the Banking Commission.[273] Again, there is no reference to the Commentary in the UCP and the empirical findings indicate that banks in Jordan do not apply them.[274]

ENGLISH LAW

2.3.19 **Modern approach and Fortis.** Contractual terms are construed under English law by looking at the common intention of the parties[275] in an objective way which is – under the modern approach - in commercial contracts a reasonable reader test[276] against the matrix of facts[277] (i.e. all the backgrounds of the contract including market practice).[278] As set by Lord Reid *"the more unreasonable the result the more unlikely it is that the parties can have intended it"*.[279] For commercial contracts reasonableness of the conveyed meaning is based on "commercial business commonsense" as elucidated by Lord Diplock:[280]

[272] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (ICC No. 680, 2009).
[273] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (ICC No. 680, 2009), Foreword.
[274] The interviewees did not mention that their banks apply the Commentary as an interpretative aid regarding UCP terms dealing with conformity of documents: Annex I, para 24.
[275] *Marquis of Cholmondeley v Clinton* (1820) 2 Jac. & W.I. 91.
[276] *Rainy Sky SA v Kookmin Bank* [2011] 1 W.L.R. 2900; *Attorney General of Belize v Belize Telecom Ltd [2009] 1 W.L.R. 1988* per Lord Hoffman; *Investors Compensation Scheme LTD v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912 per Lord Hoffman.
[277] *Prenn v Simmonds [1971] 1 W.L.R. 1381*, 1383 per Lord Wilberforce; *American Airlines Inc v Hope [1974] 2 Lloyd's Rep 301,* 305 per Lord Diplock; *Reardon Smith Line Ltd. v Yngvar Hansen-Tangen [1976] 1 W.L.R. 989 per Lord Wilberforce.*
[278] *Lloyds TSB Bank Plc v Clarke (Liquidator of Socimer International Bank Ltd)* [2002] 2 All E.R. (Comm) 992 ; *Crema v Cenkos Securities Plc* [2011] 1 W.L.R. 2066.
[279] *Wickman Machine Tool Sales Ltd v Schuler A.G.* [1974] AC 235, 251.
[280] *Antaios Compania Naviera S.A. v Salen Rederierna A.B* [1985] AC 191, 201.

"If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense".[281]

Based on the reasonable reader test, standard commercial contracts are construed in a uniform sense and not fundamentally differently in each individual contract.[282] The commercial commonsense in the interpretation of the UCP was clarified in *Fortis Bank S.A./N.V., Stemcor UK Limited v Indian Overseas Bank*[283] where Thomas LJ stated:

"*In my view, a court must recognise the international nature of the UCP and approach its construction in that spirit. It was drafted in English in a manner that it could easily be translated into about 20 different languages and applied by bankers and traders throughout the world. It is intended to be 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*".[284]

2.3.20 Uniformity, interpretative aids and international practice. The underlying aim of the UCP is to achieve uniformity in practices and terms regulating documentary credits throughout the world. The commercial commonsense of reflecting international practices and expectations as expressed above by Thomas LJ in *Fortis*

[281] *Rainy Sky SA v Kookmin Bank* [2011] 1 W.L.R. 2900.
[282] *Global Coal Ltd v London Commodity Brokers Ltd* [2010] EWHC 1347 (Ch); *Atlas Navios-Navegacao Lda v Navigators Insurance Co Ltd* [2012] 1 Lloyd's Rep. 629, [23]: Beal and others (eds), *Chitty on Contracts*, (31edn, Sweet and Maxwell 2012) para 12.57.
[283] [2011] EWCA (Civ) 58, [29]; confirmed; *Alternative Power Solution Ltd v Central Electricity Board and another* [2015] 1 W.L.R. 697.
[284] *Fortis Bank S.A./N.V, Stemcor UK Limited v Indian Overseas Bank* [2011] EWCA (Civ) 58, [29].

Bank SA/NV v Indian Overseas Bank,[285] regarding the issue of refusal of documents, was established by reference to international practice declared by both expert evidence and DOCDEX.[286] Indeed, there is a tendency in English courts to give effects to the ICC interpretive aids relative to the UCP in construing the UCP to the effect that such aids (i.e. ICC Opinions, DOCDEX and ICC Positions Papers) are regarded as persuasive sources – but the ISBP are a binding interpretative aid where the UCP are expressly incorporated into a credit contract or through course of dealing – for the interpretation of the UCP.[287] Thus in respect of the status of the ICC position paper for originality[288] David Steel J stated in *Credit Industriel et Commercial v China Merchants Bank*:[289]

"a) UCP is a code produced and published by the ICC.
(b) It is entirely legitimate for the ICC to seek to resolve any ambiguities in, or difficulties of interpretation of, the code.(c) The decision in 1999 involved discussion with local banking commissions throughout the world (to which all banks, including CIC and CMB were able to contribute)".

2.3.21 Expressed and incorporated terms. Expressed contractual terms exclude or modify incorporated terms[290] and in case of irreconcilable conflict between a UCP term (where it is incorporated or applied by virtue of trade usage or market practice, and an expressed term in the credit contract) the general English law principle gives effect to the express term as being the most likely manifestation of the intention of the parties.[291] However, it is submitted, where an expressed term contravenes a UCP

[285] [2011] 1 C.L.C. 276, [40].
[286] ICC DOCDEX Rules. Decision 242.
[287] *Bulgrains & Co Ltd v Shinhan Bank* [2013] EWHC 2498 (Q.B.), [42].
[288] ICC Banking Policy Statement, *The Determination of an "Original" Document in the Context of UCP 500*, (1999) July 470/871, it will be referred later in the research as "ICC Banking Commission Decision".
[289] [2002] 2 All E.R. (Comm) 427; [2002] C.L.C. 1263, [61-64].
[290] *Homburg Houtimport BV v Agorsin Private Ltd (The Starsin)* [2004] 1 AC 715, [11].
[291] *Homburg Houtimport BV v Agorsin Private Ltd (The Starsin)* [2004] 1 AC 715, [11]. An express term of a non-documentary condition prevails a UCP term that provides to disregard a non- documentary condition: *Kumagai-Zenecon Construction Ltd (in Liq) v Arab Bank plc* [1997] 3 SLR 770; *Korea Exchange Bank v Standard Chartered Bank* [2006] 1 S.L.R. 565, 577.

term that reflects an embedded trade usage courts would not give effect to the expressed term, unless it is very clearly stipulated in a way that is strongly indicated to be intended to be effective in the holistic context of the credit contract. In respect of implying terms, courts cannot imply terms into a contract to make the express terms reasonable.[292] Courts can thus only imply a term, as a matter of inference from the contractual terms themselves - where it is necessary[293] to give meaning to what would the contractual terms convey to a reasonable person that is consistent with business sense.[294]

JORDANIAN LAW

2.3.22 Sanctity of plain terms and ordinary meaning. The principles for the interpretation of contractual terms in the Civil Code[295] apply to commercial contracts. As under Common law, the interpretation of contractual terms under Sharia law is based on the common intention of the parties and on what the parties have agreed as their obligations in the contract.[296] The common intention of the parties is objectively established by the ordinary meaning[297] of the apparent clear and plain terms of the contract.[298] Technically, Jordanian law provides rules in respect of the objective test to establish the apparent intention of parties,[299] which are: (i) "*the original position is that words convey the true meaning, so it is not permitted to convey a metaphor unless it is impossible to convey the true meaning"*[300] and (ii) *"effects must not be given to an indication [incorporation] where there is an*

[292] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [27], *per* Lord Hoffmann.
[293] *Liverpool City Council v Irwin* [1977] AC 239, 254; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, 104-105.
[294] *Rainy Sky SA v Kookmin Bank* [2011] 1 W.L.R. 2900; *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [27], per Lord Hoffmann; *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2009] 1 AC 61, [12].
[295] Articles 213-240 Civil Code (1976).
[296] Article 213 Civil Code (1976).
[297] Article 214 Civil Code (1976): "*consideration must be given for the intentions [or content] and meanings and not for the form of words*"; translated by the researcher. The translation is a subjective one that is based on the linguistic legal understanding of the translator.
[298] Article 239 Civil Code (1976); Jordan Laws and Rules, *Memorandum of Clarification of Civil Code*, (1977), 240.
[299] Jordan Laws and Rules, *Memorandum of Clarification of Civil Code*, (1977), 245.
[300] Article 214 (2) Civil Code (1976); article 12 *Mecelle* (1877).

expression".[301] Accordingly, clear and plain contractual terms have superseding normative force and their ordinary meaning should not be deviated from by courts even for the aim of establishing the real intention of the parties, since article 239 of the Civil Code provides:

"1 - If the phrase of the contract is clear, it is not permissible to deviate from it by way of an interpretation to get to know the intention of the contracting parties.
2 - If there was a place for the interpretation of the contract, the common intention of the contracting parties must be sought without a mere adherence of the literal meaning of the words but the judge must look at the nature of the deal and what should be conveyed from the trust and the security between the contracting parties according to the current custom in transactions".

2.3.23 Thus, unlike the modern English approach of interpreting commercial contracts, Jordanian law's approach is traditional in the sense that the sanctity as to the ordinary meaning of expressed terms is still applicable to commercial contractual terms, so a conveyed ordinary meaning of a UCP term may not be changeable to yield to business commonsense as perceived by international practice. Even where there was ICC Position Paper or Opinion to the effect that there should be a deviation from the ordinary meaning of the words the conveyed ordinary meaning of a UCP term might not be displaced under Jordanian law.

2.3.24 **Ambiguity and lacunae.** Conversely, where there is an ambiguity (i.e. many valid interpretations of the same contractual term) or lacunae (i.e. the state of affairs is not regulated by the expressed or incorporated terms) in the contractual terms

[301] Article 15 Civil Code (1976); article 13 *Mecelle (*1877).

courts then should not merely rely on a literal interpretation.[302] Rather, a purposive interpretation should be applied.[303]

2.3.25 *Ambiguity.* The aim of the purposive interpretation in the case of ambiguity is to clarify the common intention of the parties.[304] The rule of such a purposive interpretation is that courts must look at the nature of the contract, and the trustworthiness that should be available between the parties as informed by custom or usage of transactions.[305] As it is not trade usage in Jordan - as clarified by the empirical findings -[306] that banks check ICC interpretative aids, except the ISBP, in interpreting the UCP, there is a potential that Jordanian courts would rely on Jordanian usage or practice as proved by expert evidence in interpreting the UCP. If there is no particular Jordanian usage or practice in interpreting a particular UCP term, as in most cases, then it is submitted that (as the international nature of the UCP depends on international banking practices as reflected or envisaged in ICC interpretative aids) Jordanian courts need to interpret the UCP through the lens of ICC interpretative aids. The empirical findings indicate that it is the aspiration of the previous Industry and Trade Minister, who is the head of the ICC in Jordan, that Jordanian courts would interpret the UCP through an international lens as reflected in the ICC interpretative aids, because being part of the international finance community is necessary for the expansion of the Jordanian finance sector.[307] The problem however is that the concept of trustworthiness originates from the context of civil contracts, and therefore such a concept should merely be operated in commercial transactions to the extent of what is accepted as trustworthiness in the relevant trade practice and that might be interpreted by Jordanian courts as being resolutely local rather than international.

[302] Article 239 (2) Civil Code (1976).
[303] Jordan Laws and Rules, *Memorandum of Clarification of Civil Code*, (1977), 238 -239.
[304] Article 239 (2) Civil Code (1976).
[305] Article 239 (2) Civil Code (1976).
[306] Annex I, para 14.
[307] Annex I, para 16.

2.3.26 *Lacunae.* The purposive interpretation where there are lacunae aims to determine the scope of the contract.[308] Article 202 of the Civil Code provides:

"(1) The contract must be performed in good faith.

(2)The contract is not confined in obliging the party on what is expressed, the contract includes its associated incidents according to law, custom and the nature of the transaction".

The parties are presumed to tacitly agree to the ancillary incidents of the contract as recognised by, law, custom and the nature of the transaction.[309] Furthermore, the parties must perform the contract in good faith,[310] in the sense the performance of the contract must be executed on the basis of trust and honesty which can be determined objectively by reference to the reasonable person test.[311] By the same tone, the freedom of the use of rights where they are spelled out in law or in a contract in an absolute way (e.g. the right to withdraw from the partnership of a company at any time)[312] is subject to the good faith principle and the principles of Sharia law as implemented in the Civil Code. The relevant Sharia principles are that the "*prevention of detriments prevails over gain of benefits*"[313] and that *"the use of rights should not be unlawful"*.[314] The use of right is considered as unlawful[315] where there is "*an intention of infringement*",[316] *"the intended benefits are unlawful"*,[317] or *"the benefit is not appropriate with the occurred disadvantages on others"*.[318] These doctrines are regarded by the Court of Distinction as principles of justice.[319] They are

[308] Jordan Laws and Rules, *Memorandum of Clarification of Civil Code*, (1977), 243-44.
[309] Article 202 (2) Civil Code (1976).
[310] Article 202 (1) Civil Code (1976).
[311] Aljbouri, *The Concise In The Explanation Of Jordanian Civil Law,* (1st, Wael 2011) 388
الجبوري, *الوجيز في شرح القانون المدني الاردني*, (ط1, 2011) ص.388.
[312] Court of Distinction (Civil) *653/1998*, www.lob.govjo.
[313] Article 64 Civil Code (1976).
[314] Article 66 (1) Civil Code (1976).
[315] Article 66 (2) Civil Code (1976); Court of Distinction (Civil) *761/2007*, www.lob.govjo.
[316] Article 66 (2) (a) Civil Code (1976).
[317] Article 66 (2) (b) Civil Code (1976).
[318] Article 66 (2) (c) Civil Code (1976).
[319] Court of Distinction (Civil) *653/1998*, www.lob.govjo.

considered as sources of law.[320] However, the principles of Sharia law and justice cannot strike down the rights that are spelled out in a contract.[321] It is submitted that the principle of "*prevention of detriments prevails over gain of benefits*"[322] should not be strictly adhered in the context of commercial law as taking risk is an inherent element in undertaking business transactions. For instance, applicants in documentary credits take the risk, or the potential detriment, that banks would not investigate the actual status of goods even where there is a suspicion of fraud, because speed and cost are paramount practical benefits that prevail over potential detriment.

[320] Article 3 Civil Code (1976).
[321] As inferred from articles 164 and 213 Civil Code (1976).
[322] Article 64 Civil Code (1976).

CONCLUSION

2.4.1 The commercial system of documentary credits was mainly generated and fashioned by the practices of banks and traders around the world, and therefore it was necessary in this chapter to investigate the nature of international trade usages that is relative to documentary credits. It was concluded that the pillars of documentary credits (i.e. irrevocability, autonomy and conformity norms) are embedded aspects of the *de facto* international trade usage of documentary credits to the effect of being *lex mercatoria* that are received as facts by autonomous legal orders and generate internal legal communications in those legal orders to the effect that such embedded international trade usages have *de jure* effect under legal orders that recognise the legality of documentary credits. The embedded usages of irrevocability, autonomy and conformity constitute the structure of the transaction of documentary credits. Such a structure operates as a socially diffuse law and thus *lex mercatoria,* since actors of documentary credits test a state of affairs as a divergence of expectation against the structure by using the code legal/illegal (acceptance/rejection).

2.4.2 As a documentary credit transaction is inherently transnational, its embedded usages ought to be transnational, and a non-recognition of any of its embedded usages by any legal system would threaten the existence or viability of documentary credits under that legal system and this would negatively affect the reputation of the legal order as being able to facilitate the needs of traders. Based on the dogma freedom to contract, traders would not apply a legal order that does not assist them to achieve their ends. Therefore, English and Jordanian laws implicitly recognise the notion of international embedded usages, as illustrated in bills of exchange, bills of lading and documentary credits, and the normativity of international embedded usages is becoming part of the "structural" component (having the highest order amongst other components) of the English legal order and that ought also to be accepted as being the case under the Jordanian legal order. Embedded usages of transnational

commercial transactions are therefore international *lex mercatoria* (being accepted and applied as a socially diffuse law by both citizens across borders and Municipal legal orders). As a stepping-stone for effective terms governing documentary credits, such terms must be based on the embedded usages of irrevocability, autonomy and conformity whether or not legal orders explicitly differentiate internationally resonant embedded trade usages from other notions of trade custom.

2.4.3 Yet, the peripheral aspects of trade usage, such as the application of the UCP in Jordan (i.e. by virtue of trade usage where the credit contract does not expressly incorporate the UCP) as indicated by the empirical findings of this research, must give way to embedded trade usage. Only if the peripheral usage was to be incorporated into the contract in such a way as to indicate that the intention of the parties was to contract out of the embedded usage would that not be the case. Article 2 of UCP 600 reflects the normative force of the principle of irrevocability, being embedded trade usage, by both defining documentary credits as being irrevocable and by deleting the reference to the revocable type of documentary credits. Such a change introduced in UCP 600 was necessary because it is reflective of the sociological value of documentary credits (i.e. the critical balancing of the distinct archetypal security needs of each of the four groups of contracting parties who typically transact documentary credits).

2.4.4 A further change introduced in UCP 600 is the call in article 1 for documentary credit parties to "expressly" incorporate the UCP into their documentary credit contracts. Such a change is responsive to the principle of freedom to contract that is shared by almost every legal order. Given the fact that the application of the UCP does not have the force of law under English law and is peripheral trade usage under Jordanian law, an expressed incorporation as to the application of the self-regulatory rules of the UCP warrants a high level in hierarchy for the effectiveness of the application of UCP 600 to the effect that its application will prevail over the application of law or

convention (i.e. which is neither mandatory nor is a matter of public policy or public morals) in relation to documentary credits. However to prevail over the embedded trade usages of documentary credits it must be expressed clearly that the parties have agreed to depart from them since such usages represent the fundamental purposes of entering into documentary credit contracts.

2.4.5 Finally, UCP 600 as with its previous iterations lacks clarity regarding the status of its ICC interpretative aids except for the ISBP. The sole reliance on usage or practice in applying the ICC interpretative aids would not achieve uniformity, because the application of such aids would substantially differ between banks as clarified in the empirical findings. Indeed, inconsistencies in interpreting the UCP lead to uncertainties affecting the viability of documentary credits as a means of secure payment. Given the fact that some legal orders (e.g. Jordanian law) are still traditional in interpreting commercial contracts in terms that they might not interpret the UCP through an international lens by considering the ICC aids, it is to be hoped that the UCP would make an explicit reference as to both the application of ICC interpretative aids and their respective hierarchical status in interpreting the UCP.

CHAPTER 3: THE NATURE OF CONFORMITY, ITS GENERAL RULES AND APPEARANCE RULES

GENERAL VIEW

3.1.1 Letters of credit are recognised as documentary letters of credit, documentary credits or covered credits due to the concept of documentary compliance or conformity. Pursuant to such a concept, the honour of the credit is conditional upon the presentation of documents that correspond to the terms of the credit. Conformity is known as compliance in the international banking community in that the presented documents must be in regular order.[323] Conformity is also known as strict compliance under Common law[324] and absolute compliance under Jordanian law.[325] Conformity is one of the main functional elements in the substance of documentary credits as proposed in the developed conceptual model in this thesis and the purpose of this chapter is to evaluate the effectiveness of the conformity concepts under UCP 600 by reference to the evaluative model.[326] Both the sociological and legal nature of conformity is examined in this chapter to determine the scope of conformity in a way that accords with the common generalised formulation of legal concepts, namely: principles, general rules and particular rules respectively. Whilst this chapter seeks to evaluate the principles and general rules for conformity under UCP 600 on the basis of the conceptual model which is set out in chapter 1,[327] chapter 4 will address and evaluate the particular rules for conformity.

3.1.2 **Plan of chapter.** Prior to the evaluation of the scope of conformity, we need firstly to look at the nature of conformity as a concept in society and the difficulties of seeking to regulate such a concept in UCP 600. Secondly we need to look at the legal

[323] Draft Uniform Regulations on Export Commercial Credits (1927) presented to ICC's fourth Conference: Taylor, *The Complete UCP*, (1st edn, ICC 2008), 30. See also, article 10 UCP (No. 82, ICC 1933) and art.9 UCP (No.151, ICC 1951).
[324] *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Lloyd's Rep 49, 52.
[325] Court of Distinction *316/1988* (Civil) Alkustas programme.
[326] Chapter 1, para 1.2.11-12.
[327] Chapter 1, para 1.1.32.

nature of conformity. Thirdly the principle and general rules determining the meaning of conformity in UCP 600 is critically analysed and evaluated.

ELASTIC NATURE OF CONFORMITY

3.2.1 It is clear that the beneficiary is not entitled to enforce the bank's undertaking to honour the credit where documents are not presented, or where the presented documents are not in conformity. Defining and forming the concept of conformity is the cornerstone for effective terms governing the documentary conformity in documentary credits. Any regulator of documentary credit transactions needs to use that cornerstone to shore up and define the boundaries of the concept of conformity: since that concept is fundamental to a coherent understanding as to when documentary presentations are acceptable, and when they are not, and to the consistent application by bankers, beneficiaries and applicants of that understanding. In social science terms, the nature of concepts vary from simple unitary concepts to multi-scaled concepts. A simple concept is where a case of study falls under the concept if it only meets a single condition, so one condition is essential and sufficient to constitute the concept (e.g. if the liquid is H^2O then it is water). Accordingly it can be said that the concept of conformity is a simple type as it only constitutes one condition, namely, that the presented documents must correspond to the terms of the credit, and such a condition is essential and sufficient to constitute conformity.[328] For a valid and reliable concept one must ensure that the concept is formed for the intended purpose and has the virtues of coherence, consistency, intelligibility and measurability.[329] Although the extension of the above simple concept of conformity (i.e. what it denotes) might refer to a wide range of cases; its intention or sense (i.e. what the concept connotes) does not capture the attributes of how conformity is or must be applied by bankers and other actors, nor does take into account the contested needs of the documentary credit parties (as identified in the developed conceptual model in chapter 1).[330] Hence, the above simple type of the concept of

[328] For formation of concepts: 6 and Bellamy, *Principles of Methodologies,* (1st edn, Sage 2012), 138 -139; Goertz, *Social Science Concepts: a user's guide*, (1st edn, PUP 2006).
[329] 6 and Bellamy, *Principles of Methodologies,* (1st edn, Sage 2012), ch 9.
[330] For the boundaries of extension and intension in concepts: Sartori, *Concept Misformation in Comparative Politics*, [1970] American Political Science Review, 64, 4, 1033-53.

conformity lacks the virtues of consistency, intelligibility and measurability to serve the efficacy of terms regulating documentary credits.

3.2.2 The task is how to form a concept of conformity that can capture the essential attributes for the purpose of effective terms regulating documentary credits transnationally. It is proposed in the developed conceptual model that the UCP community must use the means of responsiveness in forming the concept of conformity, and accordingly the formed concept must be based on the embedded usage of conformity in the trade. The virtue of such an approach is that by analysing the embedded usage of conformity one can rationally deduct the underlying needs that are commonly accepted by the parties from the function served by the usage of conformity. Once the concept reflects what is commonly observed and understood as essential attributes by the parties, it would have some prospect of being commonly understood and applied by actors.

3.2.3 Because importers in emerged markets of the last century did not own or control ships the embedded usage of conformity was developed to serve the prominent need of importers to have a documentary assurance as to the shipment of the required goods prior to the payment.[331] Therefore, the strong meaning of conformity is that documents must be in a mirror image to the terms of the credit in order to warrant the security for importers by having documents that appear to be, letter by letter, in compliance with the required conditions of the credit. However, since the conformity usage is dependent on the positive actions of both sellers (and the carriers, insurers and other agents they use) to present documents representing on their face compliance with the conditions of the credit and banks to examine the compliance of documents, it encounters the contested needs of sellers and banks as to speed, manageable presentation and manageable examination of documents.[332] Such

[331] Hershey, *Letters of Credit*, [1918] Harvard Law Review Association, 1 (Nov).
[332] Chapter 1, diagram 1.

contested needs make conformity an elastic concept, so its meaning (depending on the essentiality of each party's need according to a particular matrix of facts) might travel from the above strong meaning or dimension to a weak meaning or dimension. In social science terms, such a concept of conformity is regarded as a *"wide scale"* type in that it has a strong and a weak meaning or dimension, and presented documents falling anywhere between these dimensions might qualify as conforming.[333] Given the fact that the bank's role in determining conformity is assumed to be a ministerial role (whereby it looks only at the appearance of the documents and not at the actual facts represented by the documents), it is submitted (as inferred from the various commercial and legal sources)[334] that there are seven identifiable dimensions contained within the wide scale concept of conformity.

Dimensions (Meanings) Of Conformity

3.2.4 (1) The most exacting dimension is that the contents of documents must be in a mirror image to the terms of the credit, so any difference is not tolerated.[335] (2) The next dimension is that the contents of the document must be consistent with the terms of the credit, with other contents in the same document and with contents of other documents: so a difference in meaning is tolerated to the extent it does not affect the collective meaning of the documents envisaged by the terms of the credit.[336] (3) The third dimension is the same as the second except that the consistency is only required between the contents of the presented document and

[333] 6 and Bellamy, *Principles of Methodologies,* (1st edn, Sage 2012), 139.
[334] Below paras 326-331.
[335] ICC Banking Commission have warned that the mirror image test should not even apply on descriptions of goods in the invoice: *ISBP 2013,* C3; *ISBP 2007,* para 58; the mirror image test is clearly rejected and does not constitute part of article 14 of UCP 600: Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 63; the abstract term "exact compliance" was introduced, but might have had a different meaning, by Bailhache J in *English, Scottish and Australian Bank Ltd v Bank of South Africa*(1922) 13 Lloyd's Rep 21, 24.
[336] The general test for conformity under article 13 and 21 of UCP 500 was based on the concept of "inconsistency" which was to a certain extent understood by bankers as what is described as dimension two in this research because the concept of inconsistency unconsciously triggered the operation of its antonym which is consistency, and that lead to the encompassing of simple typing and grammatical errors in the concept of "inconsistency". It is for that reason conformity was in practice elevated from dimension two to one: Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 64.

the credit.[337] (4) The median dimension is that the contents of the document must not be in conflict with the terms of the credit, with other contents in the presented document and with contents of other documents: so in this dimension any substantive difference is tolerated unless it causes a conflict in the credit.[338] (5) A more purposive dimension is that the contents of the presented document in the context of the collective *purpose and structure* of the document itself, the other documents, the terms of the credit and the relative requirements in the applicable law must not be in conflict: so a substantive difference is tolerated unless it causes a contextual conflict with the credit, the applicable law or the contents of the presented documents.[339] (6) A looser, but still purposive dimension is that the contents of the presented document in the context of the collective *purpose and structure* of the document itself, the other documents and the terms of the credit must not be in conflict: so a substantive difference is tolerated unless it causes a contextual conflict with the credit or the contents of the presented documents.[340] (7) A further dimension is that the contents of the presented document in the context of the collective purpose and structure of the document itself and the terms of the credit must not be in conflict, so a difference is tolerated unless it causes a direct contextual conflict with the relevant term of the credit.[341]

[337] Linkage in terms that documents must relate and be consistent with one another as suggested by the claimant in *Banque de l'Indochine et de Suez SA v J.H. Rayner (Mincing Lane) Ltd* [1983] Q.B. 711, 731 is not required.
[338] That was the apparent general test for conformity under UCP 500 but the term inconsistency was used instead of conflict.
[339] This dimension is the same as envisaged by sub-article 14 (d) of UCP 600 except that it has an addition which is that the documents must also fulfil the requirements under the applicable local law as in the case for bills of exchange as imposed by *Opinions 2009-2011*, R.730.
[340] This is the dimension that is adopted by sub-article 14 (d) of UCP 600, it must be noticed that this dimension under UCP 600 refers to the terms of the credit in a broad terms that include the terms of UCP 600 and ISBP.
[341] The contents of the documents are not required to be tested against the contents of other documents: this issue being subjected to a furious debate in the Drafting Group and the ICC national committees in the preparation work for UCP 600: Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 63.

FORMAL REALISABILITY

3.2.5 According to Kennedy "formal realisability" means the quality of ruleness in terms of the capability to direct an official to respond to each one of an easily distinguishable lists of facts in certain situations by intervening in a determinative way. The question is whether there is a concept of conformity that is capable of consistent application across the wide range of very different circumstances arising in international trade: so as to engender a conclusive concept of conformity that can easily determine, in a decisive way, whether any factual matrix arising in international trade is in conformity or not. However, the description of compliance as strict or absolute under English and Jordanian laws gives no real insight as to the determination of the dimension into which conformity might fall. Now, conformity falling in dimension one (i.e. mirror image) has a high degree of formal realisability. However, conformity falling in a dimension between two and seven might be inadequate in terms of allowing easy determination with a high degree of certainty (i.e. knowledge in advance by actors) as to whether particular documents are in conformity or not. Conformity falling in dimension one would reject any difference. But there is no certain answer for a difference where conformity falls in a dimension between two and seven as whether or not this would result in a substantive difference or conflict would depend on the underlying factual circumstances. Here a bank would only be absolutely certain as to its rights and obligations where a particular rule, applying to the specific scenario and being capable of common application, was in existence.

CONTESTED NEEDS

3.2.6 The origin of the elasticity nature of conformity has its source in the opposing needs of the parties. Each party demands a standard for security that might clash with other parties' security demands and thus different means (i.e. certainty, clarity, responsiveness, flexibility and communication) are used accordingly. Therefore

achieving the right balance of security is the main challenge in the regulation of conformity.

3.2.7 **Sellers' security.** From the sellers' perspective, conformity would fall in dimension seven or six as identified above.[342] This would facilitate a presentation by sellers of documents conforming to the terms of the credit, as discrepancies would then be disregarded unless they conflicted with the apparent purpose of the relevant terms of the credit. It is clarified by the empirical findings in this research that some traders face unreasonable difficulties in presenting conforming documents due to the literal and strict approach that is adopted by some banks because of bureaucratic procedures. Thus *His Excellency* Muhammad Asfor stated:

"We have, as traders, difficulties such as late shipment and the fact that employees in banks are not aware of international practices in many areas in trade and transport. The dilemma is that the banks DC forms are extremely difficult to be changed due to the fact that the decision can only be made by the head of a department".[343]

3.2.8 Nevertheless, through the means of certainty sellers are assured that their documents will be honoured. As explained above, conformity in the first dimension has a high degree of formal realisability which substantially serves the means of certainty.[344] Of course such a dimension provides the least assurance of payment for sellers as it is very difficult in practice to present documents that are letter by letter in conformity.[345] However, a selection of one of the other dimensions (i.e. dimension two to seven) does not have a high degree of formal realisability, in that such a selected dimension does not always direct the bank in a decisive way as to whether

[342] Para 3.2.4.
[343] Annex I, para 25.
[344] For the means of certainty: chapter 1, para 1.2.20.
[345] UCP 600, Introduction.

any factual matrix arising in international trade is in conformity or not. For such dimensions (i.e. two to seven), certainty demands detailed guidance (such as articles 14 to 34 in UCP 600, ISBP and some ICC Opinions)[346] in the form of particular rules to determine the status of conformity in specific common situations.

3.2.9 **Buyers' security**. However, from the buyers' perspective, dimension seven would expose buyers to the risk of making payment against documents that might not reflect complete and perfect performance of the underlying transaction envisaged by the credit. Buyers would therefore not be assured that the correct goods have been shipped to them as required in the credit. Buyers might prefer the first strongest dimension. Jamal Abushamat stated *"the documents must be letter by letter in conformity".*[347] This would not merely provide them with a good assurance that the correct goods are shipped, but would also give them the upper hand because sellers would find it difficult to procure conforming documents and would be exposed to the discretion of buyers as to whether to accept them and to waive discrepancies. Of course where the market value of goods had fallen, buyers generally would not be content to waive discrepancies even though such discrepancies did not affect the contractual rights of buyers.

3.2.10 Indeed, the first dimension is very rigid and extremely difficult to meet in practice, particularly given the fact that there are many different actors who issue documents such as insurance companies and carriers. Sellers would be wary of dealing with documentary credits that required conformity to fall into the first dimension as there is no real security of payment for sellers in those circumstances due to the high potential for refusal of the presented documents. There is evidence that even the second dimension, under the prior iterations of the UCP, is very difficult to meet in practice.[348]

[346] *Opinions 2009-2011*, R.757.
[347] Annex I, para 25.
[348] As it can be inferred from the high number rate of refusals on first time presentation: UCP 600, Introduction.

3.2.11 **Banks' assurance of reimbursement.** Security is the main concern for banks just as for buyers and sellers. It is essential for banks to secure both their rights of reimbursement and their reputation as a payment facilitator. But the preference of banks as to the dimensions of conformity is very sensitive to the particular circumstances of a documentary credit transaction and is largely contingent on both their role in the relevant documentary credit and their commercial relationship with the applicant as well as the beneficiary as explained below.

3.2.12 *Issuing and confirming banks' security***.** The empirical findings of the present research indicate that an issuing bank which has a good relationship with a customer (i.e. the applicant) having a good financial covenant, may generally prefer dimension six and would not treat any discrepancy as material unless it affects the collective purpose and structure of the credit or the presented documents.[349] Nart Lambaz said:

"*The discrepancy needs to be a material one that affects the essence of the commercial transaction". For example, the address is required only in relation to the name of the country in UCP 600, we used to apply this rule under UCP 500 because we regarded the discrepancy in the details of the address - except as to the name of the country - as not being a material one".*[350]

Koloud Alkalaldeh stated *"the material discrepancy is the one that affects the rights of the bank".*[351]

3.2.13 However, where the issuing bank or indeed the confirming bank suspects there is a fraud, or there is a genuine dispute between the applicant and the beneficiary

[349] Annex I, paras 24-26.
[350] Annex I, para 24.
[351] Annex I, para 24.

regarding the goods, it might then prefer to adopt one or other of the first three dimensions to allow it to refuse documents. Effectively it is in the issuing bank's interests in such circumstances to have flexibility, in which case the beneficiary would not be certain as to the meaning of conformity or the status of its documents. Indeed, the empirical findings indicate that some bankers prefer the flexibility in the strictness of conformity to enable them to penalise suspected fraudsters.[352] Qhaleb Joudeh stated that:

"The discrepancy is a discrepancy but the decision for conformity depends on the bank and its customer circumstances … there is no bank that deals with conformity with utmost good faith because the standard for whether the discrepancy is material or not depends on the circumstances.[353]

3.2.14 Generally speaking, as indicated in the empirical findings, issuing banks, and confirming banks in the case of a suspicion of fraud, prefer to have discretion to decide whether the discrepancy is a material one or not. Here, for banks a material discrepancy is, in reality, any discrepancy deleteriously affecting the rights, liabilities and commercial interests of the bank in connection with the documentary credit. But as the banks' role in conformity is supposed to be a ministerial one, banks must rely on legitimate matters of form vis-a-vis the presentation of documents to justify their decision to regard a discrepancy as material.[354]

3.2.15 *Paying and negotiating banks' security.* However, flexibility by issuing or confirming banks has the potential to cause dispute with paying, or negotiating, bank. Certainty is essential for these banks as they want to be assured that their decision to accept a presentation of conforming documents is certainly correct so as to trigger

[352] Annex I, para 26.
[353] Annex I, para 26.
[354] Annex I, para 26.

reimbursement by the issuing, or confirming, bank. Furthermore, the first three dimensions as to conformity would not be the preference of paying and negotiating banks. Since the application of these dimensions would lead in most cases to the refusal of a presentation and the efforts that the paying or negotiating banks would spend to examine the documents might not be+ rewarded as they would not be able to honour the credit and thus make the intended profit. Hence, from their perspective the inspection of presented documents must be capable of being carried out quickly and easily to reduce the consumption of money and time.[355]

3.2.16 *Flexibility.* If dimension five, six or seven was adopted then banks must exercise a degree of judgement as to the apparent purpose and structure of the terms of the credit. Marginal discretion is necessary to avoid immaterial inconsistencies causing unnecessary rejections. Furthermore, banks need to exercise their discretion where there is no guidance in UCP 600 or in its interpretative aids as to the status of conformity regarding a particular situation. Here, the banker's decision as to the status of conformity should be considered as valid if it has exercised its best discretion as a reasonable banker and acted in good faith (i.e. the bank should adhere to its ministerial role). Furthermore, banks need flexibility to be able to raise issues of concern (as matters for the proper exercise of their marginal discretion) as to the determination of documentary conformity in order to safeguard their right of reimbursement.

SECURITY AND DIMENSION SIX

3.2.17 The initial question in regulating conformity is what is the acceptable balance of security as between competing – and directly opposing – needs for security in connection with conformity? As a first step, one of the dimensions of conformity must

[355] For instance it is a banking standard in Jordan to examine the documents within two or three banking days which is less than the period that is set out in article 14 UCP 600: annex I, para 33.

be determined to be a definitive domain for the operation of conformity within the context of the UCP.

3.2.18 It is submitted that dimension six would provide a balance of security that would satisfy documentary credit parties, as neither party has all the risk. Sellers would be assured that there is a good possibility that the documents would be accepted, because any difference in the documents would be tolerated unless it would reach the level of conflict and the conflict must also reach the level of a contextual conflict in terms of being a conflict with the collective purpose and structure of the credit or the documents. Unlike dimension five sellers need not check the requirements of the applicable Municipal law as they would not be familiar with such a law which is usually foreign to them. Sellers would be assured that buyers or the banks cannot refuse the documents on the basis that there is an apparent conflict or contradiction in ordinary meaning (as under dimensions three and four) since the conflict in dimension six must be substantive or material in the sense of being a contextual conflict. Indeed, only such a conflict actually affects the purpose of requiring the documents as this truly and actually undermines the security for buyers. Dimensions two and three contain the requirement of consistency which might lead to the idea that general information must be spelled out in all documents and the documents must be positively consistent in terms that a mere difference of meaning would not be tolerated. Dimension seven disregards a contextual conflict between the presented documents, so the buyer's security is affected as data in a presented document which appear to conflict with the purpose and function of another presented document would be accepted.

3.2.19 It follows that the bank would exercise a level of discretion to determine what is material conflict as observed by Parker J, in considering conformity under Common law, in *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd*:[356]

"I accept … that Lord Sumner's statement cannot be taken as requiring rigid meticulous fulfilment of precise wording in all cases. Some margin must and can be allowed …".

Here dimension six, as it is the adopted test for conformity in UCP 600, directs the bank to exercise a structured marginal discretion, in that the bank must find out the collective purpose and structure of the required document from the appearance of the terms of the credit and the document itself in order to determine whether the apparent conflict affects the purpose of the credit. So the flexibility for banks is structured and not loose. However, dimension six, as in all dimensions except the first dimension, does not have a high degree of "formal realisability". So the main concern for banks, particularly paying and negotiating banks, would be certainty in order to be assured of their entitlement of reimbursement. Indeed dimension six, which should be regarded as a general rule for the test of conformity, needs to be supplemented by particular rules. As we will see below, dimension six is adopted by sub-article 14 (d) of UCP 600 as being the general test for conformity.[357]

Meaning Of Conformity Under UCP And ISBP

3.2.20 The meaning, and the general test, for conformity in UCP 500 and in the predecessor revisions has led to interpretations by banks that placed conformity into the aforementioned dimension two or one.[358] A difference in the documents was not tolerated where it affected the alignment of the relationships between documents

[356] [1982] 2 Lloyd's Rep 476, 482.
[357] Para 3.4.28.
[358] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 64.

and the terms of the credit, even if there was no material conflict with the terms of the credit. Thus 70% of the presented documents were refused at the first presentation during the life of UCP 500.[359] This high level of rejection threatened the reputation of documentary credits as a means of payment and settlement in international trade,[360] since sellers would question the security of the payment undertaking under documentary credits when there was no assurance of enforcement because of the high risk of documentary rejection. Consequently, UCP 600 was mainly promulgated to address conformity in order to reduce unnecessary rejections.[361] The new language, particularly in article 14, suggests that conformity in UCP 600 falls in dimension six as it will be elucidated later.[362]

3.2.21 However, the introduction of ISBP in 2002[363] had already reduced the rate of rejections.[364] ISBP was updated, and not revised, in 2007 in order to match the language and the new structure of UCP 600.[365] ISBP 2002 was revised for the first time in 2013.[366] The new revision of ISBP covers practices identified by ICC Opinions since the promulgation of UCP 600. It also regulates conformity for some documents that were not covered in ISBP 2002, such as a packing list, weight list, beneficiary certificate and non-negotiable sea waybill.

3.2.22 ISBP contains particular rules that are tailored to specific situations.[367] It determines how the criteria for conformity that are set out in the UCP operate in standard international banking practices. In the same spirit, the ICC Opinions provide guidance for the interpretation of UCP 600, as *"it fills in the details that the UCP,*

[359] As indicated by a number of surveys: UCP 600, Introduction.
[360] UCP 600, Introduction.
[361] UCP 600, Introduction.
[362] Para 3.4.28.
[363] ICC, *International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP)*, (No. 645, ICC 2002).
[364] *ISBP 2013,* Introduction*; ISBP 2007*, Introduction.
[365] Chapter 2, para 2.3.10; ICC, *International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP)*, (No. 681, ICC 2007); UCP 600, Introduction.
[366]ICC, *International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP)*, (No. 745, ICC 2013).
[367] For particular rules: chapter 1, para 1.2.17.

being more general in nature, cannot always provide".[368] Similarly, decisions or position papers by the ICC – such as ICC Banking Commission Decision "Statements Indicating Originality" – regarding conformity might be applicable. Accordingly the concept of conformity within UCP 600 must be examined both by reference to those rules and their interpretive aids (i.e. ISBP, ICC Opinions and ICC Papers), and evaluated in the context of its purpose (i.e. to achieve, or maintain, documentary credits as a secure means of payment and settlement in international trade). However, the commercial and legal difficulties potentially obstructing that purpose must be taken into consideration.

LEGAL DIFFICULTIES

3.2.23 As analysed in chapter 2, both the UCP's legal status and interpretation are contingent on the interacted doctrines of Municipal legal orders. Accordingly, a first difficulty is that legal orders may adopt different approaches for the interpretation of the UCP. We are now quite certain that the UCP are interpreted through an international lens under English law.[369] Thus, ICC Opinions and ICC Position Papers are generally regarded as a persuasive source in interpreting the UCP, as they are to a certain extent representative of the international banking view of interpreting the UCP.[370] Indeed, the clear meaning of a UCP term that causes a great inconvenience to the international business community might be overridden by an interpretation expedient to that community.[371] On the other hand, the position is not clear under Jordanian law and it is difficult to envisage a situation in which Jordanian

[368] Collyer and Katz, *ICC Opinions 2009-2011*, (No 732, ICC 2012) Preface.
[369] *Fortis Bank S.A./N.V, Stemcor UK Limited v Indian Overseas Bank* [2011] EWCA (Civ) 58, [29].
[370] Chapter 2, para 2.3.16.
[371] The Court of Appeal in *Kredietbank Antwerp v Midland Bank Plc* [1999] Lloyd's Rep. Bank. 219 held that the requirement that a document be "marked as original" in sub-article 20 (b) of UCP 500 applied to photocopies of computerised documents, but not to word–processed and laser printer documents and that, as submitted, was due to the expectation of the international banking community: Hwaidi and Ferris, *The Existence of International Unchangeable and Changeable Trade Usage*, submitted paper to the SLS on Sep 2013 <http://www.conference.legalscholars.ac.uk/edinburgh/paper.cfm?id=107>.

law would be prepared to allow an interpretation that is driven by the international business community to override the clear meaning of a UCP term.[372]

3.2.24 A second difficulty is that a UCP term might be rejected under the communicated Municipal legal order or system. It is submitted that freedom to contract is one of the most fundamental doctrines under both English[373] and Jordanian laws.[374] A UCP term that attempts to disregard what the parties have expressly agreed in the credit might lead not only to the invalidity of such a term, but also to inconsistencies in practice and consequent disputes as some banks might seek to rely on such a UCP term in determining conformity against traders intent on relying on their own express agreements.[375]

3.2.25 A third difficulty is that extensive terms regulating conformity may heighten formalities, and heightened formality might attract the opposing doctrines of good faith under Jordanian law,[376] business common sense under Common law[377] or even unconscionability under Common law.[378] A refusal notice (i.e. a notice that must be served to inform the beneficiary that the documents are rejected for discrepancies) is a good example. A requirement by UCP 600[379] to express the word "refusal" in a notice of refusal might be treated as a mere formality where the notice clearly conveys the meaning that the bank refuses the documents. Yet a beneficiary might be denied the right to reject the refusal note on the basis of the lack of such formality.[380] Here the intention of the UCP is to serve certainty by heightening

[372] Chapter 2, para 2.3.18.
[373] *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 399 per Lord Reid.
[374] Article 213 Civil Code (1976).
[375] Chapter 4, para 4.4.2.
[376] A contract must be performed in good faith: article 202 Civil Code (1976).
[377] *Antaios Compania Naviera S.A. v Salen Rederierna A.B* [1985] AC 191, 201 per Lord Diplock.
[378] Unconscionability or lack of faith is recognised as an exception to the autonomy principle in relation to demand bonds in Singapore: *Bocotra Construction Pte Ltd v A-G (No2)* [1995] 2 SLR 733; *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and Another* [1999] 4SLR 604. In England unconscionability may in very special case be regarded as an exception to autonomy principle in demand bonds: *TTI Team Telecom International Ltd and another v Hutchison 3G UK Ltd* [2003] EWHC 762 (TCC).
[379] Sub-article 16 (c) (i) UCP 600.
[380] Chapter 4, para 4.5.4.

formality but the result of the interaction with Municipal systems of law is that uncertainty is heightened.

COMMONALITY OF UCP 600, ISBP, OPINIONS AND COMMENTORY

3.2.26 In order to regulate how banks must determine conformity, it is essential for terms regulating conformity to be commonly applied by banks in the sense of them adopting the same interpretations of, and the same approach to, conformity. As elucidated in chapter 2, banks apply UCP 600 and ISBP to conformity as confirmed by the empirical findings,[381] and this is due to the clarity as to the reference of the applicability of ISBP in the text of UCP 600.[382] However, due to the lack of clarity in the text of UCP 600, there is no commonality in the ways of applying ICC Opinions. For the same reason, there is no commonality as to the application of the Drafting Group Commentary.[383] Problems, or uncertainties, in applying the ICC interpretative aids give rise to the possibility of inconsistency as to the determination of conformity where there is ambiguity or no guidance in the text of UCP 600 and ISBP. Further similar dilemmas can be anticipated when there is a new revision of ISBP that endeavours to amend or to replace a conformity rule in UCP 600. As the majority of banks in Jordan treat ISBP as part of UCP 600 in relation to conformity, there is a possibility that some banks might give effect to a new ISBP over UCP 600. This would be inconsistent with the position of both the English and Jordanian legal orders.[384]

3.2.27 **Empirical findings.** Indeed, the empirical findings indicate that there is no common understanding amongst bankers as to what is meant by material or contextual conflict in sub-article 14 (d) of UCP 600.[385] Some banks perceive it as the conflict that affects the commercial essence of the transaction.[386] So they adopt the sixth

[381] Annex I, para 14: Jordanian Banks and such findings might extend to Arabic Banks.
[382] Chapter 2, para 2.3.11.
[383] Chapter 2, para 2.3.16.
[384] Chapter 4, para 4.4.7 ; Chapter 2, para 2.3.16 - 22.
[385] Annex I, para 24-26.
[386] As in BLOM Bank: Annex I, para 24.

dimension of conformity. Where other banks perceive a material conflict as any conflict that affects the rights, liabilities and commercial interests of the bank in connection with the documentary credit[387] thereby infringing the neutrality of their ministerial role and acting in apparent breach of their undertakings under UCP 600. Such diverse inconsistent interpretations are caused by a lack of clarity in the text of UCP 600. The meaning of material, or contextual, conflict (i.e. conflict with the collective purpose and structure of the term of the credit and the documents) is only explained by the Drafting Group of UCP 600 in their Commentary on UCP 600.[388] Again, such Commentary creates a dilemma as to its application not only due to the absence of any reference in UCP 600 and ISBP as to its application but also because it is not promulgated by the Banking Commission of ICC.[389] In conclusion, due to the lack of clarity bankers might adopt a meaning to the concept of conformity other than the intended meaning (i.e. dimension six).

[387] As in Arabic Bank: Annex I, para 24.
[388] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 64.
[389] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), Introduction.

LEGAL NATURE OF CONFORMITY

3.3.1 The principle of conformity gives rise to uncertainty as to the nature and scope of the legal undertakings it creates, which are highlighted below. The terms of the UCP must be sufficiently broad – without being loose - to include various legal categories under distinctive legal orders (e.g. the use of the term duty instead of contractual duty includes the possibility contractual obligations and undertakings based on sole act). Also the realisation of the legal nature of conformity clarifies the basis of the appropriate standard as to the test of conformity, and whether aspects such as a banker's examination of documents is an obligation or not.

3.3.2 **No obligation of examination.** There are only two provisions in UCP 600 that express the obligations that the issuing bank owes to the applicant. One provision is sub-article 4 (b) which can be treated under English and Jordanian laws as creating a duty on the part of the bank to advise the applicant to avoid including in the credit any reference to the underlying contract and the like.[390] Another provision is article 37 which seeks to exclude the issuing bank from any liability for the mistakes of advising banks in advising the credit. However, sub-article 14 (a) of UCP 600 provides that the bank must examine the documents to determine whether the presented documents are in conformity. Such a provision does not postulate that the bank owes to the applicant a duty of examination; it rather intends to protect the bank as explained below.[391] Yet, under English and Jordanian laws the issuing bank and the applicant are in a documentary credit relationship which means that the issuing bank must adhere to the mandate of the applicant.[392] Generally speaking, the purport of that mandate, which is usually expressed in the issuing bank's form of contract, provides that the bank is obliged to honour the credit against the

[390] Chapter 5, para 5.2.4.
[391] Para 3.3.7.
[392] English law: *Commercial Banking Co. of Sydney v Jalsard Pty Ltd* (1973) AC 279, 285; *Midland Bank v Seymour* (1955) 2 Lloyd's Rep 147, 153; *Credit Agricole Indosuez v Muslim Commercial Banking Go of Sydney Ltd v Jalsard Pty Ltd* [2000] 1 Lloyd's Rep 275, 280; Jordanian law: Court of Distinction (Civil), *152/1975*, Adalah Programme.

required documents. Thus the presented documents must correspond to what is required in the credit. If the credit is honoured against non-conforming documents, the bank will be in breach of its mandate. The consequence of such a breach is that the issuing bank is not entitled to reimbursement.[393] Furthermore, the bank might be sued for damages by the applicant where the latter loses the right to reject documents in the underlying contract (e.g. in a CIF contract where delivery of conforming goods is evidenced by the delivery of conforming documents). These consequences may be regulated by the mandate between the issuing bank and the applicant. In conclusion, the UCP leave to Municipal law to determine what duties are owed in contract and tort by the bank to the applicant. The UCP itself might not create a duty to examine the documents but the applicant's mandate may do so.

3.3.3 Conformity as a condition triggering undertakings. UCP 600 plays a bigger role in the undertakings of the issuing bank towards the beneficiary,[394] where sub-article 7 (a) states:

"A. Provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour ... .
B. An issuing bank is irrevocably bound to honour as of the time it issues the credit".

In addition, UCP 600 articulates the undertakings owed to the nominated bank (i.e. confirming, paying or negotiating banks) by the issuing bank, where sub-article 7 (c) states:

[393] *Equitable Trust Co of New York v Dawson Partners Ltd* (1927) 27 Lloyd's Rep 49; *Midland Bank v Seymour* (1955) 2 Lloyd's Rep 147.
[394] Article 7 UCP 600; article 9 (a) UCP 500; the confirming bank bears the same obligations as the issuing bank towards the beneficiary: article 8 UCP 600; article 9 (b) UCP 500.

"An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary".

Here it is clear that the undertaking on the part of the issuing, or confirming,[395] bank to honour the credit is conditional upon the presentation of conforming documents. This can be seen in the judgement of the Court of Appeal in *Glencore International AG v Bank of China*[396] where Bingham Mr stated *"the duty of the issuing bank is, and is only, to make payment against documents which comply strictly with the terms of the credit".* It is also clear that the obligation of the issuing, or confirming, bank to reimburse the nominated bank is conditional upon forwarding conforming documents to the issuing bank. By analogy, the applicant is obliged to reimburse the issuing bank only where the documents are in conformity.

Conformity As A Right And A Condition

3.3.4 Consequently, the applicant has the right to receive documents that are in conformity. Here conformity is a right. For beneficiaries conformity is a condition precedent that must be fulfilled as part of the conditional right of payment. Similarly conformity is a condition protecting the issuing or confirming bank against the nominated bank. This is not just to protect the issuing bank from the possible liability to the applicant, but it might be that the issuing bank is a party who has real interests

[395] Article 8 UCP 600; article 9 (b) UCP 500.
[396] [1996] 1 Lloyd's Rep 135, 155.

in the documents (e.g. the issuing bank is the consignee in the bill of lading).[397] The issuing bank, or nominated bank (i.e. confirming, paying and negotiating bank), needs to forward conforming documents to the applicant, or to the instructing bank as the case may be, in order to be entitled to reimbursement. Here, conformity is a protection for the issuing or nominated bank. The issuing or nominated bank is entitled to reimbursement as long as the documents are in conformity (i.e. in the case of certainty where the status of conformity is clear), even where the bank has not actually examined the documents. Both UCP 600 and its predecessor[398] stipulate that the bank (i.e. issuing, confirming, paying or negotiating) *"must examine a presentation"* to determine conformity. But as analysed above UCP 600 does not create an obligation on the issuing or confirming banks to examine the documents,[399] rather this provision advises the banks to undertake the task of examination since, we will see below, a diligent examination protects banks in enforcing their right of reimbursement where the status of conformity is uncertain.[400]

Conformity As An Objective And Subjective Belief

3.3.5 The question is what does the bank rely on to validate its decision as to the conformity, or otherwise, of the presented documents and thus to enforce its right to reimbursement?

REASONABLE CARE

3.3.6 In the so called "reasonable care defence" where reasonable care is exercised by the bank (i.e. issuing, confirming, paying or negotiating bank) in determining the conformity status of the presented documents, the bank is not responsible for any

[397] The empirical findings confirm such interests in Jordan: Annex I, para 32.
[398] Sub-article 14 (a) UCP 600; sub-article 13 (a) UCP 500.
[399] The paying or negotiating bank is not even obliged to honour the credit in the first place: article 12 UCP 600; article 10 UCP 500.
[400] Para 3.3.7.

want of conformity. Sub-article 13 (a) of UCP 500 contained a reference to "reasonable care" by stating:

"Banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit..."

The reference to "reasonable care" in UCP 500 was a source of confusion as to when the bank could rely on reasonable care and what is meant by, or the scope of, reasonable care.[401] Indeed the bank is obliged to strictly adhere to the instructions of the applicant as it was elucidated by Sumner LJ in *Equitable Trust Co of New York v Dawson Partners Ltd*:[402]

"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".

It is accordingly clear that the nature of the bank's duty is not a reasonable care in providing a service to check the status of conformity. Rather, the bank guarantees that it will be cautious in adhering to the terms of the credit in such a way that any cautious bank on its position might reach the same conclusion. However, later in *Gian Singh & Co Ltd v Banque de l'Indochine*[403] Lord Diplock referred to the term "reasonable care" in connection with conformity where he stated:

[401] Malek and Quest, *Jack: Documentary Credits,* (4th edn, Tottel 2009) para 8.3.
[402] (1927) 27 Lloyd's Rep 49, 52.
[403] [1974] 1 W.L.R. 1234, 1238.

"The duty of the issuing bank, which it may perform either by itself, or by its agent, the notifying bank, is to examine documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. The express provision to this effect in article 7 of the Uniform Customs and Practice [this provision in 1962 revision has not been changed in UCP 400 and 500] for Documentary Credits does no more than re-state the duty of the bank at Common law".

It is submitted that the term "reasonable care" under both Common law and UCP 500 was necessary to protect the bank in the situation where the status of conformity was uncertain. In such a situation the bank needed to prove that it had exercised its reasonable care in its narrow sense, namely: another cautious bank might, and not should, have reached the same conclusion irrespective of the subjective circumstances of the bank (e.g. the employees of the bank were on strike). The problem is in the language (i.e. reasonable care) that was used to describe the above legal position. In conclusion the term "reasonable care" in conformity was not intended to correlate to its usual meaning under employment or service contracts in which a performing party does not guarantee the result of the performance but agreeing to perform its services to a relative standard that is subject to the contingent circumstances, but as a description of the scope of a banking ministerial discretion.

UCP 600 (NO REASONABLE CARE)

3.3.7 The reference to "reasonable care" is bravely omitted in UCP 600 in which sub-article 14 (a) states:

"A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the

documents alone, whether or not the documents appear on their face to constitute a complying presentation".

The Drafting Group were confident to erase the term "reasonable care" as ISBP had been promulgated in 2002 prior to the drafting of UCP 600, and ISBP contained detailed rules directing a bank as to the status of conformity on many specific factual matrices.[404] In addition the Drafting Group felt that the guidance for conformity in article 2 of UCP 600 was clear and comprehensive.[405] Article 2 states:
"Complying presentation means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice".

So, the Drafting Group felt that there was certainty as to the meaning of conformity in many common situations. Accordingly, it is clear now that presented documents are, in most cases, either conforming to the terms of the credit or not, and as such the bank has no discretion in such cases and no ability to rely on the exercise of reasonable care. Here it is irrelevant whether or not the bank has actually examined the documents and the bank is supposed to make the correct decision as to the status of conformity regardless of its circumstances or its discretion. The omission of the term "reasonable care" is also significant where the status of conformity is uncertain, as the relevant situation is not determinatively captured by UCP 600 and ISBP. It is clear now, the bank cannot rely on the "reasonable care" defence in its broad sense (i.e. the bank has exercised what it can to do relative to the circumstances in which it finds itself). The bank can only rely on its claim that it has come to a decision as to the status of conformity that any cautious bank might make, regardless of the particular circumstances of the bank (e.g. the employees of the bank were on strike). This can only be proved where the bank has actually examined

[404] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 62.
[405] Drafting Group, *Commentary on UCP 600: Article by Article Analysis,* (No. 680, ICC 2009), 62.

the documents in compliance with the required standard of a prudent bank (i.e. following the rules of UCP 600 and ISBP on the determination of the status of presentation).[406] That is why the reference that the bank must examine the documents under sub-article 14 (a) of UCP 600 is a necessary advice aiming to protect the bank's right to reimbursement in the case where the status of conformity as to presented documents is uncertain.

EMPIRICAL FINDINGS AND JORDANIAN LAW

3.3.8 The empirical findings indicate that bankers perceive a presentation as being either in conformity or non-conformity and assume that any prudent banker would reach the same decision as to the conforming status of the presented documents.[407] The interviewed bankers in Jordan define a prudent banker as any banker who is specialised in checking documents in documentary credits, and not an eminent expert - such as Muhammad Burjak - who provides training in documentary credits.[408] As analysed above, the position that the presented documents are either in conformity or non-conformity should be confined to situations where there is certainty as to the status of conformity (e.g. where the issue is regulated with clarity in UCP 600 and ISBP). However, the empirical findings indicate that there is a lack of clarity in article 2 of UCP 600.

LEGAL NATURE OF CONFORMITY AND CONCEPTUAL MODEL

3.3.9 The deletion of the reference to "reasonable care" is a welcome step under UCP 600 in order to avoid the inherited confusions that were caused by the use of such a

[406] The omission of reasonable care must be interpreted as seeking a clarification rather than an amendment: Malek and Quest, *Jack: Documentary Credits,* (4th edn, Tottel 2009) para 8.4.
[407] Annex I, para 26.
[408] Annex I, para 26.

term. It is, however, unfortunate that UCP 600 did not set up a standard for conformity whereas the status of documents is uncertain. It is submitted that the standard should be an objective one: any cautious bank might, and not should, reach the same conclusion irrespective of the subjective circumstances of the bank. It must be appreciated that the examination of documents plays a protective role when the status of conformity is uncertain (as designing particular rules addressing all cases is an impossible task), so the bank is assured of reimbursement as long as it examines the documents according to the aforementioned objective standard. Thus, after determining the meaning of conformity (i.e. dimension six), a regulator must also determine the banking standard for the determination of documentary conformity whereas the status of the conformity of documents is uncertain.

SCOPE OF CONFORMITY[409]

3.4.1 This section evaluates (on the basis of the conceptual model that was set out in chapter 1) under UCP 600 and its interpretative aids, how issues of conformity should be determined in the light of the English and Jordanian legal orders. Also the functional scope of conformity (i.e. the regulated conformity that captures documentary credits cases in a determinable way) under UCP 600 and its interpretative aids is analysed.

Principle Of Conformity

3.4.2 For conformity to be regarded as principle it must be formed in a way that directly reflects that documentary credits constitute an assurance to the buyers of effective delivery of the goods by presentation of documents corresponding to the requirements of the credit (i.e. as identified in the conceptual model: conformity mainly serves the function of documentary assurance as to the delivery of the required goods). Conformity is implicitly set out as a principle in the UCP and is expressly stipulated as a principle under English and Jordanian laws.

UCP

3.4.3 The concept of compliance or conformity was set out at an early stage by the main players of documentary credits in the international banking community in a form that the principle of conformity was implicit in the Draft Uniform Regulations on Export Commercial Credits (1927), in which it was stated that the presented documents

[409] For scope of conformity under English law: Hwaidi, *The Story of The English Strict Compliance Principle in Letters of Credit and its Consistency with the UCP*, [2014] J.I.B. L.R. 28 (2), 71-81.

must be in regular order.[410] Similarly, under UCP 500, conformity was not spelled out as a principle in expressed terms, but it was implicit. Sub-article 13 (a) of UCP 500 provided that the bank is under a duty to examine the presented documents in order to determine whether the documents are in compliance with the terms of the credit, and compliance must be determined by international standard banking practice as reflected in UCP 500. Also the principle of conformity is implicit in UCP 600 from both sub-article 14 (a), which is equivalent to sub-article 13 (a) of UCP 500 apart from the omission of the term "reasonable care", and article 2. However article 2 of UCP 600 presents a significant change as to the principle of conformity, or complying presentation as it is called therein, where it states:

"Complying presentation means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice".

3.4.4 Determinable principle. Unlike the predecessor revisions, article 2 of UCP 600 directs any party determining an issue of conformity in a documentary credit transaction to consider that issue against particular contextual sources for criteria (i.e. the terms of the credit, the terms of UCP 600 and international standard banking practice). Here the benefit of the form of principle as to conformity is not merely that it reflects the underlying value of documentary credits (i.e. secure method of payment and settlement in international trade) as under the predecessor revisions, but it also has the advantages of both having a fair degree of "formal realisability" and a high degree of generality. "Formal realisability" in the sense that we know now documents must conform to those three sources of criteria. The generality of the principle of conformity is very high as it captures all cases in documentary credits.

[410] Draft Uniform Regulations on Export Commercial Credits (1927) presented to ICC's fourth Conference; article 10 UCP (No. 82, ICC 1933); article 9 UCP (No.151, ICC 1951): Taylor, *The Complete UCP*, (1st edn, ICC 2008), 30.

However, the lack of clarity as to what international standard banking practice refers to may affect commonality, since (as evidenced by the empirical findings)[411] a minority of banks might prioritise the application of ICC Opinions in over ICC ISBP. It is submitted that such a lack of clarity would not affect the position of English and Jordanian laws as they would enforce the application of ICC ISBP, given the fact that the introduction of UCP 600 expressly applies ICC ISBP to the issue of conformity.

ENGLISH AND JORDANIAN LAWS

3.4.5 The concept of conformity is described as a "strict compliance" under English law[412] and as "full conformity" under Jordanian law.[413] Both are regarded, as a matter of form, as a principle, because they directly reflect the underlying policy of documentary credits.[414] The principle of strict compliance is encapsulated in the judgement of Sumner LJ in *Equitable Trust Co of New York v Dawson Partners Ltd*:[415]

"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".

The principle of full conformity was stated by the Court of Distinction in case 316/1988:[416]

[411] Annex I, para 24.
[412] *Equitable Trust Co of New York v Dawson Partners Ltd* (1927) 27 Lloyd's Rep 49, 52.
[413] Court of Distinction (Civil), *316/1988*, Kurtas Programme.
[414] For principles: chapter 1, para 1.2.25.
[415] (1927) 27 Lloyd's Rep 49, 52.
[416] Court of Distinction (Civil), *316/1988*, Kurtas Programme.

"The issuing bank does not accept the documents unless they are in full conformity with the conditions of the credit, and if there is a difference the bank will refuse the documents".[417]

Sumner LJ endeavoured to functionalise, or enhance the "formal realsability" of the principle of strict compliance by spelling out the consequences of disregarding strict compliance. Thus a bank is not entitled to indemnity for a payment against documents when a cautious banker would have refused them for non-compliance. This may be inferred from the reasoning that:

"There is really no question here of waiver or of estoppel or of negligence or of breach of a contract of employment".[418]

Similarly the Jordanian Court of Distinction endeavoured to functionalise the principle of full conformity by the statement "... *and if there is a difference the bank will refuse the documents."* [419] Such a statement is however better considered as a general rule, which will be examined under the heading of general test for conformity.[420]

FORMAL REALISABILITY

3.4.6 The principles of "strict compliance",[421] "full conformity"[422] and "complying presentation: presented documents must be in accordance with three identified sources of criteria[423] all lack the ability to determine the dimension in which conformity falls. The principles of strict compliance and full conformity have a very

[417] Translated by the researcher.
[418] *Equitable Trust Co of New York v Dawson Partners Ltd* (1927) 27 Lloyd's Rep 49, 52.
[419] Court of Distinction (Civil), *316/1988*, Kurtas Programme.
[420] Below para 3.4.21.
[421] *Equitable Trust Co of New York v Dawson Partners Ltd* (1927) 27 Lloyd's Rep 49, 52.
[422] Court of Distinction (Civil), *316/1988*, Kurtas Programme.
[423] Article 2 UCP 600.

low degree of "formal realisability". However, as above explained, the principle of complying presentation has a fair degree of "formal realisability". Still none of these principles are capable of directing a banker in a particular case as to whether a presentation of documents in a particular situation is certainly in conformity or not.

3.4.7 Applications. The direct application of such principles by courts might enhance the "formal realisability" of these principles. Thus the credit in *Equitable Trust*[424] 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. Also, the court might have simply looked at the issue through the general English doctrines for the interpretation of contractual terms, so the court imposed a reading that made the reference to non-existing body meaningful by identifying who might have been intended by the inappropriate reference. It can, nevertheless, be inferred from such an application that the principle of strict compliance under Common law does not fall in the first dimension for conformity (i.e. mirror image).[425] This might appear inconsistent to a previous *dictum* expressed, in 1922, by Bailhache J in *English, Scottish and Australian Bank Ltd v Bank of South Africa*[426] 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 UK just after the end of the first world war,[427] it was necessary to emphasise the establishment of the principle of strict

[424] *Equitable Trust Co of New York v Dawson Partners Ltd* (1927) 27 Lloyd's Rep 49.
[425] Above para 3.2.2.
[426] (1922) 13 Lloyd's Rep 21, 24; *cited*; Malek and Quest, *Jack: Documentary Credits,* (4th edn, Tottel 2009) para 8.31.
[427] Hershey, *Letters of Credit*, [1918] Harvard Law Review Association, (Nov).

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*[428] where Evans LJ 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".

3.4.8 **Need for rules.** In order to achieve a high level of formal realisbility we need general and particular rules that determine the application of the principle to various identifiable matrices of facts. The rules must not only be capable of determining in which dimension conformity falls, but also of determining how conformity functions when applied to a wide range of circumstances. However, the principle of conformity under UCP 600 has the virtue of capturing all documentary credits cases. The principles of conformity under English and Jordanian laws also have the virtue of generality, but it is a loose generality and as such it has a very broad flexibility that might affect its ability to capture the intended cases.

General Rule Of Appearance

3.4.9 The reason that the rule of appearance is set out in this chapter prior to the general test for conformity, which is also a general rule, is that the appearance rule has a high degree of both generality and "formal realisability" as it captures most cases in documentary credits in a determinative way, in the sense it directs a banker to act decisively on many factual matrices across the wide range of very different

[428] [1999] Lloyd's Rep 219, 223.

circumstances arising in conformity. Most importantly, unlike other rules of conformity, the rule of appearance is generated from the principle of appearance which functions as a bridge between the conformity norm and autonomy norm in documentary credits. The principle of appearance is generally addressed in chapter 5. The concern in this chapter is regarding the elements of the appearance principle that are related to conformity and constitute the rule of appearance. The appearance rule means that a document checker should determine the status of conformity exclusively on the basis of what appears on the documents and nothing else.

UCP

3.4.10 Articles 5 and 34 of UCP 600 and their equivalent articles 4 and 15 in UCP 500 spell out the principle of appearance. Our concern here is on the rule of appearance that is related to conformity which is spelled out in sub-article 14 (a) of UCP 600, *inter alia*:

"A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation".

Both phrases *"on the basis of documents alone"* and *"on their face"* constitute the rule of appearance for conformity under UCP 600. The equivalent provision under UCP 500 is sub-article 13 (a) which stated:

"Banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit...".

3.4.11 **Changes.** UCP 600 presents two changes in respect of the rule of appearance. The first is the addition of the phrase *"on the basis of the documents alone"* in sub-article 14 (a). This addition is necessary to obliterate any ambiguity as to the appearance rule, and as such it is plain that the bank should not be concerned about any matter except what appears on the documents. So, it is clear, for instance, if a bill of lading indicates that the freight is paid, the bank is under no obligation to check that the freight has actually been paid.[429] The new phrase is not a repetition of article 5 of UCP 600 which provides that the bank deals with documents and not with goods. The new phrase directly serves the rule of appearance, whereas article 5 serves the principles of appearance and autonomy. The second change is the omission of *"appear on their face"* in the subsequent provisions of sub-article 14 (a). Thus it is clear now the article that deals with the general test for conformity (i.e. article 14) starts with the general rule of appearance which applies to all documentary credit cases. There is no need to repeat *"on their face"* as that might invite confusion, particularly where such a phrase is expressed in some conformity provisions and not expressed in other conformity provisions. The phrase "*on their face*" must not be understood as to refer to "*front versus the back of a document*",[430] but it stands for the reviewing of data within a document and thus it emphasises that banks should not go beyond what appears in the documents.

ENGLISH AND JORDANIAN LAWS

3.4.12 It is well established under English law that the bank is not entitled to examine the underlying facts,[431] goods[432] or the relevant contracts.[433] The appearance rule under

[429] *Collected Opinions 1995-2001,* R.432.
[430] Drafting Group, *Commentary on UCP 600: Article by Article Analysis,* (No. 680, ICC 2009), 62.
[431] *Westpac Banking Corp v South Carolina National Bank* [1986] 1 Lloyd's Rep 311, 315 per Goff L.J.; *Forestal Mimosa Ltd v Original Credit Ltd* [1986] 1 Lloyd's Rep 329, 334.
[432] *Guaranty Trust Co of New York v Van den Berghs Ltd* (1925) 22 Lloyd's Rep 446, 454 per Scrutton L.J.; *Biddell Bros v E Clemens Horst Co* [1911] 1 K.B. 934, 958 per Kennedy L.J.
[433] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, 183; *Credit Industriel et Commercial v China Merchants Bank* [2002] C.L.C. 1263, [30].

Jordanian law can be inferred from the decision number *1050/2006* of the Court of Distinction that the bank should not check or allow any interference of the underlying contract or other contracts in the determination of the conformity of the documents.[434] The appearance rule lacks clarity under the English and Jordanian legal orders; particularly as the latter regime does not have an expressed position as to the appearance rule in connection with issues of conformity. However, as the rule of appearance is clear under UCP 600 it will be enforced under English and Jordanian laws to the extent that it is not repugnant to their fundamental legal doctrines.[435]

DISCLAIMER

3.4.13 As a consequence of the principle and rule of appearance, article 34 of UCP 600[436] provides that the bank does not warrant the truth, accuracy or legal effectiveness for any state of affairs that does not appear on the face of a document.[437]

PARTICULAR RULES OF APEARANCE OF GENERAL APPLICATION

Banks are not concerned with non-documentary credit trade usage

3.4.14 As an application to the appearance rule a non-documentary credit usage or market practice should not intervene in the determination of conformity. For instance, where shipment has been effected from two ports, shipping companies would insert the date of the shipment in an on board notation only after the entire quantity had been loaded at the final port of loading, which means that there is no need to provide two

[434] Court of Distinction (Civil), *1050/2006,* Adalah Programme.
[435] For documentary fraud and illegality exceptions: chapter 5.
[436] Equivalent to article 15 UCP 500.
[437] Chapter 5, para 5.2.13.

on board notations to prove the date of each shipment. Here the bank should not rely on such a trade usage, and thus the bank needs to check the date of each shipment on the face of the presented documents.[438]

Authenticity

3.4.15 Both the need for speed in decision making and the fact that banks are not expected to be experts in the trade transactions underlying the documentary credits create an objective of speed and a factor of ignorance that informs the underlying policy of the principle of appearance. Therefore, the rule of appearance in UCP 600 functionalises this objective and factor by generating a particular rule regarding authenticity, as article 3 provides:

"*A requirement for a document to be legalized, visaed, certified or similar will be satisfied by any signature, mark, stamp or label on the document which appears to satisfy that requirement*".[439]

Thus there is a presumption of due execution in the presentation of documents: in effect a presumption that the beneficiary is *bona fide* and presents authentic documents. Therefore, there is no requirement for a particular locally utilised method of signifying authenticity where the credit requires the documents to be legalised or certified. In similar fashion, when it comes to the authentication of documents the UCP provides for a wide variety of acceptable means. Article 3 of UCP 600 provides:

"A document may be signed by handwriting, facsimile signature, perforated signature, stamp, symbol or any other mechanical or electronic method of authentication".[440]

[438] *Opinions 2009-2011*, R.723; *J H Rayner & Co Ltd v Hambro's Bank Ltd* [1943] KB 37: the argument that the statement "coromandel groundnuts" as stated in the credit was the same in the trade usage of groundnuts as "machine – shelled groundnuts kernels" which was stated in the bill of lading was rejected by the Court of Appeal.
[439] Equivalent to sub-article 20 (d) UCP 500.
[440] Equivalent to the second sentence of sub-article 20 (b) UCP 500.

Thus, any of the listed forms: a signature, a stamp, a label, or a mark intended to authenticate a document is accepted under the UCP. Article 3 allows a wide variety of permissible forms for authentication of documents.

3.4.16 Furthermore, the characters used are presumed to be appropriate if they are not within the common knowledge of the local bank. Where any of the acceptable signatory methods is expressed in the local language of its issuance, which is different from the language of the credit, it must be accepted without the need to prove the translation of the contents.[441] Such a position reflects pragmatic needs. Thus, it is not expected that a stamp from the Chinese Custom and Revenue would be issued in Arabic, even if the language of the credit was in Arabic. Similarly, it is not expected from an Arabic bank – where the language of the credit was in Arabic – to translate the Chinese stamp for it would take a long time that might exceed the permitted period for examination. Nevertheless, if the bank was cognisant of the language (e.g. the language of the credit was in English but the language of the stamp was in Arabic and the bank was an Arabic bank) of the data in the stamp, then the bank would be liable for accepting such a stamp if its data raised a valid ground for refusal. Moreover, where the document contains a declaration, in the language of the credit, which provides that the documents are issued and signed by the stated company in the credit, then the bank is not entitled to translate the foreign language of the contents of the stamp (i.e. language different from the credit's language), even where such contents provide the possibility that the documents are issued or signed by a company other than that stated Fin the credit.[442]

3.4.17 **Exception to authenticity**. However, as an exception to the presumption of authenticity drafts, certificates and declarations are not to be treated as authentic,

[441] *Collected Opinions 1995-2001*, R.441.
[442] *Opinions 2005-2008,* R.668.

unless they are signed by some permitted signatory method[443] and as such they must be signed even if the credit does not require such documents to be signed or legalised.[444] Indeed such a presumption, which was introduced in the ISBP, is responsive to: (i) most legal orders requiring a signature on bills of exchange (ii) the commercial sense of requiring certificates and declaration in that it is implicit that the parties are seeking authentication to confirm a state of affairs.

Empirical findings

3.4.18 Many banks in Jordan are cautious about the authenticity of documents. They demand a handwritten signature for documents in order for them to be treated as original, and as such they are willing to exclude the relative articles in UCP 600 that provide otherwise. Thus Muhammed Burjaq stated that Alitihad Bank does not usually exclude any of UCP 600 terms, but some banks exclude article 17 of UCP 600 as they require a handwritten signature for documents to be original.[445] Nart Lambaz said:

"We impose a condition that the original documents must have a handwritten signature. This is to ensure whether or not the documents are original. Our customers do not mind that but we have a lot of complaints from beneficiaries".

This is the same position as Mr A's Bank. Arabic Bank has a more relaxed approach, Koloud Alkalaldeh stated: *"we require that the documents must be signed. It can be signed in handwriting or by other means".* Mr B stated:

[443] For signatory methods: article 3 UCP 600.
[444] *ISBP 2013*, A3, B8; *ISBP 2007*, para 37.
[445] Annex I, para 17.

"*We do not require a handwritten signature on documents in order for them to be regarded as original. But we are thinking to implement such a requirement for bills of lading".*

Thus, some banks even plan to impose a requirement for a handwritten signature on bills of lading.[446] For these banks the issue is that they want to be protected against fraud. As authenticity is dealt with by many articles in UCP 600 including articles 3 and 17, and A35 of ISBP 2013, a requirement for a handwritten signature needs to be clearly stipulated. If the bank intends to require a handwritten signature for all the required documents, then the bank would need to exclude the articles in UCP 600 that relate to signature. Of course this creates complexities and difficulties in presenting documents that are in conformity, as many documents are issued not by the beneficiary. Indeed, the empirical findings indicate that many complaints have already been made by various beneficiaries about the requirement of a handwritten signature.[447] Given the fact that Jordan is a developing country banks still require a traditional method of signature, regardless of the fact that the Evidence Code does not limit the signature method to a handwritten signature.[448] Thus the dilemma of commonality as to the UCP articles regulating methods of signature is caused by social factors and not by the text of UCP 600. Such a dilemma might be tackled by providing training to banks in Jordan regarding the impact of requiring a handwritten signature.

EXCEPTIONS TO APPEARANCE RULE

3.4.19 **Fraud.** Under English and Jordanian laws, fraud is a well-known exception to the principle, and thus the rule, of appearance. It is submitted in chapter 5[449] that where

[446] Annex I, para 30.
[447] Annex I, para 30.
[448] Article 13 Evidence Code (1952).
[449] Para 5.3.13.

there is credible evidence of a material fraud as to the truth of the facts represented in the documents, then such documents ought to be proved to be in *actual conformity* with the credit in order to overcome the serious allegation of fraud. Thus the underlying facts – and not merely the represented facts appearing in the documents - must be in conformity with the credit in order for the payment obligation to be enforceable.

3.4.20 **Common knowledge.** Another exception is not the invention of legal orders but it is rather the invention of ICC Opinions. Pursuant to this ICC exception, the bank needs to apply common knowledge in checking conformity. Thus, where the credit provides that shipment is to be effected from any port in a specified region, then the bank has the right to investigate whether the port of loading as stated in the bill of lading – even where it is stated in the bill that it is the port in the specified region - is an actual port in that region.[450] The meaning of common knowledge might be loaded with inherent ambiguity, but this might be tackled by a reasonable reader test.[451] Namely: common knowledge is the knowledge that any reasonable banker in documentary credits would have in the relevant circumstances. In litigation, this would be proved by expert evidence. The common knowledge exception reflects the need for discretion. Here, flexibility is necessary to give the bank the required degree of judgement, which is to be exercised pursuant to the criterion of "contextual conflict" as it will be discussed in the coming section.

General Test For Conformity (The Material Alignment Test)

3.4.21 We have seen so far two propositions capturing all or most cases in documentary credits. The principle of conformity under UCP 600 determines the sources of criteria

[450] *Collected Opinions 1995-2001*, R.261.
[451] A reasonable reader test is a doctrine to interpret contractual terms and notices under common law: *Rainy Sky SA v Kookmin Bank* [2011] 1 W.L.R. 2900; *Investors Compensation Scheme LTD v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912 per Lord Hoffman.

against which documents in all documentary credits cases need to be checked.[452] The general rule of appearance under UCP 600 captures most cases of documentary credits.[453] It has generated a few particular rules and triggered a few exceptions. But as the rule of appearance is generated mainly from the principle of appearance and not from the elastic concept of conformity, it has a high degree of "formal realisability", even though it does not have many particular rules. In this section we will consider the general test for conformity as set out in sub-article 14 (d) of UCP 600, which is – in effect – a presumption of conformity in the absence of contextual conflict. It is called, in this research, the "material alignment test". It determines in which dimension conformity falls. It has generated many particular rules in order to enhance its "formal realisability". It has, however, a low degree of generality (i.e. a fair amount of cases are not captured by material alignment) even though it has the form of general rule since it has been formulated subject to many exceptions.

GENERAL RULE OF MATERIAL ALIGNMENT

3.4.22 The general test for conformity under UCP 600 is set out in sub-article 14 (d) of UCP 600. which provides, *inter alia*:

"*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*".

The equivalent of sub-article 14 (d) of UCP 600 is the second sentence of both sub-article 13 (a) and article 21 of UCP 500. The second sentence of sub-article 13 (a) of UCP 500 stated:

[452] Complying presentation: Article 2 UCP 600.
[453] Sub-article 14 (a) UCP 600.

"*Compliance of the stipulated documents on their face with the terms and conditions of the Credit, shall be determined by international standard banking practice as reflected in these Articles. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit*".

The second sentence of article 21 of UCP 500 stated:

"If the Credit does not so stipulate, banks will accept such documents as presented, provided that their data content is not inconsistent with any other stipulated document presented".

CHANGES

3.4.23 There are many important changes in UCP 600 as to the general test for conformity. It is irrelevant that the intention under UCP 500 was to give conformity the same meaning as would eventually be more adequately expressed in UCP 600. What is important is the meaning conveyed by the expressed language of the articles, namely: what bankers can be expected to understand by the provisions of the UCP?

3.4.24 **Structure***.* Firstly, the structure is now clear and entails determinative guidance under UCP 600, as we know now that there is one key sub-article (i.e. being sub-article 14 (d)) which determines the general test for conformity. This was not straight forward under UCP 500 as the general test for conformity was fragmented and needed to be inferred from different parts of various articles (i.e. being inferred from the second sentence of both sub-article 13 (a) and article 21).

3.4.25 **Need not be identical to***.* Secondly, the introduction of the phrase *"need not be identical to"* in sub-article 14 (d) of UCP 600 leaves no scope for an argument that

conformity might fall in the first dimension (i.e. mirror image). Even though that was the intended position under article 13 of UCP 500, the language of sub-article 13 (a) of UCP 500 lacked clarity, and as such many banks used to refuse documents on the basis of simple typing mistakes and grammatical errors.[454]

3.4.26 Not conflict with. Thirdly, and most importantly, the introduction of the concept that documents *"not conflict with"* under sub-article 14 (d) of UCP 600 instead of "inconsistency" in the equivalent provisions in UCP 500 is significant. On the one hand, the concept of "inconsistency" is a loop negative concept that leads to the operation of its positive side, or antonym, which is consistency. On the other hand, the concept *"not conflict with"* is a simple negative concept that does not lead to a positive element, because it constitutes a single isolated condition.[455] So, the requirement under sub-article 13 (a) of UCP 500 that "*documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance"* would convey an interpretation providing that the bank must check whether there is consistency between the data of the same document, data in other documents and data in the credit as interpreted by international standard banking practice. Here an apparent difference of meaning between the documents might be regarded as a lack of consistency, which would justify refusal regardless the materiality of the difference. But by reason of the test of *"not conflict with"* under sub-article 14 (d) of UCP 600, if there is an apparent difference in the meaning between data of presented document, data in other documents, the terms of the credit or the international standard banking practice then such a difference is disregarded unless it causes a conflict.

[454] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 64.
[455] For forming concepts in social science: 6 and Bellamy, *Principles of Methodologies,* (1st edn, Sage 2012), 138-139.

3.4.27 When read in context. Fourthly, in order that a conflict to be qualified as a positive or material conflict capable of justifying a refusal, the conflict must be contextual. The addition of the phrase *"when read in context"* in sub-article 14 (d) of UCP 600 means that a conflict should only be regarded as a material when it causes a contextual conflict. The Drafting Group in their commentary on UCP 600 explained:

"The requirements of the documentary credit, the structure and purpose of the document itself and international banking practice need to be assessed, understood and be taken into consideration in determining compliance of a document ... the new standard of "not conflict with" relates the data contained in the document to what was required by the documentary credit, to what is stated in any other stipulated document and to international standard banking practice".[456]

The purpose of a document might be stipulated in the document itself, or might be inferred from the function of the document where any reasonable banker is expected to know such a purpose.[457] An example for a contextual conflict is an air way bill evidencing that the goods are consigned to the bank, instead of being consigned to the applicant as required in the credit. The conflict here is a contextual one as it defeats the purpose of enabling the applicant to possess the goods without the interference of the bank.[458] In conclusion, the general test for conformity is called in this research as the "material alignment" test which means: data in the presented document in the context of the collective *structure and purpose* of the document itself and the other documents, and in the context of the terms of the credit and international standard banking practice must not be in conflict.

[456] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (2009, ICC No. 680), 64.
[457] *Collected Opinions 1996-2005*, R.322.
[458] *Collected Opinions 1996-2005*, R.406.

MATERIAL ALIGNMENT AND DIMENSION SIX

3.4.28 Conformity in UCP 600 falls in dimension six with an addition that conformity in UCP 600 is subject to international standard banking practice. Such an addition plays a role in enhancing certainty as international standard banking practice – mostly represented by ICC's ISBP – mainly functions to clarify when a difference or conflict in documents is to be interpreted as a contextual conflict. As submitted above, dimension six would achieve the right balance of security as between the competing needs of security. Indeed the general test for conformity under UCP 500 was understood by many bankers to fall in dimension two.[459] The question is whether the general test for conformity under UCP 600 is clear in the sense that it conveys a unified interpretation.

EMPIRICAL FINDINGS

3.4.29 In order to answer the question regarding the clarity of the test of material alignment, bankers in Jordan were asked about the meaning of a material conflict in sub-article 14 (d) of UCP 600.[460] Some bankers stated that a material conflict is the conflict that affects the essence of the commercial transaction. They gave an example for their understanding[461] which appeared to be in accordance with the intended meaning by the Drafting Group in that conformity would fall in dimension six as illustrated above.[462] However, other bankers interpret a material conflict as a conflict that affects the rights, liabilities and commercial interests of the bank.[463] One banker emphasised that the reality of what is meant by a material conflict is

[459] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 64.
[460] Annex I, para 24-26.
[461] Annex I, para 24.
[462] Para 3.2.4.
[463] Annex I, para 24.

contingent on the relationships between parties.[464] Thus the empirical findings clarify that there is a lack of commonality in understanding the general test for conformity in UCP 600. It is submitted that this is due to the lack of comprehensible clarity in sub-article 14 (d) of UCP 600. The new phrase *"when read in context"* is not explained precisely in UCP 600. Indeed the Drafting Group emphasised, in their commentary on UCP 600, the criticality of considering conformity against the structure and purpose of documents.[465] This should have been expressed in UCP 600. The problem is that the Drafting Group's Commentary on UCP 600, unlike the UCP and ISBP, was not issued by the Banking Commission of ICC. Bankers therefore might not be familiar with the Commentary. English and Jordanian laws might not give effect to the Commentary, particularly in cases where it is proved by expert evidence that many bankers did not rely on Commentary for interpretation. Here courts might hold that the parties did not intend to interpret their contract in the light of the Commentary. Unfortunately, neither ISBP 2007 nor ISBP 2013 adopts the clarification of the Commentary regarding the general test for conformity.

CLARITY

3.4.30 In conclusion, the lack of clarity, as explained above under the empirical findings, affects the "formal realisability" of the test of material alignment. Thus a fair number of bankers might not understand, and hence apply, the test as intended by the Drafting Group. This might generate bleak problems as the test of material alignment is the first step that a documentary checker would take for most documentary credit cases. If such a test is defective then banks subsequent actions might also be flawed. However, the introduction of the new changes in sub-article 14 (d) of UCP 600 is a welcome step in comparison to UCP 500, as the intention is to clarify that conformity falls in dimension six which would achieve a good balance as between the competing

[464] Annex I, para 26.
[465] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 64.

interests for security. The meaning of *"when read in context"* needs to be far clearer and it is to be hoped that this might in time be clarified by the ISBP.

ENGLISH AND JORDANIAN LAWS

3.4.31 There is no direct authority under English law as to the general test for conformity, and thus the dimension of conformity is not determined. It is, however, clear that conformity does not fall in the first dimension.[466] In Jordan the Court of Distinction states *"if there is a difference the bank will refuse the documents".*[467] This is the general rule for the test of conformity under Jordanian law. Indeed the meaning of difference in Arabic is loaded with confusing semantic baggage. Difference might refer to a mere difference, discrepancy or a material conflict. The ambiguity of the general test for conformity under Jordanian law leads to a serious shortcoming in the "formal realisability" of such a test. Consequently, the Jordanian test for conformity is not competent to determine within which dimension conformity falls.

Linkage (General Rule Of Identification Of Goods)[468]

3.4.32 It is well established under Common law that the presented documents in documentary credits must refer or link to the identification of the goods.[469] This rule intends to be general in terms of capturing most, if not all, cases in a documentary credit. It is known by some authors as linkage.[470] However, the term linkage is capable of denoting various different diverse meanings. In ICC Position Paper Number 3, the term linkage means that a condition in a documentary credit must

[466] *Kredietbank Antwerp v Midland Bank plc* [1999] Lloyd's Rep 219, 223 per Evans LJ; above para 4.4.7.
[467] Court of Distinction *316/1988* (Civil) Kurtas Programme.
[468] Hwaidi, *The Story of The English Strict Compliance Principle in Letters of Credit and its Consistency with the UCP*, [2014] J.I.B.L.R (28 (2), 73-75.
[469] *Banque de l'Indochine et de Suez SA v J.H. Rayner (Mincing Lane) Ltd* [1983] Q.B. 711, 731-732, per Sir Donaldson MR.
[470] Malek and Quest, *Jack: Documentary Credits,* (4th edn, Tottel 2009) para 8.48: "linkage" denotes to the reference of the identification of the goods.

clearly be linked to a stipulated document. However, linkage may refer to the idea that documents must relate and be consistent with one another.[471] In this research linkage refers to the idea that documents must link to the identification of the required goods in the credit. Although it might appear that the linkage rule is the creation of Common law, it is submitted that the linkage rule is an essential element of the embedded trade usage of conformity regardless of the fact that such rule is not recognised by the UCP. There is no direct authority under Jordanian law in respect of this linkage rule.

ENGLISH LAW

3.4.33 Pursuant to the linkage rule under Common law a presented document must relate to the identification of the goods in order to be in conformity.[472] The goods that must be identified are the goods that are stipulated either in the credit or in the invoice, or the goods that are the subject matter of the transaction or that have been shipped.[473] The scope of the standard by reference to which documents must identify the goods is adaptable. Primarily, the documents must with reasonable certainty refer to the identification of the goods.[474] Where, however, the contents of the document are not related to the contents of other documents and the document's status calls for a further inquiry then such a document must unequivocally identify the goods.[475]

3.4.34 **Type of documents.** It is submitted, the type of documents that need to relate to the identification of the goods are those documents that serve the purpose of

[471] This meaning was suggested by the claimant in *Banque de l'Indochine et de Suez SA v J.H. Rayner (Mincing Lane) Ltd* [1983] Q.B. 711, 731
[472] *Banque de l'Indochine et de Suez SA v J.H. Rayner (Mincing Lane) Ltd* [1983] Q.B. 711, 731-732, per Sir Donaldson MR.
[473] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135, 150.
[474] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135, 148, *dictum* per Rix J in respect of *Banque de l'Indochine et de Suez SA v J.H. Rayner (Mincing Lane) Ltd* [1983] Q.B. 711.
[475] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135, 148, *dictum* per Rix J in respect of *Banque de l'Indochine et de Suez SA v J.H. Rayner (Mincing Lane) Ltd* [1983] Q.B. 711.

confirming a particular or a general status of the goods. This would include for example a packing list, weight list, origin certificate, inspection certificate, health certificate and the like. Documents such as a beneficiary's certificate or a copy of the beneficiary's passport do not relate to the investigation as to the status of goods, and therefore they are not intended to be subject to the linkage rule.

3.4.35 Identification not description. In *Bank Meli Iran v Barclays Bank,*[476] 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 conformity. 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 J.H. Rayner (Mincing Lane) Ltd,*[477] which was subject to UCP 1976, Sir John Donaldson stated:

"*There is, in my judgement, a real distinction between an identification of the goods, the subject matter of the transaction, and a description of those goods*".[478]

In *Banque de l'Indochine et de Suez SA v J.H. Rayner (Mincing Lane) Ltd*[479] 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 credit required the following goods:

[476] [1951] 2 Lloyd's Rep 369 per McNair J.
[477] [1983] Q.B. 711.
[478] *Banque de l'Indochine et de Suez SA v J.H. Rayner (Mincing Lane) Ltd* [1983] Q.B. 711, 731-732, per Sir Donaldson MR.
[479] [1983] Q.B. 711.

"Covering shipment: "2000 (two thousand) metric tons up to 5 per cent. more or less E.E.C. 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".[480]

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-article 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". [481]

However, 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-article 32 (c) of UCP 1974. The fact that the description of the carrying vessel, voyage and cargo was not identical in all the presented certificates was sufficient, in the context of the lack of relating to other documents and the fact that the documents call for inquiry,[482] to indicate that the sugar might have come from different sources. Accordingly, the presentation of these certificates was not in conformity as the goods had not been identified "unequivocally", although this defect might have been easily cured 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.[483]

[480] [1983] Q.B. 711, 730.
[481] Equivalent to article 23 UCP 400, sub-article 37 (c) UCP 500 and sub-article 14 (e) UCP 600.
[482] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135, 148, dictum per Rix J in respect of *Banque de l'Indochine et de Suez SA v J.H. Rayner (Mincing Lane) Ltd* [1983] Q.B. 711.
[483] *Banque de l'Indochine et de Suez SA v J.H. Rayner (Mincing Lane) Ltd* [1983] Q.B. 711, 732, per Sir Donaldson MR.

UCP

3.4.36 The question is whether English rule of linkage applies to documentary credits subject to UCP 600 or not.[484] The position of UCP 600 is quite clear. There is no mandatory requirement for any description of the goods, or for any identification of the goods, in the presented documents. The new structure of the test for conformity in UCP 600[485] indicates that there is no requirement for consistency between the contents of documents, but merely that the contents of the presented document must not be in material conflict with other presented documents.[486] Further, sub-article 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".[487]

The equivalent provision under UCP 500 is sub-article 37 (c) which stated:

"The description of the goods in the commercial invoice must correspond with the description in the Credit. In all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the Credit".

The concept of "inconsistency" is replaced by "not conflict with" under UCP 600 to clarify that there is no requirement of consistency and linkage between the documents, and the words "if stated" were introduced to emphasise that. The ICC Banking Commission clearly confirmed this position in their Opinion regarding an

[484] For an affirmative answer see below para 3.4.38.
[485] Sub-article 14 (d) UCP 600.
[486] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 65.
[487] Equivalent to sub-article 37 (c) UCP 500.

enquiry in respect of a health certificate that did not bear any description, or reference as to the identification, of the goods. The Commission stated:

"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...".[488]

However, the intended position was the same under UCP 500. Thus an ICC Opinion[489] in relation to sub-article 37 (c) of UCP 500 provided that sub-article 37 (c) supersedes the test of consistency under both article 21 and sub-article 13 (a) of UCP 500, and therefore linkage to the description or identification (i.e. as was required by the refusing bank in the enquiry) to the goods was not, according to this Opinion, actually required under UCP 500. Yet, English law enforced the rule of linkage to the identification of goods on documentary credits subject to UCP 500.[490]

3.4.37 **ISBP.** The only documents that are required to relate to the goods under UCP 600 are the commercial invoice[491] and the certificate of origin.[492] The new revision of ISBP[493] 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 the function of confirming an investigation as to the status of goods - must relate to the invoiced goods.[494]

[488] *Opinions 2009-2011*, R.728.
[489] *Collected Opinions 1995-2001*, R.261.
[490] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135.
[491] Article 18 UCP 600; *ISBP 2013*, C3.
[492] *ISBP 2013,* L4; *Opinions 2009-2011,* R.727: referred to *ISBP 2007*, para 183.
[493] *ISBP 2013* (No. 745, ICC 2013).
[494] *ISBP 2013*, L1, L4.

3.4.38 It is submitted, the answer to the question of whether the rule of linkage to the identification of goods applies to documentary credits subject to UCP 600 must be in the 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.[495] It is an approach that would benefit sellers as it minimises the risk that credits might be dishonoured and promote certainty as banks are assured that the UCP position is enforced under the relevant legal order. 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 linkage would not be applicable to documentary credits subject to UCP 600, it would be an invitation to fraud.[496] 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 between the trading parties involved in a documentary credit transaction is a matter of essential justice that should not be sacrificed on the altar of certainty. Given the fact that the linkage rule only applies to a document that has the function of confirming to investigate the status of goods, it is to be expected that prudent sellers would ensure that such a document would clearly identify the goods.

3.4.39 Thus a rule of UCP 600 that would reject the requirement for such linkage cannot reflect the buyers' substantial need as to the proof of goods in documentary credits. Hence the linkage rule is a necessary element of the embedded trade usage of

[495] As it is one of the main factors to revise UCP 600: UCP 600, introduction; Collyer, *A look back at the UCP revision*, [2006] 10 DCInsight, 22.
[496] Malek and Quest, *Jack: Documentary Credits,* (4th edn, Tottel 2009), para 8.50.

conformity. Legal orders, therefore, are to be expected to continue to require linkage notwithstanding any contrary interpretation of the UCP since the linkage rule is a necessary element of the embedded trade usage. It is unfortunate that the UCP are not responsive to this element of the embedded trade usage. The potential clash between UCP 600 and Municipal legal orders in connection with linkage deleteriously affects certainty (i.e. as parties do not know in advance their legal positions),[497] since the ultimate position to be adopted by legal orders, particularly the developing systems, as to linkage in the context of UCP 600 is uncertain. Here, the extent of uncertainty is outstretched as the linkage rule is a general rule that affects most, if not all, documentary credit transactions.

3.4.40 **English law.** The rule of linkage was applied under English law on documentary credits subject to UCP 500 and its predecessors.[498] The Common law effectively relied on the lack of precision in the language of the UCP to avoid acknowledging any disavowal of linkage under the UCP. Thus it was held in *Banque de l'Indochine et de Suez SA v J.H. Rayner (Mincing Lane) Ltd*[499] that the description of goods is distinct from the identification of goods, and the latter is not therefore caught by the UCP. Such a ground is available to be raised on credits subject to UCP 600 as UCP 600 does not make it precisely clear that a reference to the identification of goods is not required, even though the changes in UCP 600 as above mentioned make it clearer that the linkage rule is not required and that ICC Opinions confirm such an interpretation. In conclusion, the concept of identification connotes the assurance that the documents are linked to the same goods. Being a necessary element of the embedded trade usage of conformity it reflects the underlying objective of documentary credits as being a secure method of payment. Thus in the light of *Fortis Bank S.A./N.V., Stemcor UK Limited v Indian Overseas Bank*[500] the interpretation

[497] Kennedy, *Form and Substance in Private Law Adjudication* [1976] 89 Harvard Law Review 1685, 1688-1689.
[498] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135.
[499] [1983] Q.B. 711, 731-732, per Sir Donaldson MR.
[500] [2011] EWCA (Civ) 58, [29]; [2011] 1 C.L.C. 276, 287.

that is based on usage and security (i.e. the underlying policy of documentary credits) is expected to give effect to the rule of linkage and for parties to contract out of linkage they must clearly express their intention to do so.

3.4.41 **Jordanian law.** There is no direct authority under Jordanian law regarding the English linkage rule. Sub-article 239 (2) of the Civil Code provides that where there is a lack of clarity or precision in the contractual term, the judge should look at the nature of the transaction and must give weight to the trustworthy between the contractual parties as presumed by the current custom. There is no clear indication by the empirical findings that the linkage rule is applied by bankers in Jordan.[501] As the linkage rule is a necessary element of the embedded trade usage of conformity Jordanian courts need to give effect to it unless it is clearly that the parties intend to contract out of that usage. Alternatively, since the nature of the transaction of documentary credit is based on the policy of security, Jordanian courts need to give effect to the linkage rule and not to the intended proposition by the ICC in respect of sub-article 14 (e) of UCP 600.

Time To Determine And Inform Conformity

3.4.42 It is clear that the principle of conformity, general rule of appearance and general test for conformity (i.e. the general rules of material alignment and linkage) capture most, if not all, cases of conformity in documentary credits not determined by the particular rules governing particular documents. There is, however, another and final general rule in conformity which is regarding the permitted time to determine conformity.

[501] Annex I, para 24.

3.4.43 **Distinct times.** The permitted period to determine conformity is distinct from the permitted period to honour the credit, or to refuse to honour on the basis of non-conformity.

UNDERLYING FACTORS

3.4.44 Documentary credits are not only meant to be a secure method of payment but also a means of settlement in international trade. Thus, the issuing and confirming bank obligation to honour a credit lasts until the expiry date of the credit. Given the fact that the presented documents are the beneficiary's property, the beneficiary has the right to withdraw the documents, correct and re-present them many times within the permitted period for presentation until the documents are honoured, negotiated or otherwise disposed of in accordance with the beneficiary's instructions.[502] The speed in the determination of conformity, and thus in accepting or refusing documents, is an essential issue for both buyers and sellers. Buyers might need to take immediate action if the presented documents are in conformity (e.g. to make arrangements to collect the goods) or not in conformity (e.g. to seek alternative suppliers for importation of the goods). Sellers want to be paid expeditiously after the presentation of documents in order to finance their trades. Also sellers need to know within a reasonably expeditious time whether the documents are accepted or rejected, otherwise they might lose the right to re-present conforming documents within the permitted period of the credit. Banks therefore need to determine conformity within a reasonably expeditious time. The empirical findings confirm that banks in Jordan appreciate the need for speed in the determination of conformity.[503] But what is meant by a reasonably expeditious time, or reasonable time, differs from case to case and is open to dispute. A one banking day difference might lead to the bank being held responsible for delay. Hence it is necessary for banks to be certain

[502] *Opinions 2009-2011,* R.715.
[503] Annex I, para 33.

in respect of the permitted period to determine conformity in order to avoid disputes and to be secure in the legality of their actions. But would a fixed period (e.g. five banking days) as a safe harbour period permit a bank to wait intentionally, and without good faith, until the last day of the fixed period to determine the conformity of a presentation or to inform the beneficiary regarding the status of the presentation?

SUB-ARTICLE 14 (B) TIME FOR EXAMINATION

3.4.45 The period for examination of documents under UCP 500 was regulated by sub-article 13 (b) which is now replaced by sub-article 14 (b) of UCP 600 which states:

"A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation".

3.4.46 **Fixed period**. Sub-article 14 (b) of UCP 600 introduces significant changes from its predecessor. The permitted period to determine conformity is now *"a maximum of five banking days"* instead of *"a reasonable time, not to exceed seven banking days"*. The new period of "*maximum of five banking days*" is simply a fixed period.[504]

3.4.47 **Reasonable time.** The purpose of removing the reference to "*reasonable time*" in the UCP was "*the lack of a standard application of this concept globally*".[505] Namely, there was no uniform certainty as to the exact period, so what was regarded as

[504] Bridge and others (eds), *Benjamin's Sale of Goods*, (8th edn, Thompson 2010) para 23.94; Malek and Quest, *Jack: Documentary Credits,* (4th edn, Tottel 2009) para 5.52.
[505] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 62-63; for the difficulty in determining the meaning of reasonable time under English law: *Banker's Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443.

reasonable time in the country of the issuing bank might not be regarded as reasonable in the country or the region of the confirming bank. The ICC national committees voted to reduce the period for examination from seven banking days to five banking days just after they had voted to remove the words "*reasonable time*".[506] Such a process indicates that the omission of "*reasonable time*" had led the ICC national committees to view the period of seven banking days as being too lengthy a fixed period, and it was therefore reduced to five banking days. Thus it is clear that the intention of the ICC national committees is to introduce a new period which is fixed in terms that it is not generally subject to the circumstances of the parties. Here the bank that determines conformity within the fixed period of five banking days is protected from a claim that the bank should reasonably have determined the conformity of documents earlier than the last day (i.e. fifth banking day) of the new permitted period.

3.4.48 **maximum**. The introduction of the concept "maximum" in the new fixed period reflects the new position presented by article 15 of UCP 600 that *when* the bank has decided that the documents are in conformity it must honour the credit without delay.[507] The fixed period for examination is thus automatically reduced when the bank determines conformity prior the close of the fifth banking day. So, when the bank determines the documents are in conformity in the second day after the presentation, it will then be obliged to honour the credit without delay which is equal to the same banking day or the next banking day in the UK and in Jordan.[508] The concept "maximum" also means that when the bank has made the decision to "refuse" the presentation earlier than five banking days it will have thereby curtailed the examination period. In order to validate the refusal, the bank in this case must

[506] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 63.
[507] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 70; Debattista, *The new UCP 600-changes to the tender of the seller's shipping documents under letters of credit*, [2007] J.B.L, June, 329, 339 suggests that the word "maximum" reflects the entitlement of the bank to complete the examination before the end of the permitted period for examination.
[508] Below para 3.4.50.

give a refusal notice by telecommunication or, if that is not possible, by other expeditious means immediately after the decision to refuse is made.[509] In any event a refusal notice must be given not later than the close of the fifth banking day after the day of presentation[510] (i.e. the permitted period of refusal expires at precisely the same moment as the expiration of the new fixed period for examination). Practically, in this case, the bank needs to complete the examination prior the end of the permitted period for examination in order to be able to communicate the refusal notice within the same period.[511]

3.4.49 **Empirical findings.** All the interviewed bankers in Jordan confirm that banks in Jordan take two to three banking days to determine the conformity of the presented documents and it is perceived as the good practice.[512] As an exception Arab bank takes five banking days to examine the documents. This is regarded as a bad practice, particularly given the fact that Arab bank always sends a copy of the presented documents to its customer (i.e. applicant) in order to obtain confirmation that the applicant accepts the conformity of the documents prior to the bank accepting the conformity of the documents. What would clearly be contrary to good faith under Jordanian law is if the bank actually determined that the documents were in conformity in the beginning of the permitted period for examination but postponed the honour of the credit until the last day of the period for examination.

ARTICLE 15 (TIME FOR HONOUR)

3.4.50 In order to avoid the risk of banks acting in such a way that is contrary to good faith, UCP 600 wisely reflects the legal norm of good faith, by providing in article 15 that

[509] Chapter 4, para 4.5.6: where it is suggested that the bank is obliged to send a refusal notice in reasonable promptness after taking the decision of refusal.
[510] Sub-article 16 (d) UCP 600.
[511] Bridge and others (eds), *Benjamin's Sale of Goods*, (8th edn, Thompson 2010) para 23.94.
[512] Annex I, para 33.

the bank is obliged to honour within reasonable promptness once it decides that the documents are in conformity. Article 15 states:

"A. When an issuing bank determines that a presentation is complying, it must honour; B. When a confirming bank determines that a presentation is complying, it must honour or negotiate and forward the documents to the issuing bank;
C. When a nominated bank determines that a presentation is complying and honours or negotiates, it must forward the documents to the confirming bank or issuing bank".

The word *"when"* in article 15 is an operative term indicating that whenever the issuing or confirming bank – within the permitted period for examination - determines that the documents are in conformity, the bank must immediately begin the process of honouring or negotiating the presentation.[513] The same rule applies to the conforming and the nominated bank regarding the obligation to forward the documents. Article 15, therefore, confirms that a discrete time period commences for the performance of the obligation to honour, negotiate and forward documents once a decision is made as to the conformity or non-conformity of the documents.[514] It is regrettable that such a proposition is implied by the word *"when"* instead of being comprehensibly stipulated. However, the addition of article 15 of UCP 600 is a necessary development due to the replacement of "*reasonable time, up to seven banking days*"[515] by a new fixed period of five banking days.[516] Namely, since the reference to "*reasonable time*" is omitted, it became necessary to formulate a rule to address the obligations of the bank (i.e. a bank which determines that the documents are in conformity prior the end of the fixed period) to honour or negotiate prior the end of the fixed period. In conclusion, article 15 does not only assist UCP

[513] Drafting Group, *Commentary on UCP 600: Article by Article Analysis,* (No. 680, ICC 2009), 70.
[514] *Banker's Trust Company v State Bank of India* [1991] Lloyd's Rep 443, [12].
[515] Sub-article 13 (b) UCP 500.
[516] Sub-article 14 (b) UCP 600.

600 to avoid repugnancy as to the legal communication of good faith under civil laws, but it also assists UCP 600 to avoid repugnancy as to the legal communication of reasonableness under Common law as encapsulated by the judgement of the Court of Appeal in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*[517] where it was stated:

"*We can see no reason why the bank, if it has checked the documents with greater dispatch than normal, should be allowed to carry forward a period of time as a credit against its next obligation*".

3.4.51 Reasonable promptness*.* UCP 600 does not, however, stipulate a precise period of time to honour or negotiate the credit after the determination that the documents are in conformity. In this respect, the Drafting Group in their commentary on UCP 600 expressed the view that the bank must immediately honour or negotiate once it decides that documents are in conformity and expressed their understanding that the process to honour or negotiate takes from an hour to a day.[518] As a matter of English and Jordanian law, where no time is stipulated for the performance of an obligation, it is implied that the time should be a reasonable time.[519] In the context of documentary credits, the time is one of reasonable promptness which is determined by reference to expert evidence in the relevant country. In the UK, it equates to the same banking day or the next banking day.[520] The empirical findings clearly indicate that the practice in Jordan is to honour or negotiate the credit on the same day, or on the next banking day where the decision that the documents are in conformity is made in the last hour of the banking day.[521]

[517] [1999] 1 Lloyd's Rep 36, [14].
[518] Drafting Group, *Commentary on UCP 600: Article by Article Analysis, (No. 680, ICC 2009)*, 70.
[519] English law: *Hick v Raymond & Reid* [1893] AC 22, 32; Bridge and others (eds), *Benjamin's Sale of Goods*, (8th edn, Thompson 2010) para 23.170. Jordanian law: article 202 Civil Code 1976.
[520] This period being consistent with the meaning assumed to reasonable promptness in the context of returning the documents as provided by the expert evidence in *Fortis Bank SA/NV v Indian Overseas Bank (No.2)* [2010] EWHC 84 (Comm), [23]-[25]; 2012] 1 All E.R. (Comm) 41; affirmed by the Court of Appeal, *Fortis Bank S.A./N.V, Stemcor UK Limited v Indian Overseas Bank* [2011] EWCA (Civ) 58; [2011] 1 C.L.C. 276 [35],[37] and [45]; *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*[1999] 1 Lloyd's Rep 36, [14].
[521] Annex I, para 34.

DAY OF PRESENTATION

3.4.52 The calculation of the time for examination starts on the day following the day of presentation[522] which is the day on which the bank is regularly open within its banking hours[523] for the receipt of documentary presentations.[524] Sub-article 14 (b) of UCP 600 provides that the occurrence of the last permitted day for presentation, or the expiry date of the credit, on or after the date of the actual presentation, does not curtail or affect the fixed period for examination. It is submitted that this new provision is necessary for clarity as it reflects the fact that a fixed period, unlike a reasonable period, is not expected to be curtailed by an expiry date, and it responds to the fact that the applicant will focus on the expiry date rather than the permitted fixed period.

FORMALITY OVER SUBSTANCE

3.4.53 The new scheme of sub-article 14 (b) favours formality over substantive fairness. Traders and bankers might well agree that a reasonable period would be fair and the fact that a reasonable banker in Jordan, as indicated by the empirical findings, takes two to three banking days to examine the documents suggests that traders might regard the new fixed period for examination as being unfair. However, as any such reasonable period would be contingent on the factual matrix of each case in a particular region, what is a reasonable time might differ from transaction to transaction and even in the same documentary credit transaction where banks are domiciled in different regions, and such factual divergence would cause confusion as

[522] Sub-article 14(b) UCP 600.
[523] Article 33 UCP 600: "The bank has no obligation to accept a presentation outside of its banking's hours".
[524] Article 2 UCP 600; Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 15.

to the accepted reasonable time for examination which would affect the right of banks to reimbursement. Therefore the dominant need for banks of being assured to reimbursement can only be achieved through the means of certainty which needs in this context formality, as expressed by sub-article 14 (b), promoting commonality without being repugnant, as implied by article 15, to legal order doctrines of good faith or reasonableness.

CONCLUSION

3.5.1 It is a thorny task to regulate the conformity of documents under documentary credits, because of the elastic nature of conformity caused by the opposing needs of the parties. It was analysed in this chapter that conformity in social science terms is a "wide scale" concept, which in the commercial and legal context of documentary credits has seven meanings or dimensions. It was evaluated that dimension six reflects the right balance of security. As the cornerstone of conformity, the UCP community must recognise the existence of the differing dimensions of conformity and select the appropriate dimension to operate as the definitive dominant meaning for the terms regulating conformity. Fortunately, it was the intention of both UCP 600 and its predecessor to adopt dimension six, and indeed UCP 600 expresses this position far clearer than UCP 500. Sub-article 14 (d) of UCP 600 is designed to adopt dimension six as being the general test for conformity which is called in this research the material alignment test. The purport of this provision can be contrasted with that of UCP 500 in which the general test for conformity was shattered by different provisions and misleading words that led to the application of dimension one (i.e. mirror image) in determining conformity. Unfortunately, the element of contextual conflict of the material alignment test under UCP 600 still lacks comprehensible clarity not only in UCP 600 but also in the last revision of ISBP. The empirical findings clarify that banks in Jordan do not adopt the explanation offered by the Drafting Group's Commentary on UCP 600, as such an interpretative aid, is not referred to by UCP 600. It is hoped that such an issue would be addressed by updating ISBP 2013, since the general test for conformity captures most cases of documentary credits, in the absence in many instances of particular rules for the determination of conformity.

3.5.2 The legal nature of conformity must also be appreciated, such that the examination of documents is seen to be a means of protecting banks from liability when the status

of conformity is uncertain. The omission of the reference to "reasonable care" in UCP 600 for the determination of conformity is a welcome step. Banks can no longer assert, simply from the language of the UCP, that the bank might have a broad reasonable care defence in its determination of conformity, rather than a defence based upon the reasonable exercise of their discretion in the performance of their ministerial function relative to the circumstances. It is hoped, however, that the forthcoming iteration of the UCP would lay down an objective standard (i.e. any prudent bank might reach the same decision regardless the circumstances of the bank) against which the decision of the bank should be assessed whenever the status of the conformity of presented documents is uncertain.

3.5.3 The attempt to define conformity in article 2 of UCP 600 is sound as it is formed as a principle reflecting the underlying policy of documentary credits and capturing all documentary credit transactions, and it has to a certain extent "formal realisability" in the sense of providing the sources for the criteria of conformity. However, not only the principle of conformity but even the general rules for conformity lack a high degree of "formal realisability" due to the elastic nature of conformity. On the other hand, the general rule of appearance has a high degree of both generality and "formal realisability" because the concept of appearance is not encountered by parties' contested needs. The clarity of the rule of appearance is fostered in UCP 600 by adopting the technique of avoiding undue verbosity, particularly as to avoid the repetition of the phrase *"on the face of the documents"*. However, the empirical findings clarify that there is a lack of commonality as to the application of the particular rule of authenticity – generated from the general rule of appearance - in UCP 600 by Jordanian banks. This is due to social factors and not to the text of UCP 600, and the available solution that the ICC might be able to offer is to run training sessions highlighting the pragmatic need for and the impact of the presumption of authenticity. Ironically the omission of the reference to "reasonable time" in article 14 regarding the time for examination is a brave step that favours formality over

substance which aims to achieve commonality, and such a step is safeguarded by the introduction of article 15 so as to avoid repugnancy to legal order doctrines of good faith and reasonableness.

3.5.4 The happy story of the enhancement of clarity and certainty of conformity under UCP 600 reflecting the balance of security underlying documentary credits has its downside. Instead of being responsive to the linkage rule which is a necessary element in the embedded trade usage of conformity, reflecting the buyers' need for security by requiring the documents - which aim to investigate the status of the goods - to be linked to the identification of the goods, as is the position under English law, sub-article 14 (e) of UCP 600 emphasises that there is no requirement for linkage. Such a UCP proposition, which is unfortunately a general rule purport applicable to many documentary credit transactions, would lead to uncertainty as it might not be enforced under many legal orders. Nevertheless, the general rule of the time for examining the documents under sub-article 14 (b) of UCP 600 enhances "formal realisability" and reflects the security underlying documentary credits for banks and, by article 15, avoids the repugnancy to legal orders.

CHAPTER 4: PARTICULAR RULES OF CONFORMITY AND RULES OF REFUSAL

GENERAL VIEW

4.1.1 The test of "material alignment" in article 14 (d) of UCP 600 clarifies that dimension six is the applicable dimension, or meaning, of conformity under UCP 600.[525] Being a general rule the "material alignment" test has a residual effect in framing what is conformity, since it applies as an initial step in the determination of conformity for the majority of documentary credit transactions. Yet, such a general rule lacks a high degree of "formal realisability"[526] so it is unable to determine with certainty whether or not documents are in conformity across a wide range of various factual matrices. This is due to the elastic nature of conformity. In order to enhance the "formal realisability" of the general rule of "material alignment", UCP 600 and its interpretative aids provide particular rules, directly generated from the general rule, directing a banker as to whether data in connection with a particular matrix of facts is in material alignment or not.

4.1.2 Based on the conceptual model explained in chapter 1, such particular rules mainly seek to reflect the needs of banks and sellers for manageable examination and manageable presentation respectively, since the fulfilment of these needs directly serves the need for assurance of payment. Of course the means of certainty through clear and sufficient rules is the most suitable tool to fulfil such needs. However the means of flexibility must be taken into account particularly for situations that are not directly regulated by the UCP. Furthermore, UCP 600 provides sets of particular rules which must reflect the needs of the documentary credit parties, which have been rationally deducted from the functions of the embedded trade usages of irrevocability, conformity and autonomy as proposed in the conceptual model. These needs are: assurance of payment for sellers and banks; documentary assurance as

[525] Chapter 3, para 3.2.4; 3.2.20.
[526] For the concept of formal realisability: chapter 1, para 1.2.26.

to the shipment of the required goods (proof of goods, insurance and shipment) for buyers; manageable presentation for sellers; manageable examination for banks; and speed for all parties. The key task in this chapter is to ascertain whether these particular rules do in fact reflect those functions in such a way that the rules are capable of being enforced in a uniform way under English and Jordanian laws. Diagrams 7 and 8 below illustratively emphasise how the needs for assurance of payment; manageable examination; documentary proof; manageable presentation and speed can generally be materialised through a suitable means.

Diagram 7: The Need for Manageable Examination/Assurance of Payment and the Needs for Proof of Goods, Shipment and Insurance

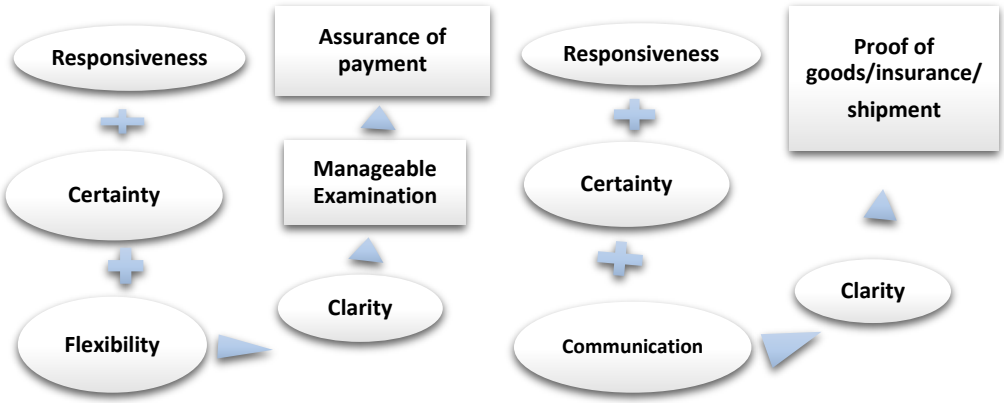
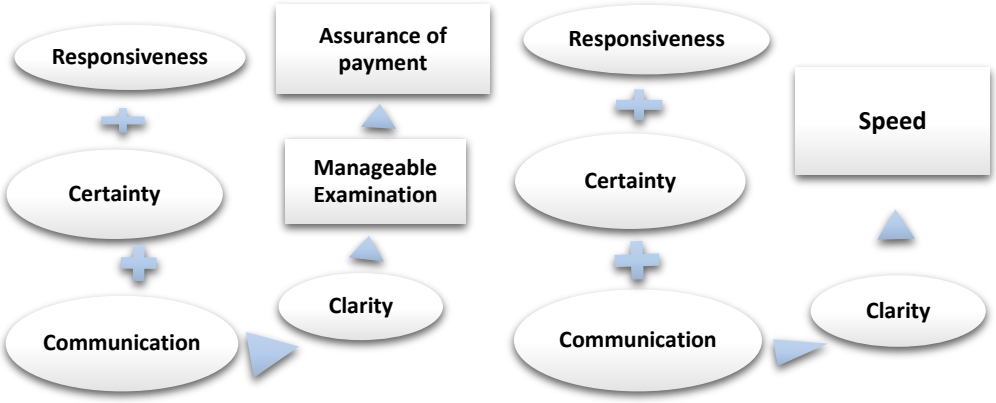


Diagram 8: The Need for Manageable Presentation and the Need for Speed



4.1.3 Plan of the chapter. Firstly, the particular rules that seek to apply the material alignment test are addressed. Then the particular rules that purport to facilitate speedy manageable presentation and examination are evaluated, followed by the particular rules that intend to satisfy the needs of buyers as to proof of goods, insurance, shipment and speed. Finally, the rules that seek to regulate refusal of non-conforming documents are evaluated.

APPLICATIONS OF THE GENERAL RULE FOR CONFORMITY

4.2.1 The new worded test of "material alignment" in sub-article 14 (d) of UCP 600 contains the following criteria. An apparent difference between expressed data in the presented document and data that are required in the credit or data in other presented documents is insufficient to justify rejection unless it reaches the level of textual conflict, and unless the conflict reaches the level of contextual conflict (i.e. a conflict affecting the purpose and structure of the documents in the context of the credit, UCP 600 and ISBP). A lack of required data ("contextual data") affecting the structure and the purpose of the document in the context of the credit, UCP 600 and ISBP would justify a refusal, whilst the lack of other data ("non-contextual data") would not, even though such non-contextual data was required by the credit. Additional data in the presented documents is tolerated unless it causes a contextual conflict. In the same spirit, additional documents are irrelevant in conformity.

Level Of Conflict And Level Of Contextual Conflict

4.2.2 An apparent difference in meaning that does not reach the level of conflict is disregarded (e.g. the use of coma "," instead of ampersand "&").[527] Similarly, a conflict that does not reach the level of contextual conflict does not justify a refusal (e.g. the name of consignee in the certificate of origin is in conflict with the name of consignee in the bill of lading).[528] The use of a punctuation mark in the presented document that is different from the punctuation mark which is stated in the credit, may not reach the level of conflict[529] unless there is an obvious conflict in the context in which the punctuation is used.[530] A replacement of a full word by a general

[527] *Collected Opinions 1996-2005,* R.409.
[528] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 64.
[529] *Collected Opinions 1996-2005,* R.409.
[530] For the rule and its illustrations: *ISBP 213,* A2.

accepted abbreviation does not constitute a contextual conflict.[531] Similarly, the use of an ISO country code does not constitute conflict.[532] To achieve certainty, it is hoped that the future revision of ISBP will include a broad list of accepted abbreviations (including in languages other than English) that are commonly in use in documentary credits. A misspelling or a typing error that does not affect the meaning of a word or a sentence in which it occurs is treated as a linguistic disparity that does not reach the level of conflict.[533] Accordingly, a presentation of the postal district code as "0256" instead of "2056" is treated as a typographical error and stating "industrial parl" instead of "industrial park" is also treated as a clear typographical error that does not constitute a conflict.[534] However, a description of "model 123" instead of "model 321" is to be treated as a contextual conflict,[535] since the order of each number is essential to identify the model and any change in the order would cause confusion as to the identity of the model. But, if the number "0" was added in the front of these numbers "123", then that would not to be treated as a conflict for it would not affect the order of the numbers. On the contrary, if "0" was added and followed by ".", then the order of "0.123" would be different from, and conflict with, "123" and would thus be treated as a contextual conflict. Similarly, a presentation of the name "Chai" instead of "Chan" reaches the level of contextual conflict[536] and the name of "Mohammed Soran" instead of "Mohammed Sofan" constitutes contextual conflict in the Middle East for this causes confusion between different names.[537]

4.2.3 Empirical findings. The empirical findings suggest that some bankers in Jordan are of the opinion that a misspelling, or a typographical error, is indeterminate.[538] An apostrophe in the form of (') might be treated as in contextual conflict with a ditto

[531] *ISBP 2013,* A1; *ISBP 2007,* R.6.
[532] *Opinions 2009-2011*, R.757.
[533] *ISBP 2013*, A23; *ISBP 2007,* Para 22.
[534] *Collected Opinions 1996-2005,* R.209; see also *Collected Opinions 1996-2005*, R.408.
[535] *ISBP 2013*, A23; *ISBP 2007*, Para 25.
[536] *Collected Opinions 1996-2005*, R.209.
[537] United States: *Beyene v Irving Trust Co* 762 F 2d 4 (2nd Cir) (1985).
[538] This is the opinion, and not the practice, of Qaleb Joudeh: Annex I, para 26.

mark of the form of (") as the latter might refer to a different size of goods in China.[539] According to this opinion, a discrepancy is a discrepancy and a banker cannot actually know whether a difference can affect the commercial purpose.[540] It is submitted that this opinion leads to place conformity in dimension one. It is true that in reality a banker cannot actually know whether a discrepancy is truly material or not, but there must be a presumption that such errors are not material (in the absence of contrary evidence) to secure the stability of transactions.

4.2.4 Mathematical calculation. A conflict between detailed mathematical calculations should not be considered as being in contextual conflict where the stated total in respect of the criterion such as amount, quantity, weight or packing list corresponds to that required in the credit or with other documents.[541] However, where a credit specifies the manner in which the subject matter of the calculations (e.g. packing details) is to be expressed, then if the total value of detailed mathematical calculations is not apparent in the presented document the bank needs to calculate the unexpressed total value to check whether there is a conflict with the credit or other documents.[542] This application of the "material alignment" test does not merely reflect the need of sellers for manageable presentation, but also highlights the positive role of the bank in its ministerial role in checking the conformity of the presented documents.

ALLOWANCE FOR THE AMOUNT OF THE CREDIT, THE QUANTITY OF GOODS OR THE UNIT PRICE

[539] Annex I, para 26.
[540] Annex I, para 26.
[541] *ISBP 2013,* A22; *ISBP 2007*, Para 24; *Collected Opinions 1996-2005*, R.447.
[542] *Collected Opinions 1995-2005*, R.447: the quantity of each package was shown in one of the presented documents whereas the other documents showed the quantity of total packages.

4.2.5 Where the words "about" or "approximately" are used in connection with the amount (i.e. the sum of money available under the credit) stated in the credit, then a 10% plus or minus of the amount is not considered as a contextual conflict by virtue of sub-article 30 (a) of UCP 600. This tolerance is not automatically applied to the quantity of the goods or the unit price unless the words "about" or "approximate" are stipulated with each of them.[543] Sub-article 30 (a) of UCP 600 omits the word "*circa*" and the reference to the statement "*or other similar statement*" from sub-article 39 (a) of UCP 500. Such a change was introduced as a reflection to the limited use of the words "circa" or "similar expressions" as stated by the Drafting Group.[544] It is submitted, however, this new stricter language of limiting the tolerance of 10% to the words "about" or "approximately" should not be interpreted literally in languages other than the formal languages of the UCP.[545] Namely, similar expressions to the words "about" or "approximately" must have the same effects, since there is a high possibility that translating these words into other languages would throw many different synonyms.

4.2.6 Still, where sub-article 30 (a) is not applicable, as for instance the words "about" or "approximately" are not used, then pursuant to sub-article 30 (b) of UCP 600 a difference of plus or minus 5% of the *quantity* of the goods is not considered as a contextual conflict. This *de minimis* rule does not apply where the quantity is stipulated in terms of a number of packing units or individual items (e.g. bales,[546] bags or 500 tyres).[547] The *de minimis* permission does not apply to the description of goods. So the phrase "*about 100 planks of sawn timber about 30 foot long and about 18 inches wide*" was considered under English law as being part of the

[543] *Collected Opinions 1996-2005*, R.365.
[544] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 138.
[545] Malek and Quest, *Jack: Documentary Credits,* (4th edn, Tottel 2009) para 8.70.
[546] *Collected Opinions 1996-2005*, R.366.
[547] *Collected Opinions 1996-2005*, R.367.

description of the goods and not the quantity of the goods.[548] To enhance the comprehensible clarity in order to avoid confusions in practice, it is to be hoped that a reference to the distinction between the description of goods and their quantity would be expressly stipulated in a future ISBP revision. Where the credit stipulates detailed quantities for each part of the goods then the tolerance rule applies for each part and also for the total amount of the goods.[549] The tolerance of 5% as stated in sub-article 30 (b) should not be used as a means of increasing the amount of the credit, otherwise doors would be opened to a beneficiary who acts with bad faith to ship extra quantity of goods in order to increase his payment. Accordingly, where the total amount of the drawings exceeds the amount of the credit then a refusal would be justified on the ground of contextual conflict,[550] but in case of a 95% shipment a tolerance of up to 5% downwards for the amount to be drawn under the credit is not considered as a contextual conflict.[551]

4.2.7 Where neither sub-article 30 (a) nor sub-article 30 (b) are applicable, then a difference of minus 5% of the amount of the credit is not considered as a contextual conflict - by virtue of sub-article 30 (c) – if both the quantity of the goods is shipped in full and the unit price is not reduced.[552]

4.2.8 **English law**. Originally, there was no application of any *de minimis* concept to documentary credits under English law.[553] This is prominently due to the interpretation of the principle of strict compliance in both *Moralice (London) Ltd v E D and F Man*[554] and *Soproma SpA v Marine and Animal By Products Corpn.*[555] It is

[548] *Kydon Compania Naviera SA v National Westminster Bank* [1981] 1 Lloyd's Rep 68, 76; Malek and Quest, *Jack: Documentary Credits,* (4th edn, Tottel 2009) para 8.71: the scope of the application of sub-article 30 (b) seems to be where the quantity of the goods is referred to weight or volume.
[549] *Collected Opinions 1996-2005*, R.238.
[550] Sub-article 30 (b) UCP 600.
[551] *Collected Opinions 1996-2005*, R.239.
[552] *Collected Opinions 1996-2005*, R.367.
[553] Even though *De minimis non curat lex* is a doctrine recognised by English common law but it is one that has a strictly limited application in connection with the sale of goods (*Wilensko v Fenwick* [1938] 3All E.R. 429): albeit in this context it is now displaced by s30(2A) SGA 1979.
[554] [1954] 2 Lloyd's Rep 526.
[555] [1966] 1 Lloyd's Rep 367.

submitted that the refusal to apply any *de minimis* concept was not generated by the acclamation of trade practice.[556] Even if the peripheral trade usage at that time supported the judgments that is not evident from the judgments. The fact that the judgments are in contrast with both the current peripheral trade usage or market practice and the UCP makes it difficult to see the viability, or even the applicability, of such law nowadays. Thus most documentary credits apply a *de minimis* concept 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.[557] For documentary credits that are not subject to the UCP, courts might find that parties have the intention to apply the current peripheral trade usage, or in the light of the modern approach of interpreting the contracts by looking at the matrix of facts,[558] courts would interpret the documentary credit contract according to market practices as being part of the matrix of fact, rather than the exclusive rules in the above English cases.

4.2.9 **Jordanian law.** It is one of the doctrines of Jordanian law that trade usage and practices[559] are taken into consideration in the interpretation of contracts. Jordanian law would adopt the UCP position if proved by expert evidence that such a UCP position reflects the practices in international trade.

Lack Of Data

4.2.10 Where data that constitutes part of a documentary term are not contained in the presented documents, then the lack of such data is accepted as long as it does not affect the purpose and the structure of the presented documents in the context of

[556] For the concept of acclamation: Hwaidi and Ferris 'The Existence of International Unchangeable and Changeable Trade Usage' (SLS Conference, Edinburgh, September 2013) <http://archive.legalscholars.ac.uk/edinburgh/restricted/paper.cfm?id=107>.
[557] Article 30 UCP 600.
[558] *Prenn v Simmonds [1971] 1 W.L.R. 1381* 1383 per Lord Wilberforce; *Reardon Smith Line Ltd. v Yngvar Hansen-Tangen [1976] 1 W.L.R. 989 per Lord Wilberforce; American Airlines Inc v Hope [1974] 2 Lloyd's Rep 301,* 305 per Lord Diplock; Reasonable reader: *Rainy Sky SA v Kookmin Bank [2011] 1 W.L.R. 2900; Attorney General of Belize v Belize Telecom Ltd* [2009] 1 W.L.R. 1988 per Lord Hoffman; *Investors Compensation Scheme LTD v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912 per Lord Hoffman.
[559] Articles 224-225 Civil Code (1976).

the credit, UCP 600 and international standard banking practice. The examples provided by ISBP and ICC Opinions of non-contextual data illustrate how discretion of the banks is essential for scenarios that are not expressly stipulated by the ICC in order to determine whether the missing data affects the collective purpose of the required documents.[560] However, when the lack of the required data affects the purpose of the presented document, then the difference between what is and what should have been provided is a contextual conflict which justifies a refusal. Accordingly, a certificate of origin must expressly state the origin of the goods and a statement such as "Sudan raw cotton" is not sufficient to mean that the origin of the goods is from Sudan.[561] Indeed, the main purpose of a certificate of origin is to certify the original source of the goods and such purpose must strictly be adhered. On the same basis, where a credit requires an inspection certificate to be signed by an inspector appointed of trading company B (the applicant), the presentation of an inspection certificate signed by an inspector without stating that the inspector is appointed by trading company B (the applicant) is not in conformity,[562] and by reason of the appearance rule the bank has no right to check whether the inspector is appointed by B or not.

4.2.11 Irrelevant data and documents. The purpose of the general test for conformity is to ensure that what is required by the credit is fulfilled by the contents of the presented documents that are linked to the terms of the credit. It is sensible therefore to ignore data and documents that are irrelevant to the terms of the credit. Accordingly, where the presented documents contain data that are not required by the credit, such data is accepted unless it clearly causes a contextual conflict. Helpfully, there are many examples of particular rules promulgated in ISBP and ICC Opinions illustrating factual matrices to be treated as additional data.[563] This, of

[560] *ISBP 2013*, A20; *ISBP 2007*, Para 22; *Opinions 2009-2011*, R.757 ; *Opinions 2005-2008*, R.635; *Collected Opinions 1996-2005,* R.289.
[561] *Collected Opinions 1996-2005,* R.320.
[562] *Collected Opinions 1996-2005*, R.403.
[563] *Opinions 2009-2011,* 715.

course, promotes certainty which serves as a means for assuring banks and sellers as to the status of conformity. Banks might face the situation where there are some documents amongst the presented documents that are not required by the credit. For such a situation, both UCP 600 and its predecessor declare the position that such documents are irrelevant to the determination of the conformity of the presentation. Sub-article 14 (g) of UCP 600 states:

"A document presented but not required by the credit will be disregarded and may be returned to the presenter".

Thus banks are directed to disregard the additional documents and they have the right to return them to the presenter. The reference to "*must not be examined*" in the equivalent sub-article 13 (a) of the predecessor revision is now replaced by "*will be disregarded*" under sub-article 14 (g). This reflects the actual fact that banks are not able to determine whether documents are additional or not unless they generally examine them. The other change in sub-article 14 (g) is the omission of the possibility of "*or pass them [documents] without responsibility*". Such an omission does not affect the previous position in the light of Rule 715 of ICC Opinions,[564] in that the presented documents are regarded as the presenter's property and thus the bank must dispose of the documents in accordance with the presenter's instruction.

[564] *Opinions 2009-2011*, R.715.

PARTICULAR RULES FACILITATING SPEEDY MANAGEABLE PRESENTATION AND EXAMINATION

4.3.1 The dominant theme on the changes introduced by UCP 600 is the attempt to reflect the need for manageable presentation in order to serve the principal need for sellers of having an assurance of payment. Reducing rejections based on a mere formality that does not actually affect the underlying substantive rights and obligations of the parties is one of the main tasks of UCP 600, and the issues of addresses, languages and drafts are regulated under UCP 600 and ISBP 2013 in that spirit facilitating a sensible presentation under documentary credits.

Addresses

4.3.2 The rule for conformity as to the addresses of the beneficiary and the applicant is specifically articulated in sub-article 14 (j) of UCP 600 which states:

"When the addresses of the beneficiary and the applicant appear in any stipulated document, they need not be the same as those stated in the credit or in any other stipulated document, but must be within the same country as the respective addresses mentioned in the credit. Contact details (telefax, telephone, email and the like) stated as part of the beneficiary's and the applicant's address will be disregarded. However, when the address and contact details of the applicant appear as part of the consignee or notify party details on a transport document subject to articles 19, 20, 21, 22, 23, 24 or 25, they must be as stated in the credit".

This is a new article under UCP 600 that does not have an equivalent under UCP 500. The new article presents a significant change. It pronounces irrelevant required data as to the addresses of the applicant and the beneficiary, except as to country identification. In other words, the data in the credit regarding addresses of

beneficiaries and applicants, except the name of the country, are regarded as non-contextual data. This position reflects the fact that export and import companies have many branches and offices in the same country,[565] and it is thus responsive to the need for manageable presentation without affecting the security for buyers. However this rule does not apply where the address of the applicant appears as part of the description of the consignee as stated by the same provision. Here the details of the applicant's address must be the "*same*" as stated in the credit,[566] so it is submitted that in this situation conformity falls in dimension one.[567] The mirror image dimension applies because transport documents usually function as documents of title, and as such it is vital to exactly reflect the consignee's name and addresses in order to enable the applicant to receive the goods and thus reflect the security of documentary credits. Since the Drafting Group's Commentary lacks commonality as clarified by the empirical findings,[568] it is regrettable that the words of sub-article 14 (j) do not make it exclusively clear that the mirror image test applies for addresses in transport documents.

4.3.3 English and Jordanian laws. Given the fact that freedom to contract is one of the most dominant legal doctrines, or paradigms, under English[569] and Jordanian[570] laws, it is questionable whether sub-article 14 (j) would have enforceable effects under these legal orders. The analyses below regarding non-documentary conditions apply.[571] However, the empirical findings confirm that, as some bankers in Jordan stated, sub-article 14 (j) reflects the practice that had already been implemented.[572] In describing the test for conformity Nart Lambaz said:

[565] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 66.
[566] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 67.
[567] For the mirror image dimension: chapter 3, para 3.2.4.
[568] Annex I, para 14.
[569] *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 399 per Lord Reid.
[570] Article 213 Civil Code (1976).
[571] Para 4.3.11.
[572] Annex I, para 24.

The discrepancy needs to be a material one that affects the essence of the commercial transaction. For example, the address is required only in relation to the name of the country in UCP 600, we used to apply this rule under UCP 500 because we regarded the discrepancy in the details of the address - except as to the name of the country - as not being a material one".[573]

This is due to the fact that banks realise that applicants do not actually intend to give effects to the details of the addresses of the applicant or the beneficiary as stated in the credit. It is submitted therefore sub-article 14 (j) would be held effective under both English law in the light of the approach of interpreting contracts in business common sense[574] and Jordanian law. Consequently, the introduction of sub-article 14 (j) is a welcome change as it is responsive to the practices in documentary credits and that should reduce unnecessary rejections.

Languages

4.3.4 Although it is expected in international standard banking practice that the issued documents by the beneficiary will be in the language of the credit,[575] it is confirmed now that the documents may be issued in any language where the credit is silent in respect of the language of the presented documents.[576] This proposition facilitates manageable presentation by sellers. By the same spirit, if the credit allows two or more languages, then the fact that data in the documents are expressed in any of the stipulated languages is not treated as in contextual conflict. Of course, if the credit stipulates the language of the documents to be presented, the data in the presented documents needs to be expressed in the required language.[577] But a *draft*

[573] Annex I, para 24.
[574] *Antaios Compania Naviera S.A. v Salen Rederierna A.B* [1985] AC 191 , 201 per Lord Diplock.
[575] *ISBP 2007,* para 23.
[576] *ISBP 2013,* A21 (b).
[577] *ISBP 2013,* A21 (a); *Opinions 2009-2011*, R.774.

(i.e. bill of exchange) is not to be considered as one of the documents that the credit requires to be presented in the stipulated language.[578] This approach of the ICC Opinion and English law needs to be adopted under Jordanian law, for it is essential to keep a draft operative under the law of the country in which the draft is intended to be paid. However, the number of the accepted languages that are allowed by the credit may be limited by the nominated bank on its advice of the credit.[579] In order to reduce unnecessary rejections, data in the presented documents that are expressed in a language other than the required or allowed languages are treated as additional data that are irrelevant for the determination of conformity,[580] and it is unreasonable to expect banks to examine such data. Moreover, and as an indirect application to the principle of appearance, *"the name of a person or entity, any stamps, legalization, endorsements or similar, and the pre-printed text on a document, such as, but not limited to, field heading"*[581] are presumed to be in "material alignment" where they are expressed in a language other than the stipulated language in the credit.[582]

Drafts

4.3.5 The issue of conformity of drafts directly affects the need of sellers for an assurance of payment. The new revision of ISBP has introduced many paragraphs regulating the conformity of drafts. Thus ISBP 2013 clarifies many requirements for drafts in documentary credits since such requirements had been misunderstood by some banks because, as submitted, of the lack of written rules. For instance, it is clear now that the drawee of drafts in acceptance credits is the nominated bank who decides to accept the draft,[583] and such understanding reflects the purpose of having

[578] *Opinions 2009-2011*, R.730; *Credit Industriel et Commercial v China Merchants Bank* [2002] 2 All E.R. 427 (Comm).
[579] *ISBP 2013,* A21 (c) (i); *ISBP 2007,* para 23; *Opinions 2009-2011*, R.771.
[580] *ISBP 2013,* A21 (d).
[581] *ISBP 2013,* A21 (e).
[582] *ISBP 2013,* A21 (e).
[583] *ISBP 2013,* B11, B12.

acceptance credits that are available with nominated banks in addition to the confirming bank. But that was not clearly understood by many bankers in Jordan as indicated by the interviews with bankers that were conducted just couple of days before the distribution of ISBP 2013 to Jordanian banks.[584] Another illustration of the core improvements is the clarification that conformity of drafts is only determined by the terms of the credit according to the rules and the requirements stipulated in ISBP 2013,[585] and thus banks should not check whether drafts fulfil the requirements of the applicable local law. Such a clarification having the effect of simplifying the requirements for drafts which in turn serves the need for manageable examination and presentation. The participating bankers, in all bar one case, stated that they do not check the Jordanian Commercial Code in order to determine the conformity of the presented bills of exchange. According to Qhaleb Joudeh there is a common standard for the structure of a bill of exchange. Muhammad Burjaq stated that *"bills of exchange are meant to be negotiable instruments".*[586] Thus, there are no specific requirements outside the regime of UCP 600 for the conformity of bills of exchanges except the practice of Arabic Bank as Koloud Alkalaldeh said *"a bill of exchange must be in accordance with both the Commercial Code and ICC Opinions".*[587] A further improvement not only fosters clarity but it also responds to the legal doctrine of "freedom to contract" is the rule B18 of ISBP (2013). Such rule interprets sub-article 6 (c) of UCP 600, which provides that a credit must not be available by a draft drawn on the applicant, to the effect that sub-article 6 (c) has no effect where the parties expressly require in the credit a presentation of a draft drawn on the applicant.[588]

[584] Annex I, para 31.
[585] *ISBP 2013,* B1 (b).
[586] Annex I, para 31.
[587] Annex I, para 31.
[588] *ISBP 2013,* B18.

Ambiguity

4.3.6 Having a term in the credit that has a high degree of ambiguity is a serious dilemma, as it is an express term that is commonly regarded as being stipulated to reflect the intention of the parties. It leads to a dispute, for instance between the issuing bank and the confirming bank, as to what is the right interpretation for an ambiguous term in order to determine the conformity of the presented document that is related to such a term.

4.3.7 There are many types of ambiguous documentary credits terms, and UCP 600 identifies two types of them. One is known as a "non-documentary condition" and the other is the term that is silent as to the contents of, or the issuer of, the required document. However, there is no particular rule in UCP 600 generally regulating the dilemma of ambiguous terms or instructions but the ISBP do provide a provision regarding ambiguous terms. Paragraph V of the preliminary considerations of ISBP 2013 states:

"The applicant bears the risk of any ambiguity in its instructions to issue or amend a credit. An issuing bank may, unless the applicant expressly instructs to the contrary, supplement or develop those instructions in a manner necessary or desirable to permit the use of the credit or any amendment thereto. An issuing bank should ensure that any credit or amendment it issued is not ambiguous or conflicting in its terms and conditions".[589]

The ISBP reflects the need for discretion by offering the proposition that the issuing bank is entitled to convert the ambiguous instructions of the applicant into workable documentary terms. This as we will see in the next paragraph is consistent with the

[589] *ISBP 2013*, Preliminary Considerations (v); *ISBP 2007,* para 2.

position of legal orders. The last sentence of the above provision in ISBP 2013 is a new provision that was not contained in paragraph 2 of ISBP 2007. Such new provision is significant. It seems that there is a realisation that legal orders would not accept the idea that applicants who usually have no expertise in dealing with documentary credits should bear the risk of framing documentary credits, given the fact that banks use their standard form of documentary credit as they are the experienced and skilled party in documentary credits. In other words, there is no escape from the reality that Municipal legal orders would impose a duty of care upon banks in order to advise applicants in framing workable documentary credits. UCP 600 introduced a new provision responding to such a position where sub-article 4 (b) states:

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

Thus the applicant bears the risk of the ambiguity of its instructions to the issuing bank to open the credit. The instructions are converted into terms when the credit is issued by the issuing bank, and here the bank is responsible to issue a workable documentary credit, namely: the terms of the credit need to be effective within the context of the administrative task of banks to determine the conformity of documentary presentations. The new change in the ISBP is a welcome step as it responses positively to the legal communications generated by Municipal legal orders (i.e. that they will oblige banks to honour their contractual commitments and exercise the variable standards of care required by those legal orders).

4.3.8 **English law.** An agent who receives ambiguous instructions or instructions bearing different meanings (where the appearance of the ambiguity is reasonably apparent) is obliged to seek a clarification – where reasonably possible - from the principal,

and thus if it fails to do so it will proceed at its own risk.[590] This is applicable to the documentary credit contract between the applicant and the issuing bank, as the latter is an agent of the applicant[591] in terms of the internal mandate.[592] Where it is not reasonably possible to seek a clarification from the applicant,[593] or where the ambiguity was not reasonably apparent before the date of the presentation of the documents, then the consequences are different. In these situations, the instructed party (i.e. the issuing or confirming bank) is obliged to place on the ambiguous terms a reasonable interpretation.[594] The bank is not liable for a failure to adopt another reasonable interpretation as long as it has adopted one of the reasonable alternative interpretations. This position is valid whether the legal nature of the relationship between the bank and the instructing party is an agency[595] or not.[596]

4.3.9 Jordanian law. The relationship between the issuing bank and the applicant is a documentary credit relationship.[597] The issuing bank must adhere to the instructions of the applicant, and thus the bank is not entitled to reimbursement if it pays against documents that are not in conformity.[598] However, if the mistake in the decision of conformity is caused by the applicant then the bank is entitled to reimbursement,[599] and the applicant therefore should bear the risk. It is not clear what is meant by the

[590] Bridge and others (eds), *Benjamin's Sale of Goods*, (8th edn, Thompson 2010) para 23.38; *Woodhouse AC Israel Coca Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, 772.
[591] *Midland Bank v Seymour*1955) 2 Lloyd's Rep. 147,153 per Devlin J; *Commercial Banking Co. of Sydney v Jalsard Pty Ltd* (1973) AC 279, 285 per Lord Diplock.
[592] *Credit Agricole Indosuez v Muslim Commercial Banking* [2000] 1 Lloyd's Rep 275, 280 where Sir Christopher Staughton stated that there is no agency relationship in law between the issuing bank and the applicant and that lead to the suggestion of Elinger and Neo (*The Law and Practice of Documentary Credit*, (1st edn, 2010) 83-84) that the agency relationship is confined to the internal mandate. The issuing bank under a duty to strictly adhere to the instructions or the mandate of the applicant: *Equitable Trust Co of New York v Dawson Partners Ltd* (1927) 27 Lloyd's Rep. 49, 52; *South African Reserve Bank v Samuel & Co* (1931) 40 Lloyd's Rep. 291; *Rayner & Co Ltd v Hambro's Bank Ltd* [1943] K.B. 37, 43 per Goddared LJ.
[593] *Credit Agricole Indosuez v Muslim Commercial Banking* [2000] 1Lloyd'sRep 275, 278: seeking a clarification would unreasonably affect the time for the examination of documents.
[594] *Midland Bank Ltd. v Seymour* [1955] 2 Lloyd's Rep 147*,* 153 per Devlin J; *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279, 286 per Lord Diplock; *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] 1 Lloyd's Rep 275.
[595] *Midland Bank v Seymour* (1955) 2 Lloyd's 147, 153; *Commercial Banking Co. of Sydney v Jalsard Pty Ltd* (1973) AC 279, 285.
[596] *Credit Agricole Indosuez v Muslim Commercial Banking* [2000] 1Lloyd's Rep 275: the confirming bank (which is clearly under English law not an agent of the issuing bank) was entitled to reasonably interpret the ambiguous instructions.
[597] Court of Distinction, *1068/1989,* (Civil) Adalah Programme.
[598] Court of Distinction, *781/1990,* (Civil) Adalah Programme.
[599] Court of Distinction, *1068/1989,* (Civil) Adalah Programme.

applicant's mistake. It might be inferred that an ambiguous instruction is seen as an applicant's mistake but the decisions of the Court of Distinction are not clear on this point. For ambiguous instructions in documentary credits, we can review the principles of interpreting ambiguous contractual terms under Civil Code.[600] The relative provision is article 239 (2) which states:

"If there is a place for the [non literal] interpretation of the contract, the common intention of the contracting parties must be searched without sticking to the literal meaning of the words but by looking at the nature of the transaction and what should be available from the trustworthiness between the contracting parties according to the current custom in transactions".

Indeed, the nature of the transaction between the applicant and the issuing bank is similar to the internal mandate in the agency contract. By looking at the agency contract under Jordanian Civil Code, particularly the mandate between the principal and the agent, there is - unlike Common law – no clear duty upon an agent to seek a clarification from its principal whose instructions are ambiguous. There is, however, a duty upon the agent to inform the principal regarding any necessary information the agent needs as to the performance of the mandate.[601] It can be deduced from this, by analogy, that the issuing bank is under a duty of care to advise the applicant as to the effectiveness of the credit terms. This is heightened by the provisions of both sub-article 4 (b) of UCP 600 and the preliminary considerations under ISBP 2013. Also an agent is obliged to perform the contract on the basis of both the mandate and what is necessary by custom in order to perform the tasks in the mandate.[602] Alternatively, the trust and security between the parties acting in good faith would impose a duty upon the issuing bank, as it is the experienced party

[600] Articles 213-240 Civil Code (1976).
[601] Article 856 Civil Code (1976).
[602] Article 836 (1) Civil Code (1976).

providing the documentary credit service, to advise the applicant as to the status of the ambiguous terms.

4.3.10 **Duty to advise the applicant.** In conclusion, it is submitted, the issuing bank is obliged to advise the applicant with regard to all information, such as to the effectiveness of ambiguous terms, which are necessary to render the credit terms workable. The issuing bank is entitled to convert the instructions of the applicant - by a supplementary addition that reflects the intention of the applicant – into workable documentary terms. However, the applicant ultimately bears the risk of ambiguous instructions if he insists on imposing ambiguous instructions or acts unreasonably in seeking to impose ambiguous instructions on the bank. In such a situation the bank is entitled to place a reasonable interpretation on the ambiguous term and act accordingly.

NON-DOCUMENTARY CONDITIONS

4.3.11 A non - documentary condition is a term of a documentary credit which requires a fact to exist without specifying what documentary confirmation is to be presented to prove that fact (e.g. a term requiring shipment by a conference line vessel).[603] Thus a non-documentary condition is perceived as a type of ambiguous term, but one that has a special direct treatment under the UCP. In this regard, sub-article 14 (h) of UCP 600, which is reproduction of sub-article 13 (c) of UCP 500, 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".

[603] Drafting Group, *Commentary on UCP 600: Article by Article Analysis,* (No. 680, ICC 2009), 66; Bridge and others (eds), *Benjamin's Sale of Goods*, (8th edn, Thompson 2010) para 23.114.

Nevertheless, a non- documentary term is not treated as if it did not exist, because data in presented documents must not be in contextual conflict with the non-documentary term.[604] Data in other stipulated documents would justify a refusal if it was in contextual conflict with the credit, including the non-documentary term, as stipulated by the general test in sub-article 14 (d).

4.3.12 New UCP relevant provisions. Pursuant to the new provisions of both sub-article 4 (b) of UCP 600 and the last sentence of paragraph V of the preliminary considerations of ISBP 2013, and as analysed above, the issuing bank is under a duty of care to advise the applicant as to the status of ambiguous terms. Thus if the issuing bank did not advise the applicant as to the consequences of a non-documentary condition, the bank would be liable for a breach of a duty of care where the applicant suffers damages from the disregarding of the non-documentary condition.[605]

4.3.13 Empirical findings. [606] Muhammad Burjaq stated that, as a UCP rule, the non-documentary condition is ignored. He elucidated:

"We face these problems with Iraqi banks where we deal as a confirming bank. We ask the issuing bank to amend the instructions, since, indeed prevention is better than cure. We explain to them in advance that instructions such as non-documentary conditions will be ignored. It is not fair for the applicant, and the issuing bank must advise the applicant regarding the consequences of such ambiguous instructions".[607]

[604] *ISBP 2013*, A26; *Opinions 2005-2008,* R.631; Drafting Group, *Commentary on UCP 600: Article by Article Analysis,* (No. 680, ICC 2009), 66.
[605] For contractual and tortious liability: *Henderson v Merrett Syndicates Ltd* [1995] 2 AC145.
[606] Annex I, para 27-8.
[607] Annex I, para 27.

Mr B stated *"it happens a lot with Iraqi banks, we receive ambiguous instructions. We disregard non-documentary conditions".*[608] It can be inferred from these statements that the lack of experience and training are the main reasons for ambiguous instructions. However, the Jordanian banks in this situation tend to treat ambiguous instructions as non-documentary conditions, as stated by the participating banks. Traders would perceive the credit as being a non-secure method of payment if they were not to be advised as to that issue and given the opportunity of rectifying any ambiguity or invalidity in such a term. Ali Melham said *"I have never had such a situation, but it is not fair for traders".*[609] The empirical findings indicate that even bankers are of the opinion that banks are responsible to advise the applicant as to the inherent ambiguity of a non-documentary condition, and that the issuing bank is the party which should be responsible for spotting any such ambiguity. However, the empirical findings also clearly indicate that bankers consider sub-article 14 (h) to be fully effective and would thus disregard a non-documentary condition. Sub-article 14 (h) appears to be intended to have the effect of favouring the interests of banks over traders. This might be 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 percent of the members of the ICC Banking Commission.[610]

4.3.14 Repugnancy. Given the fact that sub-article 14 (h) might be seen as being repugnant to the fundamental doctrine of freedom to contract under English[611] and Jordanian[612] laws, the question is whether such a repugnant article would be enforced under these legal orders. If it were repugnant the attempted erasure of bad practice in the inclusion of non-documentary conditions might result in uncertainty.

[608] Annex I, para 27.
[609] Annex I, para 28.
[610] Bacon, "Who speaks for the exporter" [2006] 9 DCInsight.
[611] *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 36*1*, 399 per Lord Reid.
[612] Article 213 Civil Code (1976).

4.3.15 **English law.**[613] Express contractual terms are treated under Common law as being the most likely manifestation of the intention of the contractual parties,[614] and thus in the case of conflict with incorporated terms (i.e. most of the UCP terms) the express terms prevail. It is obvious and certain that parties can exclude or amend any incorporated UCP term by an expressed contractual term.[615] But, it is not certain that spelling out a non-documentary condition in the credit reflects the intention of the parties to exclude sub-article 14 (h) of UCP 600. 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.

4.3.16 *Firstly* the nature of sub-article 14 (h) in UCP 600. It is essential to determine whether such a term operates independently as law, by means, for instance, of being fundamental to a documentary credit such as embedded trade usage.[616] For in this case the term might have a paramount status in the sense that parties need to clearly express their intention to contract out of it. However, sub-article 14 (h) is not regarded as a fundamental concept in documentary credits or in UCP 600.[617] This eases the task of striking down such a UCP term.

4.3.17 *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*[618] and *Kumagai-Zenecon Construction Ltd (in Liq) v Arab Bank plc*[619] the non-documentary

[613] Hwaidi, *The Story of The English Strict Compliance Principle in Letters of Credit and its Consistency with the UCP*, [2014] J.I.B.L.R 28 (2), 73-78.
[614] *Homburg Houtimport BV v Agorsin Private Ltd (The Starsin)* [2004] 1 AC 715, [11].
[615] Article 1 UCP 600; article 1 UCP 500; *Homburg Houtimport BV v Agorsin Private Ltd (The Starsin)* [2004] 1 AC 715, [11].
[616] Chapter 2, para 2.2.1.
[617] Bridge and others (eds), *Benjamin's Sale of Goods*, (8th edn, Thompson 2010) para 23.114.
[618] [2006] 1 S.L.R. 565, 577.
[619] [1997] 3 SLR 770.

conditions, subject to sub-article 13 (c) of UCP 500,[620] were given effect as they were essential for the commercial operation of the relevant credits.

4.3.18 *Thirdly*, the underlying aim of the promulgation of sub-article 14 (h) is to eradicate the *"wrong practice of incorporating non-documentary condition(s) into documentary credits"*.[621] Given the fact that the issue of non-documentary conditions causes problems to all parties dealing with documentary credits, the ICC Banking Commission has endeavoured to promote formality over substance. Formality narrows the scope of discretion. It seeks to serve certainty. It might thus lead to uniformity in practice - not only on the rejection of non-documentary terms but also on their treatment - which is a substantive objective of the UCP.[622] On the other hand, substance in this issue stands for the effectiveness of the intention of the parties and freedom to contact. Such substance requires banks to call for a document that can reasonably be required to fulfil the relevant non-documentary condition. It achieves fairness for the parties who express, and intend to give effect to, the non-documentary conditions. Most importantly, it serves security for buyers. Thus the formality of sub-article 14 (h) causes repugnancy as to the substantive principle of freedom to contract, and does not reflect the underlying policy of documentary credits as being a means of security for buyers. It must be realised that up to this date the UCP has not attained the status of mandatory rules[623] so sub-article 14 (h) may be overridden by express agreement even when that agreement takes the form of a non-documentary condition.

[620] Equivalent to sub-article 14 (h) UCP 600.
[621] ICC Position Paper N.3 (1994).
[622] Taylor, *The Complete UCP*, (1ST edn, ICC 2008), 27.
[623] There is a stronger view in that the UCP have never been "a legal regime automatically applicable": Debattista, *The new UCP 600 – changes to the tender of the seller's shipping documents under letters of credit* [2007] J.B.L 329, 332-333.

4.3.19 *Fourthly,* the expressed trend under English law is to interpret the UCP through the international lens of business practices rather than a literalistic national approach.[624] As uniformity of practice is one of the main underlying objectives of the UCP,[625] the interpretation of non-documentary conditions must substantively serve the purpose of uniformity and gives rise to the proposition that sub-article 14 (h) ought to be allowed to prevail irrespective of the parties' express agreements. This proposition needs to be balanced with the needs of security, which is the underlying aim of a documentary credit transaction. Buyers, and some issuing banks which have real interests in documents, would be left vulnerable if the non-documentary condition that they required was to be ignored, particularly when the fulfilment of such condition could be seen as being essential for the commercial purpose of the transaction. Furthermore, the approach to the interpretation laid out in *Fortis* is subject to the general contractual interpretation principles of English law requiring interpretation from the standpoint of the informed reasonable reader construing the agreement in the context of its factual matrix.[626] Any reasonable reader within the international trading community who is not a banker would not expect sub-article 14 (h) to have full effectiveness.[627] Such a reasonable interpretation reflects the expectation of international traders that is referred to by Thomas LJ in *Fortis*.[628] But it does not reflect the expectation of the international banking community as any reasonable banker would expect, as he relies on UCP 600, the effectiveness of sub-article 14 (h).[629]

4.3.20 *Conclusion.* The original position under Common law is that a non-documentary condition needs to be satisfied by presenting a document that reasonably proves the

[624] *Fortis Bank S.A./N.V, Stemcor UK Limited v Indian Overseas Bank* [2011] EWCA (Civ) 58, [29]; [2011] 1 C.L.C. 276, 287 per Thomas LJ.
[625] Taylor, *The Complete UCP*, (1ST edn, ICC 2008), 27.
[626] *Antaios Compania Naviera S.A. v Salen Rederierna A.B* [1985] AC 191, 201 per Lord Diplock; *Investors Compensation Scheme LTD v West Bromwich Building Society* [1998] 1 All E.R. 98, 114 per Lord Hoffman.
[627] As indicated by the empirical findings: chapter Chapter 1, para 1.2.28.
[628] *Fortis Bank S.A./N.V, Stemcor UK Limited v Indian Overseas Bank* [2011] EWCA (Civ) 58, [29]; [2011] 1 C.L.C. 276, 287.
[629] Annex I, para 27.

existence of the called fact.[630] The credit, subject to UCP 400, in *Banque de l'Indochine et de Suez SA v J.H. Rayner (Mincing Lane) Ltd*[631] required:

"Shipment to be effected on vessel belonging to shipping company that member of an International Shipping Conference".[632]

It was held that the bank must have satisfied itself of the existence of such a fact by calling for any evidence reasonably establishing that fact. However, the position of the Common law after the introduction of the rule requiring the disregarding of a non-documentary condition under UCP 500 is not certain. What is clear is that Common law will not give effect to sub-article 14 (h) where the non-documentary condition is essential for the commercial purpose of the transaction.[633] This is because in such a case it would be clear that the parties did intend to give effects to such a non-documentary condition.

4.3.21 **Jordanian law***.* It is clear under Jordanian law that express terms override implied terms[634] and accordingly, a non-documentary condition would be given effects over sub-article 14 (h) of UCP 600.

4.3.22 **Evaluation**. In conclusion, Courts would be willing to strike down the repugnant UCP rule, namely, sub-article 14 (h). This is clearly a surprise for banks in Jordan as the empirical findings show that bankers expect the effectiveness of sub-article 14 (h). Banks therefore need to be aware that a non-documentary condition is most probably operative under English and Jordanian laws, irrespective of sub-article 14 (h). By accepting a non-documentary condition in a documentary credit, the bank is

[630] *Union Bank of Canada v Cole* (1877) 47 L.J.C.P. 100; *Banque de l'Indochine et de Suez SA v J.H. Rayner (Mincing Lane) Ltd* [1983] Q.B. 711.
[631] [1983] Q.B. 711, 719 per Parker J.
[632] [1983] Q.B. 711, 717.
[633] *Korea Exchange Bank v Standard Chartered Bank* [2006] 1 S.L.R. 565, 577; *Kumagai-Zenecon Construction Ltd (in Liq) v Arab Bank plc* [1997] 3 SLR 770.
[634] Article 15 Civil Code (1976); article 13 *Mecelle* (1877).

signifying its intention to respect that condition. Accordingly, beneficiaries would be well advised to require the issuing bank to stipulate what document is required to prove satisfaction of any non-documentary condition.[635] Where the issuing or confirming bank does not provide a clarification, then beneficiaries would be advised to present documents evidencing compliance with the non-documentary condition, and such documentary compliance needs to be contained in a document that is required by a documentary condition in order to avoid the application of sub-article 14 (e) of UCP 600 (i.e. which directs banks to ignore additional documents).[636] The real problem is that the parties are uncertain about the status of non-documentary conditions, as there is no direct authority under English and Jordanian laws dealing with such an issue subject to the UCP 600 regime. This uncertainty is illustrative of the problems arising where a self-regulatory rule contravenes a fundamental legal doctrine (e.g. freedom to contract) shared transnationally across legal orders.[637] The resulting uncertainty is far more extensive than the mischief of uncommon practice that was intended to be tackled. Fortunately, the rule of non-documentary conditions is a particular rule and it does not therefore capture many cases. It is undeniable that the extreme solution offered by sub-article 14 (h) has resulted in deterring banks from including non-documentary terms. Indeed the researcher noticed from the reaction of the interviewed bankers, when a question was posed regarding ambiguous terms or non-documentary terms, that the bankers gave a quick and a decisive answer that they would disregard such a condition.[638]

NON-STIPULATED CONTENTS OR ISSUER

4.3.23 Where a documentary condition in the credit does not stipulate the required issuer or contents for the called document, other than transport, insurance or commercial

[635] To avoid the application of sub-article 14 (e) UCP 600.
[636] Above, para 4.2.11.
[637] For the transnational doctrine of freedom to contract: Berger, *The Creeping Codification of the New Lex Mercatoria,* (2edn, Kluwer Law International 2010).
[638] Annex I, para 27.

invoice documents, then pursuant to sub-article 14 (f) of UCP 600 the document as a whole must appear to fulfil its function as appearing in the credit in order to be in conformity. The general test "material alignment" in sub-article 14 (d) applies to the data in that document with emphasis on the "function" of such document as stated in sub-article 14 (f) of UCP 600:

"*If a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, banks will accept the document as presented if its content appears to fulfil the function of the required document and otherwise complies with sub-article 14 (d)*".

The new guidance of checking the fulfilment of the "function" of the document does not mean that the bank needs to have knowledge regarding all the specific requirements of the presented document, it merely means that the document must appear to fulfil its purpose as it appears on its face which can be known by any reasonable banker.[639] It is submitted that the emphasis on the "function" of the documents is a mere reflection as how the test of "material alignment" in sub-article 14 (d) must apply in general and in particular to the situation of ambiguous terms in documentary credits, and it is regrettable that the Drafting Group did not clearly stipulate such a proposition. However, it is the responsibility of the bank to ensure that the terms of the credit contain sufficient requirements.[640] This reflects the security policy in that a non-expert applicant, as indicated by the empirical findings, expects the terms of the credits to be operative and to fulfil their function. The emphasis on function is illustrative of how the problem of ambiguous terms in documentary credits can be resolved without repugnancy to legal orders.

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

PARTICULAR RULES FOR PROOF OF GOODS, INSURANCE, SHIPMENT AND SPEED

4.4.1 Given the fact that documentary credits are regarded as the ideal method of payment for C.I.F, C.I.P, C & F and F.O.B contracts, commercial invoice, transport documents and insurance documents are commonly tendered under many documentary credits. It is for the convenience of all parties in documentary credits to have standard terms regulating the material requirements for the above common documents, since such rules have the potential to avoid, or at least resolve, many possible disputes regarding the conformity of these common documents. Articles 18 to 28 of UCP 600 stipulate the ruling requirements for the above common documents, and such rules are particular as they are only applicable to specific documents. However, the fact that these documents are common results in these rules being applicable to many documentary credit transactions.

Commercial Invoice

4.4.2 Article 18 of UCP 600 provides particular rules for commercial invoices. Article 18 replaces article 37 of UCP 500 and there are no significant changes under the new article since that the new sub-article 18 (b) is not now expressed as being subject to the terms of the credit as discussed below. Of course the general test for conformity in sub-article 14 (d) of UCP 600 applies to commercial invoices subject to the particular rules stipulated in article 18.

4.4.3 **Empirical findings and invoice value.** Pursuant to sub-article 18 (b) of UCP 600, the equivalent to sub-article 37 (b) of UCP 500, the bank's decision to accept an invoice exceeding the value of the goods stipulated by the credit will be valid and binding on all the parties, as long as the bank in question has not honoured or

negotiated the credit for an amount in excess to that permitted by the credit. The language of sub-article 18 (b) is unlike sub-article 37 (b), which started with the phrase *"unless otherwise stipulated in the Credit, banks may refuse commercial invoices"*. Rather sub-article 18 (b) starts by saying that the bank *"may accept commercial invoice".* The new language in sub-article 18 (b) encourages banks to accept invoices rather than refusing them.[641] Here, the empirical findings indicate that many banks in Jordan now exclude sub-article 18 (b), and replace it by a provision prohibiting the acceptance of an invoice in excess of the value stated in the credit.[642] This is mainly due to the fact that, if the value of the invoice exceeded that required, many importers would face difficulties with Jordanian customs as they would be required to pay a higher custom duty than that contemplated.[643] The commonalty of sub-article 18 (b) is questionable, when many traders in developing countries will want to reject invoices for amounts in excess of the credit to avoid unexpected custom duties. However, the need underlying sub-article 18 (b) is to simplify the presentation of invoices in order to assure the sellers of their right of payment, and, as submitted, such need has the priority over the need of buyers for invoices that are not in excess to the stipulated value in the credit.

Insurance Documents

4.4.4 Article 28 of UCP 600 addresses the applicable criteria on the presented insurance documents. Sub-article 28 (a) provides that insurance policy, insurance certificate and declaration under an open cover are the types of the documents that are included in the concept of an insurance document. This indicates that insurance documents are not confined to an insurance policy. As in other documents, conformity for insurance documents is determined by the terms of the credit and

[641] Drafting Group, *Commentary on UCP 600: Article by Article Analysis,* (No. 680, ICC 2009), 78.
[642] Annex I, paras 20-22.
[643] Annex I, para 20.

UCP 600 but not the requirements of insurance in the applicable Municipal law.[644] Even though they have had a significant effect on documentary presentations of insurance documents for documentary credit transactions, only a couple of the particular rules articulated by article 28 of UCP 600 require particular comment as follows.

(i). When a credit requires insurance against all risks, then an insurance document contains any "all risks" notation or clause is accepted even if it indicates that certain risks are excluded.[645] It is submitted that such a provision in UCP 600 which is equivalent to article 36 of UCP 500 is responsive to the insurance practice as the words "all risks" are understood in the insurance industry, and presumably by the parties to the credit, to be not absolute in terms that an insurance coverage contains exclusions as provided in clauses 4 to 7 of Institute Cargo Clauses (A). Indeed, the ISBP stipulates that an insurance document indicating that it covers Institute Cargo Clauses (A) satisfies the requirement of "all risks" insurance coverage.[646] Still "*an insurance document may contain reference to any exclusion clause"* [647] even if the credit is explicit regarding the risks that need to be covered.[648] This is a new provision under UCP 600 that seeks to further reflect the insurance industry practices in implementing numerous exclusion clauses which often relate to terrorism.[649] Such a broad position might reduce the amount of rejections. However, it is submitted that under the English and Jordanian legal orders a reference to any exclusion clause needs to reflect the intention of the parties.[650] Thus an exclusion clause in this context is only permitted if it is the type that is common in the insurance industry so as to be within the contracting parties reasonable expectation. It is a matter of fact

[644] Bridge and others (eds), *Benjamin's Sale of Goods*, (8th edn, Thompson 2010) para 23.155, ftn 534.
[645] Sub-article 28 (h) UCP 600; *ISBP 2013*, K18; article 36 UCP 500.
[646] *ISBP 2013,* K18; *ISBP 2007,* para 173.
[647] Sub-article 28 (h) (i) UCP 600
[648] *ISBP 2013,* K17 (b); *ISBP 2007,* para 173.
[649] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 133.
[650] As this is the main cause of the doctrine of freedom to contract.

that needs to be proved by expert evidence. Of course an express term in the credit that clearly prohibits exclusion clauses in insurance must prevail.[651]

(ii). The introduction of the word proxy to the effect that an insurance document may be signed by proxies is a welcome clarification as although the term proxy is a synonym to the term agent it has a slight technical distinction in some countries.[652] Sub-article 28 (a) also clarifies in precise language how an agent or proxy needs to declare the capacity in which it signs. The new revision of ISBP clarifies that the name of the insurance company or underwriter must be indicated in the insurance document that is signed by an agent or proxy.[653] These changes foster clarity to serve certainty leading to commonality.

(iii). The general terms and conditions in an insurance document are irrelevant in conformity.[654] Given the need for speed and manageable presentation, this change reflects the need for manageable examination. Albeit as such terms and conditions may significantly undermine buyers' security, the credit may expressly provide to the contrary.

Transport Documents

4.4.5 Articles 19 to 27 of UCP 600 articulate the requirements that must be fulfilled for the conformity of a document that is categorised as a transport document under the aforementioned articles. Such articles regulate as a matter of conformity the most common types of transport documents in a documentary credit which are as follows: transport documents covering at least two different modes of transport (article 19),

[651] Express terms must prevail where there is a clear conflict between express terms and incorporated terms as the former is the most closely connected to the parties' intention. English law: *Homburg Houtimport BV v Agorsin Private Ltd (The Starsin)* [2004] 1 AC 715, [11]; Jordanian law: Article 15 Civil Code (1976); article 13 *Mecelle* (1877).
[652] Byrne, *The Comparison of UCP 600 & UCP 500*, (2007), 215.
[653] *ISBP 2013,* K4.
[654] *ISBP 2013,* K22.

bills of lading (article 20), non-negotiable sea waybills (article 21), charterparty bills of lading (article 22), air transport documents (article 23), road, rail or inland waterway transport documents (article 24), and courier receipts, post receipts or certificate of posting (article 25). Each type of transport document is distinguished by its means of transportation. The main function that transport documents must serve in the context of conformity is to evidence the fact of shipment having occurred between two places, ports or airports and the fact of consignment to the required consignee.[655] If, thus, a transport document merely evidences the receipt of goods (e.g. forwarding agent's goods receipt) it will not be treated as a transport document,[656] and this of course reflects the need of buyers for documentary evidence of shipment. These particular rules have had a significant effect and a high degree of "formal realisability" on documentary presentations of transport documents for documentary credit transactions, and that is illustrated in this thesis by focussing on the particular rules concerning bills of lading at article 20 of UCP 600.

BILL OF LADING

4.4.6 A bill of lading is considered as evidence of shipment of the goods from the port of loading to the port of discharge,[657] and it must only cover a port to-port shipment.[658] It serves the functions of being evidence of the contract of carriage[659] and a document of title[660] under the UCP. A bill of lading functions as a semi-negotiable instrument under English law.[661] Conversely and oddly, the Jordanian Marine Commercial Code (1972) only recognises a charter party bill of lading as the

[655] *Opinions 2005-2008*, R.638 and R.640: a forwarding agent's goods receipt is not a transport document covered by the content of UCP 600's articles 19-25 as it is not intended to evidence shipment having occurred between two places, ports or airports.
[656] *Opinions 2005-2008*, R.640.
[657] Sub-article 20 (a) (iii) UCP 600; *ISBP 2007,* para 92.
[658] *ISBP 2013*, E1.
[659] Sub-article 20 (a) (v) UCP 600; English law: Harris, *Ridley's Law of the Carriage of Goods by Land Sea and Air,* (8th edn, Sweet and Maxwell 2010) para 3.2.3.4.2.
[660] *ISBP 2013,* E12 and E13; *ISBP 2007,* paras 101-103; English law: Harris, *Ridley's Law of the Carriage of Goods by Land Sea and Air,* (8th edn, Sweet and Maxwell 2010) para 3.2.3.3.
[661] Harris, *Ridley's Law of the Carriage of Goods by Land Sea and Air,* (8th edn, Sweet and Maxwell 2010) para 3.2.3.4.3.

transport document for carriage of goods by sea, since – based on holistic interpretation of the Code - the name of the charterer is a binding requirement to be indicated in the bill.[662] A charter party bill of lading serves the functions of being evidence of the carriage and of the charter party contract,[663] and being a document of title that can be treated as a negotiable instrument.[664] However, the requirements for a charter party bill of lading that are set out in article 22 of UCP 600 would be insufficient to validate a charter party bill of lading under Jordanian law,[665] so we are left in the position that Jordanian law would not recognise as being bills of lading many of the documents presented as bills of lading under UCP 600.

4.4.7 **Empirical findings.** Accordingly, it is questionable whether Jordanian banks are obliged to accept a negotiable bill of lading or a negotiable charter party bill of lading that has fulfilled the expressed requirements as spelled out in the credit and UCP 600, or whether they are also obliged to ensure such negotiable transport documents fulfil the requirements of such documents under the applicable Municipal law. The empirical findings clarify that the practice in Jordan is that banks do not check whether negotiable bills of lading or charter bills of lading are in conformity with the Marine Commercial Code[666] and this practice reflects the material alignment test for conformity.

REQUIREMENTS FOR A BILL OF LADING

4.4.8 Article 20 of UCP 600 articulates particular rules for conformity in bills of lading and requirements that bills of lading need to fulfil in order to be in conformity. Such rules

[662] Article 200 Marine Commercial Code (1972).
[663] Article 198 Marine Commercial Code (1972).
[664] Article 200-2009 Marine Commercial Code (1972).
[665] Marine Commercial Code (1972) contains requirements for the charter party bill of lading that are not provided by the UCP.
[666] Annex I, para 32.

have a high degree of "formal realisability" as they direct the documents checker as to whether or not the presented transport documents are in conformity. However, only a couple of the particular rules articulated by Article 20 of UCP 600 require particular comment as follows.

(i). Since the bill of lading is a type of a transport document that envisages to cover shipment from a port of loading to a port of discharge,[667] subs-article 20 (a) (ii) and (iii) of UCP 600 have been rephrased in a way that omits the reference to "loaded on board" and "place of receipt" that was contained in sub-article 23 (a) (ii) of UCP 500. This change is to ensure that pre-carriage of the goods is not to be covered in a bill of lading.[668] Thus, any reference or indication to a pre-carriage of the goods, regardless that the bill is pre-printed as "shipped on board" or "received for shipment", leads to a requirement that the bill must include a dated on-board notation which indicates the name of the vessel and the port of loading stated in the credit.[669] This of course has the effects of protecting the buyer's need for proof of shipment. However, the mere fact that there is a place of receipt in addition to the port of loading does not indicate that there is a pre-carriage, as long as the bill of lading is pre-printed "shipped on board" and not "received for shipment".[670] In any case, if there is no clear indication in the bill that the goods have been shipped on board the required vessel or shipped at the required port of loading (e.g. intended vessel or intended port of loading), then a dated on-board notation indicating the name of the actual vessel and the port of loading as stated in the credit is required.[671]

[667] Sub-article 20 (a) (iii) UCP 600: "*indicate shipment from the port of loading to the port of discharge stated in the credit*" where the predecessor sub-article 23 (a) (iii) UCP 500 provided the same provision without including the word "shipment".
[668] Drafting Group, *Commentary on UCP 600: Article by Article Analysis,* (No. 680, ICC 2009), 91.
[669] *ISBP 2013,* E6 (c) (i).
[670] *ISBP 2013,* E6 (b); for shipped and received for shipment bills of lading: Harris, *Ridley's Law of the Carriage of Goods by Land Sea and Air,* (8th edn, Sweet and Maxwell 2010) para 3.2.3.3.
[671] Sub-article 20 (a) (ii) UCP 600; Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009), 91.

(ii). Where a bill of lading indicates that the goods will or may be transhipped, the transhipment must be evidenced by one and the same bill of lading, thus the presentation of separate documents covering each leg of the carriage constitutes a contextual conflict.[672] Sub-article 20 (c) (ii) of UCP 600 has been restructured to clearly confirm the effectiveness of the requirement that in transhipment the whole journey must be evidenced by one and the same bill of lading.[673] To foster clarity, transhipment is now defined in the context of a bill of lading as "*unloading from one vessel and reloading to another vessel during the carriage from the port of loading to the port of discharge stated in the credit*".[674]

(iii). A clause in a bill of lading reserving the right to tranship is not treated as evidence of transhipment, and it is accordingly to be disregarded even if the credit prohibits transhipment.[675] This is in alignment with the English law's doctrine that "*reserving the right to do something cannot be equated with doing it*".[676]

(iv). As an assurance for buyers the new revision of ISBP expresses a previous ICC Opinion providing that a bill of lading must indicate the name of the actual port of discharge, even where the credit indicates a geographical area or range of ports of discharge.[677] On the other hand, the charter party bill might either state the name of the actual port of discharge – which is to be within the geographical area – or simply show the geographical area or range of ports as the port of discharge.[678] Indeed transportation by charter party, unlike liner vessels, often provides for shipment to a range of ports or to a certain geographical area.[679] Such a rule is highly responsive to the practices of the transportation industry and it is therefore, in

[672] Sub-article 20 (c) (i) UCP 600.
[673] Sub-article 20 (c) (i) UCP 600.
[674] Sub-article 20 (b) UCP 600.
[675] Sub-article 20 (d) UCP 600.
[676] Bridge and others (eds), *Benjamin's Sale of Goods*, (8th edn, Thompson 2010) para 23.141: *Svenska Traktor Aktiebolget v Maritime Agencies (Southampton) Ltd* [1953] 2 Q.B. 295.
[677] *ISBP 2013,* E10; *Collected Opinions 1995-2001*, R.281.
[678] *ISBP 2013,* G9.
[679] *Collected Opinions 1995-2001*, R.281; Drafting Group, *Commentary on UCP 600: Article by Article Analysis,* (No. 680, ICC 2009), 106.

addition of being accepted and adopted by all the parties of documentary credits, serves the needs for manageable presentation and examination.

EMPIRICAL FINDINGS AND TRANSHIPMENT

4.4.9 The scheme in sub-articles 20 (c) (ii), 21 (c) (ii), 23 (c) (ii) and 24 (e) (ii) of UCP 600 provides that transhipment of goods is permitted even if transhipment is prohibited in the credit. However, the empirical findings indicate that it is the practice of most banks in Jordan to include a standard term, as part of the standard form of the application for documentary credits, excluding the application of the transhipment UCP 600 scheme.[680] The empirical findings clarify that the main concern for Arab Bank, which influences other banks in Jordan, is that transhipment might otherwise be permitted in road carriage.[681] Thus the intended purpose of the scheme to enforce the common practices in the transport industry faces a lack of commonality as documentary credits parties tend to reject such a scheme as they do not consider that practice is appropriate. Koloud Alkalaldeh stated:

"A bill of lading must be consigned to our order and when we release the bill of lading we ask the applicant to sign a bill of exchange to our order as a guarantee of our rights".[682]

Nart Lambarz stated:

[680] Annex I, para 20.
[681] Annex I, para 6.
[682] Annex I, para 32.

"We impose a condition that bills of lading must be issued from the actual carrier and not from forwarders. We expressly exclude the relevant UCP article and we stipulate our condition in the DC contract".[683]

4.4.10 English and Jordanian laws. Freedom to contract is a fundamental doctrine under English[684] and Jordanian laws.[685] Accordingly, where there is a conflict between express terms (e.g. the term in the credit prohibits transhipment) and incorporated terms (e.g. sub-article 20 (c) (ii) of UCP 600), express terms must prevail as they are presumed to be the most closely connected to the intention of the parties.[686] Thus, on the one hand, it seems that an express term in the credit prohibiting transhipment would overcome the UCP 600 scheme. On the other hand, as it is common and expected that goods shipped by sea in containers or trailers are to be transhipped from one vessel to another vessel, parties who intend to prohibit transhipment of goods shipped in containers or trailers need to express their intention clearly in the credit. However, it is submitted that under Jordanian law an express term in the credit prohibiting transhipment, would still prevail over the UCP 600 scheme even without an express exclusion of the UCP 600 articles in respect of transhipment. This is due to the fact that the empirical findings clearly indicate that parties to documentary credits in Jordan do not intend to give effect to the UCP 600 provisions relating to transhipment. Given the free market in transnational context, freedom to contract is more predominant norm than common practices. For the efficacy of the UCP it is advocated that one cannot sacrifice freedom to contract for common practices as such an attempt would be futile under Municipal legal orders and some local practices, as explained above for transhipment in Jordan.

[683] Annex I, para 32.
[684] *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 36*1*, 399 per Lord Reid.
[685] Article 213 Civil Code (1976).
[686] *Homburg Houtimport BV v Agorsin Private Ltd (The Starsin)* [2004] 1 AC 715, [11]; Article 215 Civil Code (1976); article 13 *Mecelle* (1877).

Particular Rules For Speed

4.4.11 Time is a dominant need for all the parties as it is generally of the essence in international supply contracts.[687] As a reflection to the need for speed in shipment, a presentation for transport documents, subject to articles 19-25 of UCP 600, must not be made later than 21 calendar days after the date of shipment, and in any event not later than the expiry date of the credit.[688]

4.4.12 **Drafts, transport and insurance documents.** The absence of issue dates from drafts, transports documents and insurance documents is considered as a contextual conflict even if the credit does not expressly require such dates to be stated.[689] The new ISBP revision provides extensive particular rules in A11, which is the equivalent to paragraph 13 of ISBP 2007, regarding the requirement of dating drafts and the other above documents. It particularly clarifies what is meant by dating documents in order to protect the buyers' rights, who usually lack technical experience in documentary credits, by stipulating the requirements for conformity. It generally enhances the "formal realisability" as to the determination of conformity and it affects many documentary credits as the use of the aforementioned documents is common in documentary credits.[690]

4.4.13 **Date of insurance documents.** Sub-article 28 (e) of UCP 600 states:

"The date of the insurance document must be no later than the date of shipment, unless it appears from the insurance document that the cover is effective from a date not later than the date of shipment".

[687] *Bunge Corporation v Tradax Export SA* [1980] 1 Lloyd's Rep 294.
[688] Sub-article 14 (c) UCP 600; sub-article 43 (a) UCP 500.
[689] *ISBP 2013*, A11; *ISBP 2007,* para 13.
[690] For the date of insurance documents: *ISBP 2013,* K11.

Sub-article 28 (e) of UCP 600 is elucidated by K10 of ISBP 2013 in a clear decisive language. Thus a statement in the insurance document indicating that the cover is effective from a date later than the date of shipment is a contextual conflict that justifies a refusal.[691] This protects buyers need to have insurance covering the goods from the date of shipment. An indication in the insurance documents that the date of their issuance is later than the date of shipment is a contextual conflict, unless *"it is clearly indicated by addition or note that coverage is effective from a date not later than the date of shipment"*.[692] In this context K10 (c) of ISBP 2013 reserved the prior ICC position (contained in Rule 766 of ICC Opinions) [693] by stating that:

"An insurance document that indicates coverage has been effected from "warehouse-to-warehouse" or words of similar effect, and is dated after the date of shipment, does not indicate that coverage was effective from a date not later than the date of shipment".

This is because the Drafting Group consulted the insurance industry, and it was revealed that the clause *"coverage has been effected from warehouse- to – warehouse"* does not necessarily backdate the commencement of cover.[694] Accordingly, the ISBP is responsive to the actual practices in the insurance industry which in turn protects buyers, and such responsiveness is consistent with the concept of business common sense under English law.[695]

4.4.14 Other documents. A requirement for the date of documents, other than the invoice, insurance and transport documents can be satisfied by a reference to the document's

[691] *ISBP 2013,* K10 (a).
[692] *ISBP 2013,* K10 (b).
[693] *ISBP 2013*, Introduction.
[694] http://www.lcviews.com/index.php?page_id=75 access 04/04/2014.
[695] *Antaios Compania Naviera S.A. v Salen Rederierna A.B* [1985] AC 191 , 201 per Lord Diplock.

date in another document in the same presentation.[696] There is no contextual conflict where documents, such as a certificate of analysis, inspection certificate or fumigation certificate, indicate a date of issue later than the date of shipment.[697] But a document that has the purpose to evidence a pre-shipment (e.g. pre-shipment inspection) must verify the pre-shipment event,[698] in order to secure buyer's expressed need. If the date of issuance is not stipulated in a document then the date of signing is deemed to be the date of issuance.[699] Such a position reflects the need for manageable presentation through the means of flexibility. Furthermore, article 3 of UCP 600 enhances clarity by providing guidance as to the contextual significance of dates.

[696] *ISBP 2013,* A11 (b); *ISBP 2007,* para 13.
[697] *ISBP 2013,* A12 (a).
[698] *ISBP 2013,* A12 (b); *ISBP 2007*, para 14.
[699] In alignment with *ISBP 2013,* A13; *ISBP 2007,* para 15.

REFUSAL FOR NON CONFORMITY[700]

4.5.1 As the determination of conformity is essential for documentary credits parties, the validity of the decision of refusing the presented documents after the determination that the documents are not confirming to the terms of the credit is also essential, so the intention of refusal ought to be clearly communicated to the other parties in a way that is unequivocally understandable as a refusal with reasons that are also clearly communicated. After the determination that the presented documents are not in conformity the bank (i.e. issuing bank, conforming bank or nominated bank which acts upon its nomination) has the choice either to accept the presentation (by virtue of the principle of autonomy)[701] or to refuse it.[702] Since the bank has a choice of inconsistent options and may elect for either acceptance or refusal, the doctrine of election at English law is applicable[703] and thus the bank must make an election for one of them rather than the other.[704] The acceptance of the bank for non-confirming documents would be at the bank's peril for it would not be entitled to reimbursement. Banks in most cases, therefore, would elect to refuse the non-conforming presentation.

4.5.2 However, in order to validate the bank's choice for refusal, the bank must follow the requirements for refusal that are set out in article 16 of UCP 600, otherwise the bank is precluded by sub-article 16 (f) of UCP 600 from claiming that it has provided a valid refusal notice. The aim of article 16 is to achieve uniformity in the practice of refusing presentations in order to reduce disputes. So the intention is to promulgate

[700] Hwaidi and Harris, *The Mechanics of Refusal in Documentary Letter of Credits: An Analysis of the Procedures Introduced in Article 16 UCP 600*, [2013] J.I.B.L.R, 28(4), 146-155.
[701] Articles 4 and 5 UCP 600; chapter 5.
[702] Article 16 UCP 600.
[703] In *Fortis Bank S.A./N.V, Stemcor UK Limited v Indian Overseas Bank* [2011] EWCA (Civ) 58, [29]; [2011] 1 C.L.C. 276, 287,[37] Thomas LJ stated "when the issuing bank determines that the documents do not conform, it may reject them. If it does, then it cannot be entitled to retain the documents, as it is implicit in rejection that it has refused to accept them".
[704] *Fortis Bank S.A./N.V, Stemcor UK Limited v Indian Overseas Bank* [2011] EWCA (Civ) 58, [29]; [2011] 1 C.L.C. 276, 287,[37]; *Craine v Colonial Mutual Fire Insurance Co. Ltd.* (1920) 28 C.L.R. 305, 326, this Australian case was cited by Lord Scarman in *China National Foreign Trade Transportation Corp v Evlogia Shipping SA of Panama* [1979] 1 W.L.R. 1018,1034; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corpn of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391, 398– 399.

rules to standardise the ways presentations are commonly refused as between the parties to documentary credits. There are two main general rules in refusal. The first requires the giving of a single refusal notice containing the required formalities as stipulated in sub-article 16 (c). The second requires that the refusal notice be served not later than the fifth banking day from the date of the presentation as stipulated in sub-article 16 (b). Although general these rules intend to have a high degree of "formal realisability" through the means of both certainty (i.e. by introducing particular rules and formalities) and communication by spelling out the consequences of not adhering to these rules. The consequences are spelled out in sub-article 16 (f) (generally referred to as the preclusion rule) as being that the refusal is deemed invalid. These rules are generally applicable to all cases of refusal of a documentary presentation.

4.5.3 The precedent provision of article 16 was article 14 of UCP 500 which was one of the most frequently queried articles in queries directed to the ICC Banking Commission and which resulted in the ICC issuing a paper in 2002 entitled "Examination of Documents, Waiver of Discrepancies and notice under UCP 500" to enhance the understanding of article 14 of UCP 500.[705] Accordingly, article 16 of UCP 600 was drafted to improve the expression of the ICC understanding of this provision and this required the use of the means of clarity.

Formality And Substance Of Unequivocal Refusal

4.5.4 The introduction of the requirement of a statement of refusal[706] in a single notice[707] in UCP 600 makes it necessary to the status under the English and Jordanian legal orders of unequivocal communications of refusal that do not comply with the UCP

[705] Drafting Group, *Commentary on UCP 600: Article by Article Analysis*, (No. 680, ICC 2009) 72.
[706] Sub-article 16 (c) (i) UCP 600.
[707] Sub-article 16 (c) UCP 600.

specified formalities. As where, for instance, the bank provides a list of discrepancies and selects one of the available options in sub-article 16 (c) (iii) (c) as to the presented documents, so that the bank's refusal of the presentation could be implied into the communication, but the communication itself – without such implication - does not contain the required statement of refusal.

4.5.5 **Formality over substance.** The scheme of UCP 600 intends to promote formality over substance. So even where the communication, such as the one in the previous paragraph, clearly conveys by implication the position and the intention that the communication is an unequivocal refusal notice, the fact that the statement of refusal is not expressed renders the communication as an equivocal refusal note. The bank must transmit a statement of refusal as part of the single refusal notice to be submitted with reasonable promptness after the bank has arrived at a determination to refuse,[708] and in any event within the period of five banking days.[709] Of course equivocal prior communications will not constrain the bank's liberties to subsequently submit a valid refusal notice within the permitted timescale.

4.5.6 Nevertheless, any prior unequivocal communication of refusal not in compliance with the required formalities might do so: since that prior unequivocal communication of refusal would constitute the single refusal notice and its non-compliance with the required formalities might trigger the preclusion rule. The purpose as to the articulation of the new requirement of a statement of refusal is to introduce a formality[710] in order to promote commonality, in that banks would use standard forms of refusal that clearly express the intention of refusal. Such a scheme aims to achieve certainty in order to reduce disputes as to the status of refusal. But such a formality does not intend to have the effect of a mere advice. It intends to have the

[708] Below para 4.6.23.
[709] Sub-article 16 (d) & sub-article 14 (b) UCP 600.
[710] Byrne, *The Comparison of UCP 600 & UCP 500*, (2007), 147.

function of determinative rule that has a high "formal realisability" as the consequences of disobeying such a formality is materialised by the "preclusion rule" in sub-article 16 (f) of UCP 600. Therefore the question is whether this new formality of stating that the bank refuses to honour or negotiate would be responsive to fundamental doctrines or effectively enforced under English and Jordanian legal orders.

4.5.7 English and Jordanian laws. A communication which clearly conveys by implication the position and the intention that the communication is an unequivocal refusal note, would simply amount an unequivocal refusal note,[711] the intention of refusal being implied where the recipient, acting reasonably, would have understood the communication as being a statement of unequivocal and unconditional refusal. Such was the conclusion of the Court of Appeal, under UCP 500, in *The Royan*,[712] where the communicated statement of refusal was in the following terms: "*please consider these documents at your disposal until we receive our principal's instructions concerning the discrepancies mentioned in your schedules".* English and Jordanian judges generally seek to avoid attributing to the parties an intention (e.g. one of non-refusal) which they plainly could not have had.[713] Clearly, unless the communicated intention is entirely disregarded, a statement of refusal could not be considered equivocal simply because of the absence of an express refusal statement.

4.5.8 Empirical findings and evaluation. However, it was revealed in the interviews that a reasonable banker who has expertise in documentary credits expects that a

[711] *China National Foreign Trade Transportation Corp v Evlogia Shipping SA of Panama* [1979] 1 W.L.R. 1018.
[712] *Co-operative Central Raffeisen-Boerenleebank BA v Sumitomo Bank Ltd (The Royan)* [1988] 2 Lloyd's Rep 250; *Banker's Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 where the notice was invalid for being a conditional.
[713] An approach encapsulated in the statement by Lord Diplock in *Antaios Compania Naviera S.A. v Salen Rederierna A.B* [1985] AC 191 , 201*: "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense*"; article 239 Civil Code (1976): "*where the phrase or expression of the contract is clear, such phrase should not be manoeuvred by interpreting it in a way seeking to know the intention of the parties";* article 214 Civil Code (1976): "1) *The consideration of interpreting contracts is to the purposes and meanings and not to the words and phrases; 2) the default position is that words convey the fact for it is not allowed to suppose that a word convey a metaphor unless its true meaning cannot be conveyed*".

communication clearly conveying an implication of refusal would be perceived by bankers as a valid unequivocal refusal note. [714] Muhammad Burjaq stated:

"Where the content clearly conveys the meaning of refusal it will be regarded as a refusal notice and it makes no sense that the notice must in this situation spell out the statements that 'the bank refuses the documents' or 'refusal notice'".[715]

The interviewed bankers opined that it is unreasonable to expect otherwise.[716] If it were to be assumed that such an opinion reflects the views of the international business community of bankers and beneficiaries more accurately than the apparent meaning of UCP Article 16, the formality of the statement of refusal might then be considered as repugnant to the very fundamental doctrine or legal communication under English and Jordanian laws: that the task of interpreting contractual terms is to reflect the intention of the parties.[717]

[714] Annex I, para 37.
[715] Annex I, para 37.
[716] Annex I, para 37.
[717] Chapter 2, para 2.3.17 -22.

CONCLUSION

4.6.1 It is beneficial to international trade that UCP 600 and its interpretative aids have greatly enhanced the "formal realisability" of the general rule of "material alignment" through the form of detailed particular rules that are tailored to various distinctive common situations as elucidated in this chapter under the section of applications for the general rule of "material alignment". Such certainty reflects the needs of documentary credit parties, particularly the need of banks for manageable examination and the needs of sellers and banks for assurance of payments and reimbursement respectively. One of the core inferences that can be abstracted from these particular rules is that in the case of their absence the means of flexibility must operate in order to reflect the need of banks for manageable examination in the sense of giving effect to a reasonable banker's prudent objective judgement as structured by the "material alignment" test. Therefore if an apparent conflict most probably appears, pursuant to the principle of appearance, to be in material alignment then a mere conflict must not justify a refusal even if it might in fact be a material conflict (e.g. misspelling errors, lack of non-contextual data). This of course serves the need of sellers for manageable presentation and it is clear in the UCP that the bank must take a positive role in its ministerial role in the determination of conformity by for instance working out the mathematical calculation of the total amount of the quantity of goods.

4.6.2 No doubt the particular rules of conformity under UCP 600 generally serve the need of banks for manageable examination. However, the dilemma of non-documentary terms has been handled in UCP 600, by the use of the tool of communication that has a clear formality ordering banks to ignore non-documentary terms in order to achieve the means of certainty which aims to reflect the needs for manageable examination and presentation, without being responsive to "freedom to contract" which is a fundamental common doctrine across legal orders. That results in

uncertainty. Although the UCP 600 scheme might erase the bad practice of expressing non-documentary terms as highlighted in the empirical findings, its enforceability is however questionable under the English and Jordanian legal orders leading to the non-materialisation of the need for manageable examination. Still, as indicated by the empirical study such a UCP scheme does not reflect the need of buyers for documentary assurance as to the shipment of the required goods. It is, nevertheless, a welcome change that sub-article 4(b) of UCP 600 and the preliminary considerations of ISBP 2013 indicate that the issuing bank is under a duty to advise the applicant as to the consequences of the documentary credit terms, because this assists buyers on expressing the credit terms in a clear way that ensures the protection of their prominent needs.

4.6.3 Given the high rate of rejected presentations in documentary credits under the UCP 500 regime, it is to be expected that the need of sellers for manageable presentation - in order to achieve the dominant need for sellers of assurance of payment - is the prominent factor triggering many changes as to the rules of conformity under UCP 600. Strikingly, the most successful tool fulfilling the need for manageable presentation is the responsiveness to the general practices and understandings adopted by the documentary credit parties or by actors in the industries directly relevant to documentary credits and accepted by the parties, because such practices are evidence that one or more of the needs of the documentary credit parties are fulfilled without the other partys' needs being undermined. Sub-article 14 (j) of UCP 600 is illustrative of this whereby it reflects the practice, as confirmed by the empirical findings, of confining the interpretation as to the required details of the addresses of beneficiaries and applicants to the name of the country, and such an interpretation does not apply to the transport documents due to the need for proof of shipment. The flexibility in accepting different languages as expressed in A21 of ISBP 2013, particularly for drafts as expressed in a new ICC Opinion, and the acceptance of the reference to dating a presented document in other presented

documents are also some of the main successful examples that are responsive to common practices facilitating justified manageable presentation. A strong example, illustrating how the responsiveness to practices reflects the dominant need of buyers for proof of insurance coverage, is the introduction of paragraph K10 (c) of ISBP 2013, whereby the interpretation is driven from the general understanding of insurance companies as to the statement of *"coverage has been effected from warehouse- to – warehouse"* confirming that such a statement does not necessarily backdate the commencement of cover.

4.6.4 However, the keenness to facilitate manageable presentation is excessive under UCP 600 and that could result in uncertainty for particular situations under English and Jordanian laws. Thus the introduction of sub-article 28 (h) (i) of UCP 600 and K17 of ISBP 2013 postulating that a reference to an insurance exclusion clause is permissible in an insurance document even where the credit clearly stipulates each risk that the insurance document must cover, might conflict with the parties' contemplation as to the extent of coverage and potentially conflict with the dominant doctrines of the English and Jordanian legal orders. Hence although such a UCP 600 proposition is responsive to the common practice of implying institute cargo clause exclusions, there is a lack of clarity as to the type of exclusion clauses that are expected to operate. Another, and implausible, proposition is the emphasis in the designated articles for transport documents (articles 20-24) disregarding express documentary credit term that prohibits transhipment of goods. Such a position is responsive to the common practice of transhipment of goods in the sea, road and air transportations. Yet, it is clear that such a scheme lacks responsiveness to the transnational legal doctrine of "freedom to contract". Here the repugnancy to such a fundamental legal doctrine is intolerable, since the UCP scheme does not merely attempt to interpret a documentary credit's term, as in the above situation for insurance documents, rather the scheme attempts to dismiss the intention of the parties by totally invalidating an expressed term. Indeed, the empirical findings

clarify that many banks in Jordan exclude such a UCP 600 scheme in their standard form of documentary credits, and the interviewed bankers indicate that the scheme does not reflect the dominant need of buyers for proof of shipment, and this also affects the dominant need of banks for assurance of reimbursement.

4.6.5 Hence, the responsiveness to trade practices is part of a mosaic scene in the sense that it is an effective means only when it operates cooperatively with other means, particularly the responsiveness to the fundamental doctrines of legal orders, in order to reflect the balance of the needs of the parties to documentary credits. An ironic example is the welcome provisions of E12 and G9 in ISBP 2013 that require the ascertainment of the name of the actual port of discharge in bills of lading and not in charter-party bills of lading. However, the responsiveness to legal orders comprises a non-repugnancy to the fundamental legal doctrines transnationally shared across legal orders. Thus the fact that the UCP rules of *de minimis* in documentary credits are contrary to those of English law (i.e. the concept of *de minimis* in documentary credits is rejected under English law on the basis of the principle of strict compliance) does not affect the viability of such UCP rules. Here English law is rigid and lacks the responsiveness to peripheral trade usage in documentary credits and the social norm of *de minimis* in documentary credits.

4.6.6 The particular rules for commercial invoice, insurance documents and transport documents have a high degree of "formal realisability" and they are reflective of the dominant needs of buyers for a documentary assurance of proof of goods, shipment and insurance. The structure and precision of UCP 600 language aided by ISBP 2013 have fostered the clarity of the UCP. An example is article 20 (a) (ii) and (iii) of UCP 600 that deals with bills of lading. It has been rephrased in a clear way by, for instance, omitting the words "loaded on board" in order to protect the buyer's need for proof of shipment from the port of loading to the port of discharge. A further example is the introduction of paragraph K4 in ISBP 2013 clarifying how the

identification of insurance companies is to be indicated in the insurance documents that are signed by an agent. However, a few provisions in UCP 600 particularly those relating to newly expressed propositions in UCP 600 need further comprehensible clarity. An example is the lack of clarity in sub-article 14 (j) as to the applicable test for conformity to the addresses of the applicant where he is the consignee of the goods in the transport documents.

4.6.7 In order to avoid confusions in respect of the unequivocal communication of the intention of the bank as to the refusal of documents article 16 of UCP 600 adopts the means of certainty through the imposing of formalities to which the parties must adhere. The new options in refusal notice that are introduced by article 16 foster clarity, in addition to being responsive to the practices, leading to a high degree of "formal realisability". However, the insistence on formalities should not be at the cost of substance. So the introduction of the formality of the statement that "the bank refuses the documents" in sub-article 16 (c) (i), would lead to uncertainty under the English and Jordanian legal orders in the situations where a refusal notice which does not comprise the above statement is nonetheless a clear communication of the intention of the bank to refuse documents. Here such a communicated intention should not be ineffective simply for the lack of an unmerited formality, as the substance would prevail under English and Jordanian laws.

CHAPTER 5: AUTONOMY AND EXCEPTIONS

GENERAL VIEW

5.1.1 The embedded trade usage of autonomy is one of the main functional elements in the substance of a documentary credit transaction, as was postulated in the conceptual model in chapter 1. For effective terms regulating documentary credits, one must prudently analyse the elements of the embedded usage of autonomy in order to reflect the functions of such usage that convey the accepted needs of the parties to documentary credits. This also assists how each element of the embedded usage of autonomy must be responsive to overriding mandatory norms (i.e. a prohibition by a national parliament of certain activities: the norm of the parliamentary sovereignty has a very high hierarchical status in the structure of many Municipal legal order)[718] under legal orders. Still, a comprehensive formula of the embedded usage of autonomy provided by clear terms assists courts and other submitted actors to rationalise the extent of the operation of such usage under the relevant Municipal legal orders. It is well known under the English and Jordanian legal orders that fraud is an exception to the operation of the norm (embedded usage) of autonomy in documentary credits, but the type and the scope of fraud that is, and ought to be, recognised as an exception to the autonomy norm can only be determined once the elements of the embedded usage of autonomy are distilled. The current scholarly discourse in the law of documentary credits does not analytically address such elements. The enforceability of documentary credits may also be undermined by concepts of illegality even though illegality is not so readily recognised as an exception to the autonomy norm and so concepts of illegality can give rise to similar issues to those thrown up by fraud.

5.1.2 The first part of this chapter analyses therefore the elements of the embedded usage of autonomy and evaluates from the standpoint of the conceptual model (on the

[718] Carter, *The Role of Public Policy in English Private International Law*, [1993] ICLQ, 42, 1 Jan 1-10; *Kuwait Airways Corp v Iraqi Airways Co* (No.6) [2002] 2 A.C. 883.

basis that these elements of autonomy must be conveyed using the means developed in the conceptual model) how effectively the interests of autonomy are served (in the context of English and Jordanian laws) by the designated content of UCP 600. Given observed deficiencies in the effectiveness of the autonomy norm in the context of UCP 600, this chapter then moves on to address how the interests of autonomy might be better served in the future.

5.1.3 Given that the bank must decide on the conformity of the presented documents within a short period of time that is five banking days under UCP 600,[719] and it must thus either honour (pay or negotiate) or refuse to honour the credit within such a period, it is within that time period that the norm of autonomy might be infringed by a refusal to honour on basis other than that of an apparent non-conformity of documents. It is, accordingly, almost always that the exceptions of fraud and illegality operate at the pre-trial or interim stage, when the full facts are unknown. Therefore, when one deals with fraud and illegality exceptions it is essential to determine: (1) the grounds at full trial that would justify the bank's refusal to honour the credit within the short period in which the bank must take its honour or refusal decision; (2) the grounds that would justify at full trial a bank's or an applicant's refusal (within the due period for reimbursement) to reimburse the negotiating, confirming or issuing bank (as the case may be) who paid the credit and (3) the grounds at a pre-trial, or interlocutory, stage that would justify a court granting interlocutory injunctions either prohibiting a bank from making a payment or a beneficiary from drawing on the credit. The second part of the chapter postulates - on the basis of rational deduction - what is, and ought to be, the legal positions of the English and Jordanian legal orders as to fraud in documentary credits. The third part deals with the similar issue arising in connection with illegality, which is generally considered an unruly area.[720] The task is how to regulate illegality as an

[719] Article 14 UCP 600.
[720] Burroughs J stated in *Richardson v Mellish* (1824) 2 Bing 229, 252 that public policy is "a very unruly horse, and when once you get astride it you never know where it will carry you".

exception to the embedded usage of autonomy in a way that both serves an appropriately narrow application of such exception and tackles the justifiable public policy concern of the misuse of documentary credits for illegal purposes. Finally, the chapter evaluates whether the UCP should maintain its present silence on the fraud and illegality issues whilst witnessing the potential rise of the disorderly evolution of these exceptions to the embedded usage of autonomy under Municipal legal orders? In this context it is argued that the UCP should, before it is too late to do so, endeavour to nudge legal orders towards appropriate outcomes by utilising the means of communication.

ELEMENTS OF THE EMBEDDED USAGE OF AUTONOMY

5.2.1 As proposed in the conceptual model, the autonomy usage serves the function of ensuring that the payment offered by a third party is independent from the underlying contracts and that the documents are presumed to truly represent the underlying facts. Being independent from the underlying contracts, such a function in the usage of autonomy protects the needs of sellers for an assurance of payment and banks for an assurance of reimbursement. The function that the payment is not subject to the examination of the underlying facts, but merely to the appearance of the presented documents, protects the needs of banks for manageable examination and speed and of course the need of sellers for secure and speedy payment.

5.2.2 **The principle of independence.** The commercial reality is that documentary credits are usually opened for the purpose of discharging the buyer's payment obligation, even if they might occasionally be opened for other reasons.[721] Thus, generally speaking, the underlying supply contract is the cause of a documentary credit. Accordingly, the applicant usually enters into a documentary credit contract with the issuing bank to discharge its payment obligation with the seller under the underlying contract. Making a profit is the main cause for an issuing bank to enter into the credit contract. The credit contract is the cause of the unilateral binding offer or undertaking that is made by the issuing bank to honour the credit when the beneficiary presents conforming documents. Similarly, the cause of the undertaking unilateral binding offer by the confirming bank to honour the credit is the contract between the issuing bank and the confirming bank. Yet, the reality of the interconnection of these relationships is replaced by the "fiction of independence", which gives rise to the first element of the embedded usage of autonomy, namely, the principle of independence.

[721] For instance to facilitate finance as in *GKN Contractors Ltd v Lloyd's Bank Plc* (1985) 30 B.L.R. 48.

5.2.3 Independence and the needs of parties. Pursuant to the independence principle, each relationship is treated as independent from the other relationships. The principle of independence constitutes two hands. The right hand provides that the documentary credit is to be treated as separate and independent of the underlying contract that generates the documentary credit. The left hand provides that the operative contracts (i.e. contracts between issuing bank and applicant, issuing bank and beneficiary, issuing bank and advising/confirming bank, confirming bank and beneficiary) in the documentary credit are themselves independent from one another. The norms of autonomy, conformity and irrevocability collectively function as a median compromising the contented security's needs of the parties (compromise of the security of payment for sellers and banks with the security of shipment of the required goods for buyers). More specifically, the norm of autonomy reflects the policy that documentary credits are supposed to be a means of security for sellers and banks, as it maintains the mechanism of documentary letters of credit being an independent facility of payment and finance. Thus sellers are assured that the banks' undertaking to honour the credit is not influenced by the other relevant relationships, particularly where some of these relationships are invalid. So, banks are not permitted to be influenced by the applicant in the honouring of the credit. It is accordingly said that documentary credits are meant to be cash for sellers,[722] even though the cash is conditional on a conforming presentation. Such a condition is meant to provide buyers with a sort of security, in that the payment is not made unless the beneficiary presents documents evidencing the shipment of the goods and the other requirements stipulated in the credit. Banks, therefore, are not entitled to reimbursement where they make payment against non-conforming documents.[723] Pursuant to the principle of independence, banks are assured that their right to reimbursement, whilst conditional upon them only honouring conforming documents,

[722] *Intraco Ltd v Notis Shipping Corp of Liberia (The Bhoja Trader)* [1981] 2 Lloyd's Rep 256; [1981] Com. L.R. 184, [9] per Donaldson L.J.
[723] Chapter 3.

is not to be infringed by any other contractual relationships such as the relationship between the applicant and the beneficiary.

5.2.4 Appearance and the needs of parties. As banks are facilitators and guarantors of payments, their role is a ministerial one in checking the conformity of documents.[724] Given the need for speed in documentary credits (and the need for manageable presentation, given that banks are not part of – or expert - the underlying transaction),[725] it is a normative presumption that the facts are truly represented by the presented documents. This entails the protection of banks where it turns out that the accepted documents actually lack authenticity or are not genuine.[726] In addition, the normative force of autonomy generates the presumption that banks are not entitled to examine the actual facts represented by the documents. This serves the underlying aim of documentary credits as being a secure means of payment and settlement. Both the presumption that documents suffice on their face to evidence the actual facts, and the position that banks are not entitled to examine the actual facts, give rise - and constitute - the "principle of appearance".

5.2.5 High degree of formal realisability. The autonomy fiction and the appearance normative presumption take the form of principles as they directly represent the substantive objective of documentary credits as described.[727] However, the appearance principle also takes the form of a general rule when it operates with the principle of conformity.[728] Both the autonomy fiction and the appearance principle have high degree of "formal realisability".[729] This is due to the fact that the autonomy

[724] As suggested by the appellate in *Kredietbank Antwerp v Midland Bank plc* [1999] Lloyd's Rep 219, 223; chapter 3, para 3.2.1.
[725] The needs of the parties in documentary credits are elucidated in the evaluative standpoint: chapter 1, para 1.1.32.
[726] As expressed in article 34 UCP 600.
[727] For types of form: Kennedy, *Form and Substance in Private Law Adjudication,* [1976] 89 Harvard Law Review 1685, 1686.
[728] Chapter 3, para 3.4.9.
[729] For the definition of this Kennedian's concept: chapter 1, para 1.1.6; Kennedy, *Form and Substance in Private Law Adjudication,* [1976] 89 Harvard Law Review 1685, 1688.

and appearance concepts are, unlike conformity, not elastic concepts in society, [730] since they are not directly encountered with contested needs of the parties so they are not by themselves meant to bridge between opposing functions. The autonomy fiction is a conjunction concept, in that it requires the combinations of two conditions being the right and left hands of autonomy as explained above. The appearance normative presumption is a simple concept, in that it constitutes one condition or element which is elucidated above. Thus these concepts have very clear boundaries and each case unambiguously falls within or outside these concepts.[731]

5.2.6 Not absolute principles. As we will notice under the headings of fraud and illegality the principles of autonomy and appearance would not be enforced under the English and Jordanian legal orders where there is fraud or illegality. Fraud is a well-established exception to the principle of appearance under English and Jordanian laws. It is also submitted in this chapter that illegality would permit the laying aside of the principle of autonomy. The autonomous nature of documentary credits manifests the protection of their underlying aim of being secure methods of payment and finance.[732] In this spirit, thrombosis will occur in the financial system if courts intervene in the autonomous nature of these established mercantile methods of payment.[733]

5.2.7 Demand bonds. Documentary credits and demand bonds share the nature of being autonomous methods of payment. They are treated alike in respect of the autonomy principle in the context of fraud and illegality. However, the role of documents in demand bonds is in fact far less important than in documentary credits, as in most

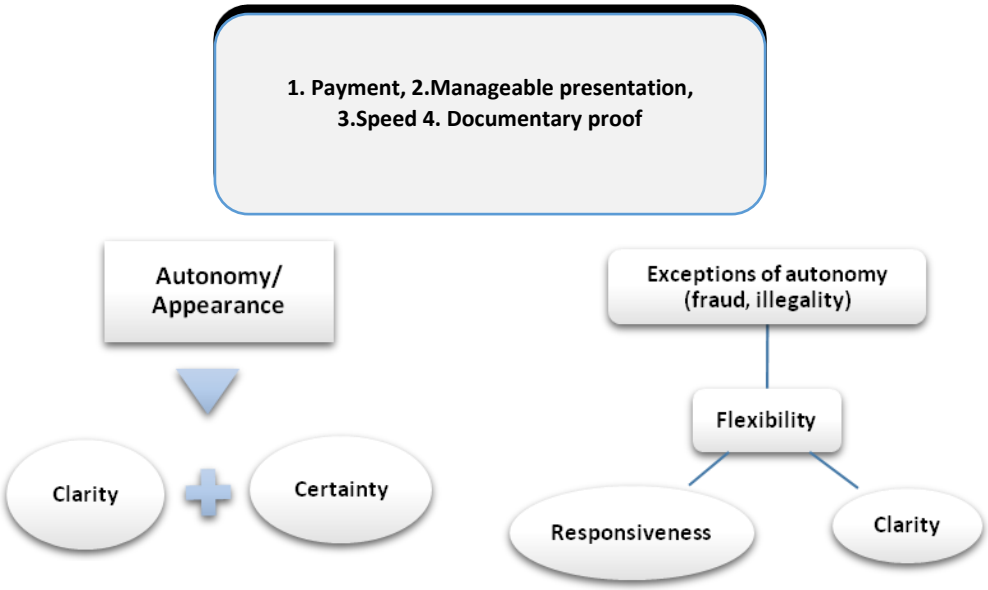
[730] For the elastic nature of conformity: chapter 3, para 3.2.1.
[731] 6 and Bellamy, *Principles of Methodologies,* (1st edn, Sage 2012), 138-139.
[732] *Intraco Ltd v Notis Shipping Corp of Liberia (The Bhoja Trader)* [1981] 2 Lloyd's Rep 256; [1981] Com. Lloyd's Rep 184, [10].
[733] *Intraco Ltd v Notis Shipping Corp of Liberia (The Bhoja Trader)* [1981] 2 Lloyd's Rep 256; [1981] Com. Lloyd's Rep 184, [10] per Donaldson LJ.

cases demand bonds merely require a written demand from the beneficiary in order to trigger the payment.[734]

5.2.8 Needs and means in the conceptual model. As in other chapters in this thesis, the conceptual model that was set out in chapter 1 applies to the principles of autonomy and appearance in this chapter. The needs of the documentary credit parties under the principles of independence and appearance (embedded usage of autonomy) can be listed in descending order of importance as: (1) the need of sellers for an assurance of payment; (2) the need of banks for an assurance of reimbursement; (3) the need of sellers for manageable presentation; (4) the need of banks for manageable examination; (5) the need of sellers, buyers and banks for speed; and (6) the need of buyers for a documentary proof of performance by sellers of the underlying contract in compliance with the terms of the credit. Of course, to maintain a high degree of the "formal realisability" for these principles the means of certainty that is reflective to the above needs is required. Since, however, the independence and appearance principles are not absolute, by being subject to exceptions, under legal orders, the means of flexibility is also required. Here the means of responsiveness to the common fundamental doctrines among legal orders that are relevant to such principles is the key to promulgating successful rules that are capable of being adopted and applied by various legal orders. Still, to influence social actors and legal orders, one must use the means of communication. Clarity is an essential means assisting the uniformity in the interpretation of the substance of documentary credits and the realisation of all other means. The diagram below illustrates how the means in the conceptual model should together function to effectively regulate the principles of independence and appearance in the embedded usage of autonomy.

[734] Elinger and Neo, *The Law and Practice of Documentary Credit*, (1st edn, Hart 2010), 143.

Diagram 9: The Prominent Needs and Means for Regulating Autonomy and Appearance



Independence And Appearance Principles Under the UCP

5.2.9 The principles of independence and appearance are spelled out in UCP 600. Article 4 of UCP 600 articulates the principle of independence as follows:

"A. A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.

A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank.

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

Sub-article 4 (a) of UCP 600 is the equivalent to article 3 of UCP 500, there are no changes in sub-article 4(a) except a linguistic change. The equivalent to sub-article 4 (b) of UCP 600 is sub-article 5 (a) (i) under UCP 500. There is a change in the language of sub article 4 (b) to make explicit the duty of the issuing bank to discourage the applicant from including the underlying contract in the credit. This might convey a substantive change under legal orders by creating a duty of care for bank to advice as explained below.

RIGHT HAND OF INDEPENDENCE

5.2.10 The right hand of the independence principle (i.e. the credit is independent from the underlying contracts) is clearly laid down in sub-article 4 (a) of UCP 600 and generates the main proposition that the bank's undertaking to the beneficiary is not subject to claims or defences arising under the underlying contract, even where a reference is made to such a contract in the credit. It is submitted that under English and Jordanian laws a mere reference to the underlying contract would be ignored, because sub-article 4 (a) has a paramount status as reflecting the embedded trade usage of autonomy. This *lex mercatoria* of documentary credits is enforceable unless there is an express term to clearly exclude the applicability of such embedded usage.[735]

5.2.11 **High protection**. Sub-article 4 (b) goes on to protect the right hand of independence. It thus endeavours to impose a duty on the issuing bank to discourage

[735] See the discussion of non-documentary conditions: chapter 4, paras 4.3.11.

any attempt to include copies of the underlying contract, performa invoice and the like into the credit. This is not to say that an issuing bank is now under a legal obligation to refuse the inclusion of such documents into the credit. Indeed, the UCP are incapable of imposing such an obligation due to the fact that the UCP terms are not mandatory law. Accordingly, the parties can contract out of them even if a UCP term has the force of law.[736] Indeed UCP 600 provides that the parties are free to exclude or modify any of its terms.[737] However, unlike sub-article 5 (a) (i) of UCP 500, it is clear now, pursuant to sub-article 4 (b) of UCP 600, that there is a duty upon the issuing bank to discourage the inclusion of any terms of the underlying contract into the credit notwithstanding a clear request by the applicant for such inclusion. Discouragement must mean more than the issuing bank simply informing the applicant that it should not incorporate the underlying contract, since otherwise such discouragement would not convey to the applicant – who usually has no expertise in documentary credits - the consequence of such an inclusion. It is thus submitted, that an effective discouragement must involve the issuing bank explaining the reasons "why" the underlying contract should not be included. Namely, because the terms of the underlying contract would be subject to being disregarded by other banks for being non-documentary terms pursuant to sub-article 14 (h) of UCP 600.[738] It follows that one consequence of the issuing bank having a duty under sub-article 4(b) to discourage any inclusion of the underlying contract is that, under English and Jordanian laws, the issuing bank would have a concomitant duty of care to advise the applicant of the consequences of the incorporation of the underlying contract. Should it fail to advise as to the effect of non-documentary conditions the issuing bank would be exposed to liability for breach of contract or in tort for negligence[739] depending upon the extent of the duty of care arising in the particular transaction. Sub-article 4 (b) is a welcome change in the UCP because it

[736] Chapter 2, paras 2.3.5-9.
[737] Article 1 UCP 600.
[738] Chapter 4, para 4.3.21.
[739] For contractual and tortious liability: *Henderson v Merrett Syndicates Ltd* [1995] 2 AC145.

not only reflects the need of buyers for documentary proof, but it is also responsive to the legal doctrine of duty of care arising under the English and Jordanian legal orders. It is hoped, however, that a future iteration of the UCP would be clearer in expressing that the duty of discouragement extends to the advising of consequences.

LEFT HAND OF INDEPNDENCE

5.2.12 Conversely, the left hand of the independence principle has not been clearly tackled in the second part of sub-article 4 (a) of UCP 600 which merely states "*a beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank*". Despite the contractual relationship between the beneficiary and the applicant being rendered independent, pursuant to the first part of sub-article 4 (a), article 4 does not necessarily, as a matter of textual interpretation, bar the issuing bank from availing itself of the contractual relationships between itself and the beneficiary, the confirming bank and the beneficiary or even between the first beneficiary and the second beneficiary in the transferred credits. This generates the possibility that an issuing bank might, in honouring or negotiating the credit, seek to avail itself of its contractual relationship with the applicant and argue, for instance, that it can rely on its documentary credit contract with the applicant to correct an error in the advised credit without the agreement of the beneficiary or that the illegality of the contract with the applicant taints the issuing bank's contract with the beneficiary. Unlike English law,[740] there is no clear provision in UCP 600 expressly confirming that each contract in the operative documentary credit contracts are each independent from one another.

APPEARANCE

5.2.13 The principle of appearance is articulated separately under the heading of documents v. goods in article 5 which provides "*banks deal with documents and not with goods,*

[740] Below para 5.2.14.

services or performance to which the documents may relate". This is to say that banks are not entitled to check the actual facts represented by the documents. This prohibitory principle is effective where it operates as a general rule in the determination of conformity. Thus sub-article 14 (a) of UCP 600 provides that the bank must examine the documents "*on their face*". The result of this position is that the bank is not entitled (i.e. would be liable to the beneficiary for wrongful refusal) to refuse documents that on their appearance are in conformity, by reason only that the actual facts are not actually in conformity. The bank is not entitled to investigate the actual facts.[741] This, however, must be subject to the honesty of the beneficiary and therefore under English and Jordanian laws in the case of documentary fraud the bank is entitled to require documents that are actually in conformity with the actual facts.[742] Article 5 now replaces the phrase "*all parties*" (which was contained in article 4 of UCP 500) by "*banks*". This is a welcome change as it reflects the fact that an applicant as a buyer and a beneficiary as a supplier deal not only with documents, but they also deal with goods or services. As a consequence of the appearance principle, the bank is not liable for any want of authenticity in the documents as expressed in detail by article 34 of UCP 600.

Independence And Appearance Under English Law

5.2.14 Lord Diplock eloquently formulated the principle of independence in *United City Merchants (Investments) Ltd v Royal Bank of Canada,*[743] as follows:

"It is trite law that there are four autonomous though interconnected contractual relationships involved. (1) The underlying contract for the sale of goods, to which the only parties are the buyer and the seller; (2) the contract between the buyer and

[741] *Collected Opinions 1995-2001*, R.405: banks should not investigate the authority under which a specific document was issued; *Westpac Banking Corpn v South Carolina National Bank* [1986] 1 Lloyd's Rep 311, 315.
[742] Below para 5.3.30.
[743] [1983] 1 AC 168, 182, 183.

the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to or to the order of the seller ... ; (3) if payment is to be made through a confirming bank the contract between the issuing bank and the confirming bank authorising and requiring the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit; (4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents".

Of course, there is also a fifth contractual relationship between the issuing bank and the seller (beneficiary). This formula must have intended to address both the right hand and the left hand of the independence. The formula must have reflected the embedded trade usage of autonomy in a clearer way by expressly stating that the operative contracts are independent from one another and independent from the underlying contract. Lord Diplock also addressed the appearance principle:

"Again, it is trite law that in contract (4), with which alone the instant appeal is directly concerned, the parties to it, the seller and the confirming bank, "deal in documents and not in goods," as article 8 of the Uniform Customs puts it".

5.2.15 It is well established under English law that the bank is not entitled to examine the underlying facts,[744] goods[745] or the relevant contracts.[746] Lord Diplock went on to

[744] *Westpac Banking Corp v South Carolina National Bank* [1986] 1 Lloyd's Rep 311, 315 per Goff L.J.; *Forestal Mimosa Ltd v Original Credit Ltd [1986]* 1 Lloyd's Rep 329, 334; *Basse and Selve v Bank of Australia* (1904) 90 LT 618, 20 TLR 431.
[745] *Guaranty Trust Co of New York v Van den Berghs Ltd* (1925) 22 Lloyd's Rep 446, 454 per Scrutton L.J; *Biddell Bros v E Clemens Horst Co* [1911] 1 K.B. 934, 958 per Kennedy L.J.
[746] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, 183; *Credit Industriel et Commercial v China Merchants Bank* [2002] C.L.C. 1263, [30].

elucidate the underlying aim of the independence and appearance principles in documentary credits, he stated:

"The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment".

Thus English law accepts that the principles of independence and appearance represent the substantive objective of documentary credits and that the application of these principles needs to be responsive to the underlying security aim of documentary credits.

Independence And Appearance Under Jordanian Law

5.2.16 The right hand of the principle of independence is well established under Jordanian law,[747] but the position of the left hand has not arisen before the Jordanian courts. It is submitted that the lacunae in UCP 600 as to the left hand of the independence principle (whereby each contract is independent from one another) should also be considered embedded trade usage under Jordanian law.[748] Indeed, the empirical findings indicate that judges in Jordan recognise the left hand of autonomy as an essential part of documentary credits, as Judge B stated, *"it is the fundamental structure of documentary credits that each contract is independent from one another".*[749]

[747] Court of Distinction (Civil), *1050/2006,* Adalah Programme.
[748] Chapter 2, para 2.2.22.
[749] Annex I, para 44.

5.2.17 The principle of appearance has not been articulated by the Court of Distinction. It is submitted that the appearance principle would be applied by Jordanian courts even where the documentary credit is not subject to the UCP. This is due to the fact that this principle operates as a part of the embedded trade usage of autonomy and, as a general rule under the principle of conformity, as a matter of trade usage in Jordan which is consistently applied as indicated by the empirical findings.[750] For example, Koloud Alkalaldeh stated *"we examine the appearance of documents in accordance with the DC terms.* What is recognised by custom is considered as a contractual condition under Jordanian law.[751]

[750] Annex I: as indicated by bankers para 24; as indicated by traders para 25.
[751] Articles 224 and 225 Jordanian Civil Code 1976.

FRAUD

General view

5.3.1 As analysed above, the principle of independence is a normative fiction and the principle of appearance is a normative presumption that are both founded by, and constitute, the embedded trade usage of autonomy. But fraud challenges the effectiveness, or the application, of these principles. The performance of documentary credits is manifested when issuing or confirming banks fulfil their autonomous undertaking of honouring the credit. The issuing bank, the confirming bank and the applicant might wish to avoid the trap of fraud by refusing or restraining others from the honouring or the reimbursement of the credit where fraud is suspected. In most cases, fraud occurs in documentary credits where the tendered documents appear on their face to conform to the terms of the credit, but in fact misrepresent the actual facts, or alternatively they are fully or partly forged. Fraud is a well-established exception to the embedded trade usage of autonomy both under the English[752] and Jordanian[753] legal orders. A distinction must be drawn between fraud in the credit contract between the issuing or confirming bank and the beneficiary, and fraud in the underlying contract (or in one of the operative contracts) in the documentary credit between other parties. Thus it is submitted in this thesis that fraud is actually a well-known exception to the presumption of appearance, which constitutes part of the embedded trade usage of autonomy, and

[752] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 Q.B. 159, 172-173; *European Asian Bank AG v Punjab & Sind Bank (No.2)* [1983] 1 W.L.R. 642, 658; *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 Llyod's Rep 251; *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554, 561; *GKN Contractors Ltd v Lloyds Bank Plc* (1985) 30 B.L.R. 48, 63; *Themehelp Ltd v West* [1996] Q.B. 84; *Group Josi Re v Walbrook Insurance Co* [1996] 1 W.L.R. 1152, 1161; *Turkiye Is Bankasi AS v Bank of China* [1998] 1 Lloyd's Rep 250, 253; *Safa Ltd v Banque du Caire* [2000] 2 All E.R. (Comm) 567; [2000] 2 Lloyd's Rep 600; *Solo Industries UK Ltd v Canara Bank* [2001] EWCA Civ 1041; [2001] 1 W.L.R. 1800; *Consolidated Oil Ltd v American Express Bank Ltd* [2002] C.L.C. 488, 495; *Banque Saudi Fransi v Lear Siegler Services Inc* [2007] 2 Lloyd's Rep 47; *Enka Insaat Ve Sanayi AS v Banca Popolare dell'Alto Adige SpA* [2009] EWHC 2410 (Comm); [2009] C.I.L.L. 2777; *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] Q.B. 146, 155-156; *Discount Records Ltd v Barclays Bank Ltd* [1975] 1 W.L.R. 315; *Tukan Timber Ltd v Barclays Bank Plc* [1987] 1 Lloyd's Rep 171, 174; *Society of Lloyd's v Canadian Imperial Bank of Commerce* [1993] 1 Lloyd's Rep 251,256; *Kvaerner John Brown Ltd v Midland Bank Plc* [1998] C.L.C. 446; *Credit Agricole Indosuez v Generale Bank* (No.1) [1999] 2 All E.R. (Comm) 1009, 1015; *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187, 191.

[753] Court of Distinction (Civil), *1215/2005*, Alkurtas programme.

not to the fiction or principle of independence under English and Jordanian laws. It is also postulated that the UCP Drafting Group should exercise their power of seduction by promulgating advisory guidance as to the fraud exception to encourage uniformity.

5.3.2 English law. The fraud exception to documentary credit transactions received authoritative iteration under English law in *United City Merchants (Investments) Ltd v Royal Bank of Canada.*[754] The bill of lading contained a fraudulent misstatement by one of the carrier's agents that the date 15th December was the shipment date when the goods were in fact shipped one day later. This was a material misstatement as the credit provided that the last date for shipment was to be 15th December. The confirming bank refused to pay on the ground that they had received information that shipment was not effected as it appeared in the bills of lading, but neither the sellers (original beneficiary) nor their transferee had any knowledge about the fraud at the time of the presentation of documents. The confirming bank was sued by the sellers and their transferee for wrongful refusal to pay. After elaborating on the nature of the norm of autonomy and the presumption of appearance Lord Diplock confirmed that fraud is a well-established exception to the norm of autonomy under English law stating:

"*To this general statement of principle as to the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue*".[755]

[754] [1983] AC 168.
[755] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168, 183.

5.3.3 This statement must convey the position that fraud in the issue or presentation of documents is an exception to the normative presumption of appearance and not to the fiction of independence in documentary credits. Thus later in the same judgment, in the course of rejecting the confirming bank's submission that a deliberate misstatement could operate as an exception to the principle of autonomy where it obscured the buyer's right to reject the goods, Lord Diplock stated:

"But this [submission] is to destroy the autonomy of the documentary credit which is its raison d'etre; it is to make the seller's right to payment by the confirming bank dependent upon the buyer's rights against the seller under the terms of the contract for the sale of goods, of which the confirming bank will have no knowledge".[756]

5.3.4 *Underlying policy.* The House of Lords held that the underlying policy of fraud is based on the maxim of *ex turpi causa non oritur actio*, translated to English as "no action arises from an unworthy cause", and therefore *"courts will not allow their process be used by a dishonest person to carry out fraud".*[757] The bank was accordingly held liable for refusal to pay, because the sellers and the transferee were not dishonest at the time of presentation.[758]

5.3.5 In a subsequent case Rix J sought to define the effect of fraud on documentary credits rather more rigorously than had the House of Lords, commenting in the following manner on the judgment of Lord Diplock:

"*When, therefore, Lord Diplock stated that the fraud exception was an application of the doctrine that "fraud unravels all", he was not, in my respectful opinion, speaking as broadly as might be thought. It would be less pithy but more accurate to fill out*

[756] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168, 185.
[757] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168, 183 per Lord Diplock.
[758] Below para 5.3.30.

the dictum by saying that fraud unravels the bank's obligation to act on the appearance of documents to be in accordance with a credit's requirements provided that the bank knows in time of the beneficiary's fraud".[759]

5.3.6 It does seem likely that Lord Diplock meant that the impact of a documentary fraud is that it unravels the bank's obligation to pay on the appearance of documents. On this interpretation fraud simply rebuts the presumption that the documents reflect the facts of the underlying transaction as the application of the appearance principle is conditional upon the honesty of the beneficiary, or the paying bank, at the time of payment.[760] Once the implied condition of honesty is breached the appearance principle is dissolved and the bank is entitled for documents that actually conform the represented facts. It is, however, clear from Lord Diplock's statement that the English law public policy concept of fraud, which applies to any type of fraud including non-documentary fraud, is that courts will not let a fraudster use their participation in a documentary credit transaction to carry out a fraud. Hence, the complicity of the beneficiary, or the entity who asserts rights based on a documentary credit (e.g. a paying bank), in the fraud is essential, in order to permit fraud impeaching the embedded usage of autonomy. The bank in *United City Merchants* was, therefore, held liable for refusal to pay, because the sellers and the transferee were not dishonest at the time of presentation.[761]

5.3.7 **Jordanian law.** Similarly authoritative treatment of the fraud exception under Jordanian law was given in *Exports and Imports Bank v Jordanian Ahli Bank*[762] where the beneficiary presented documents that appeared on their face to be in conformity. Prior to the date of payment the issuing bank discovered by perusal of inspection

[759] *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187, 203.
[760] In the context of demand bonds which is applicable to documentary fraud a statement by Lord Dinning in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 Q.B. 159, 171 suggests that a bank's duty to pay is conditional upon the honesty of the demand: cited with approval by Mance LJ in *Solo Industries UK Ltd v Canara Bank* [2001] EWCA Civ 104; [2001] 1 W.L.R. 1800, [10];
[761] Below para 5.3.30
[762] Court of Distinction (Civil), *1215/2005,* Alkurtas programme.

reports (issued both by the Governmental Institution of Iraqi Coordination and the Jordanian Royal Science Society) that the actual goods that had been shipped by the seller (i.e. the beneficiary) were sham goods. The issuing bank informed the other parties, whose precise role is unclear from the judgment, about the fraud and required them to restrain payment. However notwithstanding that notice, one of those banks honoured the documentary credit and was automatically reimbursed by the issuing bank under the interbank payment mechanism. The issuing bank sued the paying party to recover the amount reimbursed. It was held that banks are not entitled to make payment to the beneficiary when they clearly know that a fraud is being, or has been, committed by the beneficiary, or by others, with the knowledge of the beneficiary. Thus the confirming bank and the beneficiary were liable to the issuing bank for the amount of payment. The Court stated:

"The jurists and jurisdictions provide that there is a condition in order to regard documentary credits as a strong assurance for the beneficiary (seller) and that is the documentary credits are means of payment to an honest commercial transaction, namely, the behaviour of the seller should not be tainted by fraud... if the documents appeared to be in conformity but in fact they did not match the reality by the will or the knowledge of the beneficiary, then the bank is obliged to reject the documents. It is permitted for the bank to restrain from its obligatory promise if the contents of the documents do not confirm the actual fact and this was by the fraud of the seller or with his knowledge".

5.3.8 *Underlying policy.* The Court of Appeal and the First Instance Court provided that "*fraud unravels all"*, namely that it invalidates the contract of sale and extending to the relationship between the bank and the seller. Yet, it was held that one of the requirements to give fraud the power to infringe the autonomy principle is that the beneficiary must act fraudulently or must have knowledge of the fraud prior the presentation of documents. The case for treating fraud as an exception to the *norm*

of autonomy must be confined to the effect that fraud invalidates the relationship between the bank and the guilty beneficiary. Thus, the Court of Distinction, unlike the Court of Appeal and the First Instance Court, stated that fraud *"invalidates the relationship between the bank and the seller"*. It is submitted, the underlying policy for the fraud exception should not be based on the maxim *"fraud unravels all"*. Otherwise the innocent seller is caught by such a maxim. According to the principles of Sharia law,[763] it can be said that the *Hadeeth* (saying) of Prophet Muhammad to a seller that "*whoever commits a fraud is not one of us*"[764] applies as the policy on how to regulate the effects of fraud in civil litigation. This *Hadeeth* is parallel to the maxim of *ex turbi causa non-orito action,* namely that a person will not be able to pursue a cause of action arising from his own illegal act (e.g. the beneficiary who knowingly presents forged documents that appear on their face to be in conformity). The consequence of this analogy is that fraud would only operate to deter the guilty party. Fraud would not thus lead to the collapse of the whole transaction. Consequently, fraud would not vitiate all transactions as it is not based on the maxim of *"fraud unravels all"*.[765] Thus, the beneficiary who innocently presents forged documents is not prevented from enforcing its right for payment. The maxim of *"fraud unravels all"* does not originate in Sharia law, and it is irreconcilable with Sharia's approach that aims to achieve consistency and stability in transactions.[766]

Meaning Of Fraud

5.3.9 **English law.** The civil[767] and criminal frauds are the two main categories of fraud under English law. The Common law civil fraud is defined in *Derry v Peek*[768] as "*a*

[763] Article 2 Civil Code 1976.
[764] Narrated by Abul-Hussain Muslim son of Habaj son of al Nishapuri*, Sahih Muslim Book 10 Business Transactions.*
[765] Most Arabic scholars adopt the maxim "*fraus omnia corrumpit"* in dealing with fraud exception in documentary credits.
[766] Jordan Laws and Rules, *Memorandum of Clarification of Civil Code*, (1977), 23-24.
[767] *GKN Contractors Ltd v Lloyds Bank Plc* (1985) 30 B.L.R. 48, 63.
[768] (1889) 14 App. Cas. 337.

false representation has been made: (1) knowingly; or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false".[769] Thus dishonesty[770] is the fundamental element. It can be established by proving actual knowledge, including the reckless behaviour of a wilful shutting of eyes to a credible suspicion that a statement might be false. Under criminal fraud, in addition to the dishonesty element, there must be a dishonest motive.[771] Namely: the person who made the representation must have the intention to make a dishonest gain for himself, or to cause loss to another or to expose another to the risk of loss.[772] Fraud in civil litigation often occurs in the form of fraudulent misrepresentation, in that the false statement aims to induce the other contractual party to enter into the contract.[773]

5.3.10 Jordanian law. There are two types of civil fraud under Jordanian law. The first is fraud in the formation of the contract. It is known as delusion (تغرير). It is similar to the Common law concept of fraudulent misrepresentation. Delusion is categorised under the general heading of "defects of consent" in the Civil Code.[774] Article 143 of the Civil Code defines delusion by stating, *inter alia*:

"*Delusion is where one of the contracting parties deceives the other party by verbal or behavioural deceitful ways in order to induce that party to consent to enter into a contract that he would not have consented to enter had the delusion not been made*".

Article 144 of the Civil Code adds that:

[769] (1889) 14 App. Cas. 337, 374, Per Lord Herschell.
[770] The term indicates telling of a lie.
[771] S2 Fraud Act (2006); *Polhill v Walter* (1832) 3 B. & Ad. 114; *Denton v G.N. Ry* (1856) 5 E. & B. 860; Beale and others (eds), *Chitty on Contracts* (31st edn, Sweet and Maxwell 2012) para 6.50, ftn 246.
[772] S2 Fraud Act (2006).
[773] Peel, *Treitel The Law of Contract*, (12th edn, Sweet and Maxwell 2007), para 9.17.
[774] Articles 143-150 Civil Code (1976).

"*A deliberate silence in respect of a state of affair is considered as delusion if it is proved that the victim would not have entered into the contract had he known such a state of affairs*".

5.3.11 A deliberate silence denotes the idea that there are situations where the contracting party is under a duty of disclosure as to information that cannot reasonably be available to the other party, and the knowledge of such information is vital to the decision to enter into the contract.[775] Behavioural delusion occurs where the contracting party displays the subject matter of the contract so as to hide its actual condition.[776] Verbal delusion is the provision of dishonest statements as to some fundamental aspects of the contract. Distinctively, delusion under Jordanian law is only effective where it leads to onerous disadvantage.[777] A disadvantage is considered as onerous in property and other transactions if the range of expert valuation would have differed had the true facts been known.[778]

5.3.12 The second type is fraud committed in the performance of a contract. Article 358 (2) of the Civil Code states:

"In any event the guilty party is responsible for any fraud that he commits, or any fundamental mistake that he makes".

It is submitted that the meaning of civil fraud in the course of performance of a contract is the same as the criminal fraud under Jordanian law, except that the civil fraud does not require motive.[779] The distinction between criminal fraud[780] and delusion[781] under Jordanian law is not easy to draw. Both types share the same

[775] *Court of Distinction* (Civil), *3837/2009,* Adalah Programme.
[776] Sarhan and Khater, *Explanation of Civil Code Sources of Rights and Obligations,* (2000) 147.
[777] Article 145 Civil Code (1976): subject to exceptions (e.g. state property) laid down in articles 147-149 Civil Code (1976).
[778] Article 146 Civil Code (1976).
[779] Court of Distinction (Crim: Five members), *256/2004* 7/3/2004, http://www.lob.govjo.
[780] Articles 417 and 428 Criminal Code (1960).
[781] Articles 143 and 144 Civil Code (1976).

fundamental elements, except that deliberate silence is not recognised in criminal fraud[782] and inducement to enter into the contract is not a requirement for criminal fraud. The latter might therefore occur prior the formation of the contract or during the contractual performance.

Qualifications For Fraud Exception

5.3.13 To breach the embedded usage of autonomy (i.e. whether it is in relation to the principle of appearance or independence) any type of fraud must fulfil three qualifications under English law, namely: (1) knowledge of the relevant parties (i.e. those against whom the fraud exception is asserted) prior to the payment; (2) strong corroborative evidence in order to restrain the bank from payment at the pre-trial stage and (3) the balance of convenience for a protective relief at the pre-trial stage pending a full trial of the issues. Under Jordanian law it is clear that knowledge of the parties is an essential qualification for the operation of fraud exception. However, the strength of evidence of fraud required by a Jordanian court is a matter that is simply for the discretion of the court in each individual case. Also the test of English law of the balance of convenience does not operate under the procedural rules of Jordanian legal system, as the Jordanian courts appear to grant relief whenever they suspect both the existence of fraud and knowledge of it by the party seeking to enforce the documentary credit.

KNOWLEDGE OF THE PARTIES

5.3.14 As a consequence of the policy that *courts will not lend their process to a fraudulent person* underlying the principle that fraud is an exception to the autonomy usage, the knowledge of the relevant parties is essential. The applicant, who wishes to restrain the bank from payment, or refuses to reimburse the bank, on the basis of

[782] This can be clearly inferred in Court of Distinction (Crim), *120/1977*, http://www.lob.govjo.

fraud, must prove the knowledge of the bank and the involvement, or the knowledge, of the beneficiary as to the fraud. The same applies where the issuing bank, or confirming bank, wishes to refuse to reimburse the nominated bank which made a payment. Furthermore, where the bank refuses to pay, it needs to be able to defend itself against a claim by the beneficiary, or the applicant, that it has acted wrongfully. So the bank must be able to prove the involvement, or the knowledge, of the beneficiary as to the fraud.

5.3.15 **English law.** The applicant who relies on the fraud exception needs to prove that the bank has knowledge as to the fraud[783] prior to the payment. The bank is under *no obligation to investigate* whether there is fraud or not and the onus is on the applicant to present clear strong evidence of fraud to the bank.[784] The bank is not obliged to investigate the applicant's presented evidence, even where the investigation would reveal the weakness of the applicant's evidence.[785] The fraud exception is inoperative against the bank which does not have the required knowledge of fraud prior to the date of payment against apparently conforming documents.[786] Of course the involvement, or the knowledge, of the beneficiary as to the fraud is required.[787] The applicant, or the bank as the case may be, must prove either the beneficiary's involvement, or his knowledge, as to the fraud. Here, actual knowledge is required under the rule in *Derry v Peek*[788] including the situation where there is a wilful shutting of eyes to credible evidence of falsehood.[789] It does not include a constructive knowledge based on what the beneficiary as a reasonable

[783] *Deutsche Ruckversicherung AG v Walbrook Insurance Co Ltd* [1995] 1 W.L.R. 1017, 1030.
[784] *Turkiye Is Bankasi AS v Bank of China* [1996] 2 Lloyd's Rep 611, 617; *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554, 560.
[785] *Gian Singh & Co. Ltd. v Banque de l'Indochine* [1974] 1 W.L.R. 1234.
[786] *European Asian Bank AG v Punjab & Sind Bank* (No.2) [1983] 1 W.L.R. 642, 658; *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554, 560; *Credit Agricole Indosuez v Generale Bank* [1999] 2 All E.R. (Comm) 1009, 1015; *DCD Factors Plc v Ramada Trading Ltd* [2007] EWHC 2820 (Q.B.), [2008] Bus L.R 654; *Group Josi Re v Walbrook Insurance Co* [1996] 1 W.L.R. 1152, 1161.
[787] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168, 187.
[788] (1889) 14 App. Cas. 337.
[789] Malek and Quest, *Jack: Documentary Credits,* (4th edn, Tottel 2009) para 9.18.

person should have known,[790] as the dishonesty of the beneficiary is required. Parker LJ expressed this requirement in the following terms: *"The reasonable application of the doctrine [fraud exception] must involve active dishonesty as an exception to the protection otherwise afforded"*.[791] It is the knowledge of the beneficiary prior to, or at the time of, the documentary presentation that is relevant.[792] Accordingly, the knowledge of the beneficiary is hard to prove as he must be shown to have actual knowledge at the time of the presentation.

5.3.16 Jordanian law. The knowledge of the bank as to the fraud is a requirement for the enforcement of the fraud exception.[793] In *Exports and Imports Bank v Jordanian Ahli Bank*[794] the claimant informed the bank that a fraud was being committed by the beneficiary and later presented to the bank strong documentary evidence as to the fraud. There is no statement by the Court of Distinction suggesting that the knowledge of the bank can only be acquired from the applicant or other parties. The empirical findings indicate that there are situations that the banks would be confident from the appearance of the documents that there is a fraud, as for example where different types of documents (such as bills of lading and inspection certificates) are effected by the same signature.[795] Here, it can be argued that the knowledge of the bank must be presumed as it is driven from the appearance of the documents. This is not to say that the bank is under an obligation to investigate whether there is fraud or not,[796] but where it is clear to any reasonable banker from the appearance of the documents that there is a fraud then the bank is presumed to have knowledge of fraud. But fraud of whom? It must be fraud by or with the knowledge of the beneficiary.[797] Since the bank is not under a duty to investigate fraud, it must be

[790] Malek and Quest, *Jack: Documentary Credits,* (4th edn, Tottel 2009) para 9.18; Elinger and Neo, *The Law and Practice of Documentary Credit*, (1st edn, Hart 2010) p.142.
[791] *GKN Contractors Ltd v Lloyd's Bank Plc* (1985) 30 B.L.R. 48, 63; *Consolidated Oil Ltd v American Express Bank Ltd* [2002] C.L.C. 488, 495.
[792] *Group Josi Re v Walbrook Insurance Co* [1996] 1 W.L.R. 1152, 1161.
[793] Court of Distinction (Civil), *1215/2005,* Alkurtas programme.
[794] Court of Distinction (Civil), *1215/2005,* Alkurtas programme.
[795] Chapter 1, para 1.2.39.
[796] Article 34 UCP 600.
[797] Court of Distinction (Civil), *1215/2005,* Alkurtas programme.

protected regardless of the fact that the appearance of the documents indicates the occurrence of fraud.

5.3.17 *Degree of knowledge.* The question is what is the degree of the knowledge required of the beneficiary? Is it an actual knowledge as under English law or a constructive knowledge (i.e. what the beneficiary as a reasonable person should have known)? The Court of Distinction stated in *Exports and Imports Bank v Jordanian Ahli Bank:*[798]

"*If the documents appeared to be in conformity but in fact they did not match the reality by the will or the knowledge of the beneficiary, then the bank is obliged to reject the documents. It is permitted for the bank to restrain from its obligatory promise if the contents of the documents do not confirm the actual fact and this was by the fraud of the seller or with his knowledge".*

The judgment emphasises that it is not only the actual involvement or participation of the beneficiary in the fraud that gives rise to the fraud exception, but also knowledge of the fraud on the part of the beneficiary. In this context knowledge means a deliberate silence which is equivalent to wilfully shutting eyes to credible evidence of fraud.[799] However, the issue of knowledge of fraud is a matter of fact that is left to the total discretion of the court as to whether or not it is convinced by the presented evidence as to the fact of the parties' knowledge of the fraud.[800] The Court of Distinction has no authority on other courts as to the weighting of evidence.[801] It is submitted that the relevant time for knowledge of the beneficiary and the bank must, as under English law, be prior to or at the time of documentary

[798] Court of Distinction (Civil), *1215/2005,* Alkurtas programme.
[799] For deliberate silence: Court of Distinction (Civil), *3837/2009*, Adalah Programme.
[800] Articles 33 and 34 Evidence Code (1956).
[801] Court of Distinction (Civil), *1215/2005,* Alkurtas programme.

presentation. This is a consequence of the underlying policy for the fraud exception as elucidated above.

EVIDENCE

5.3.18 English law. The second qualification for the fraud exception under English law is that the evidence of fraud at pre-trial must be strong and corroborative, so that from the material available the only realistic inference to be drawn is that the beneficiary, or other party asserting rights on the credit has committed fraud, or is complicit in fraud committed by others.[802] Such a requirement is based on the reality that the evidence is fully examined only at the full trial, but not at the interim stage.[803] Therefore, both banks in the refusal of payment, and courts in granting injunctions prohibiting payment (or prohibiting the beneficiary from drawing on the credit) should be extra cautious as to the proof of fraud. It has been clear under English law that the standard for proving fraud at the interlocutory stage is stronger than the balance of probabilities at full trial,[804] and the formulation of such a standard of proof is now confirmed by the Privy Council in *Alternative Power Solution Ltd v Central Electricity Board and another*[805] in which the Board reiterated the test that had previously been laid out per Akner LJ in *United Trading Corp SA v Allied Arab Bank Ltd*[806] by stating that:

"On the material available, the only realistic inference is that [the beneficiary] could not honestly have believed in the validity of its demands on the performance bonds".

[802] *Alternative Power Solution Ltd v Central Electricity Board and another* [2015] 1 W.L.R. 697, [59].
[803] *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187, 202 per Rix J; *cited with approva*l; *Alternative Power Solution Ltd v Central Electricity Board and another* [2015] 1 W.L.R. 697, [57].
[804] *United Trading Corp SA v Allied Arab Bank Ltd [1985] 2 Lloyd's Rep 554, 561* per Ackner LJ*; Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 WLR 1152 , 1160 per Staughton LJ; *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187, 202 per Rix J.
[805] [2015] 1 W.L.R. 697, [59].
[806] [1985] 2 Lloyd's Rep 554, 561.

5.3.19 Fraud as the only realistic inference is, however, presumed where there is strong evidence of fraud combined with a failure on the part of the allegedly guilty party to provide a reasonable response to the allegation of fraud.[807]

5.3.20 The applicant who relies on the fraud exception needs to prove that the bank has knowledge of both the fraud[808] and the complicity of the beneficiary[809] prior to the payment. The bank is not liable for making payment unless it is proved that strong corroborative evidence of the fraud with the actual knowledge of the beneficiary was presented to the bank at or before the time of payment.[810] Given the principle of appearance, the bank is under *no obligation to investigate* whether there is fraud or not and the onus is on the applicant to present clear strong evidence of fraud to the bank.[811] Given the need for speed in examining the documents,[812] the bank is not obliged to investigate the applicant's presented evidence, even where the investigation would reveal the weakness of the applicant's evidence.[813] The fraud exception is inoperative against the bank which does not have the required knowledge of fraud prior to the date of payment against apparently conforming documents.[814] However, the bank which refuses payment on a mere suspicion of fraud, would not be liable if it transpires at the full trial that there was a fraud and that the beneficiary was complicit in the fraud; but if it transpires at the full trial that either the beneficiary was not complicit in a fraud or that there was, in fact, no fraud

[807] *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554, 560-564.
[808] *Deutsche Ruckversicherung AG v Walbrook Insurance Co Ltd* [1995] 1 W.L.R. 1017, 1030.
[809] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168, 183 per Lord Diplock; *Alternative Power Solution Ltd v Central Electricity Board and another* [2015] 1 W.L.R. 697, [59].
[810] *Turkiye Is Bankasi AS v Bank of China* [1996] 2 Lloyd's Rep 611, 617; *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554, 560.
[811] *Turkiye Is Bankasi AS v Bank of China* [1996] 2 Lloyd's Rep 611, 617; *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554, 560.
[812] The period for examining documents in a documentary credit is a maximum of five banking days pursuant to sub- article 14 (d) UCP 600 and was a reasonable time up to seven banking days under sub-article 13 (b) UCP 500; under English law, for instance, terms relating to time in international trade are regarded as conditions to the effect that the breach of them gives rise to a repudiatory breach: *Bunge Corporation v Tradax Esport SA* [1980] 1 Lloyd's Rep 1 HL.
[813] *Gian Singh & Co. Ltd. v Banque de l'Indochine* [1974] 1 W.L.R. 1234.
[814] *European Asian Bank AG v Punjab & Sind Bank* (No.2) [1983] 1 W.L.R. 642, 658; *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554, 560; *Credit Agricole Indosuez v Generale Bank* [1999] 2 All E.R. (Comm) 1009, 1015; *DCD Factors Plc v Ramada Trading Ltd* [2007] EWHC 2820 (Q.B.), [2008] Bus L.R 654; *Group Josi Re v Walbrook Insurance Co* [1996] 1 W.L.R. 1152, 1161.

at all,[815] the bank would be liable for wrongful refusal as well as damaging its own reputation as a payment facilitator.

5.3.21 **Empirical findings.** It is indicated by the empirical findings of the present research that many banks in Jordan refuse to infringe the autonomy principle where there is an allegation of fraud, unless there is an injunction obliging them to dishonour the credit.[816] Thus, Muhammad Burjaq stated "*we advise the customer that the credit is separate from the underlying contract and that we refuse to integrate such a contract with the credit contract".*[817] He also commented in respect of faulty goods that:

"Many times the applicants tried to influence our decision to pay, but the applicants never produced solid evidence. The only evidence we accept is a decision from courts".[818]

5.3.22 The analysis of the collected data generated by the empirical study indicates that Jordanian judges presume that the issue of restraining payment to a fraudster in documentary credits as an urgent matter, particularly where the fraudster is domiciled outside the Jordanian jurisdiction.[819] All the participating judges stated that in order to grant an injunction, there must be very strong documentary and apparent evidence of fraud on the part of the beneficiary, and the bank would need to have knowledge about the fraud. The participating judges confirmed that the matter depends on whether the court is convinced as to the evidence of fraud. In respect of the balance of convenience which is an essential stage under English law, the Jordanian judges stated that the balance of convenience in terms of weighing damages and benefits is borne in mind. But the judges commented that the most influential factor would be that if the beneficiary was a fraudster he would receive

[815] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168, 183.
[816] Annex I, para 39.
[817] Annex I, para 49.
[818] Annex I, par 49.
[819] Annex I, para 49.

payment under the documentary credit and would be able to escape from any future enforced judgment (given the fact that all cases before the judges involved a beneficiary who was not domiciled within the Jordanian jurisdiction). Thus the priority for judges in Jordan is to restrain payment to the beneficiary if there was strong evidence that he is a fraudster.

5.3.23 The court has a broad discretion either to accept or to refuse the presented evidence, but it has no power to require additional evidence. It is submitted that the required level of the strength of the presented evidence is higher under English law than under Jordanian law, because the defendant in English law must have the opportunity to reply[820] whereas the defendant under Jordanian law has merely the right to appeal against an enforced injunction.[821] Judge A gave an example of strong evidence: "*documents issued by the Jordanian custom confirming that the goods are water mixed with chemical instead of being petrol as required by the credit".*[822] Although Judge A asserted that such evidence is strong the other party does not have the opportunity to challenge the evidence in the first instance, nor did the Judge explain how that evidence is capable of clarifying the level of the beneficiary's knowledge (as proving actual knowledge is far harder than proving constructive knowledge). Banks therefore need to be cautious. There is a possibility under Jordanian law that where a bank is presented with documentary evidence that indicates a possibility of constructive knowledge on the part of a beneficiary as to a fraud, the bank will not be protected if it makes payment.

[820] *CPR 23.7(1)*.
[821] Article 170 Jordanian Civil Procedures Rules (1988).
[822] Annex I, para 49.

BALANCE OF CONVENIENCE

5.3.24 **English law.** Another qualification under English law for the fraud exception is the balance of convenience[823] in granting a protective relief (an interlocutory injunction and a freezing injunction) pending a full trial of the issues, because in most cases the credit's payment will be due prior to any full trial and final judgement. An interlocutory injunction would not be granted where the petitioner is considered likely to have an adequate remedy in damages at trial (were it to be successful at trial)[824] or the respondent is likely to suffer greater damages by the interlocutory injunction than it is likely to suffer by losing at trial.[825]

5.3.25 Applying the balance of convenience, it is difficult to see how an interlocutory injunction could ever be obtained against a bank (prohibiting the bank from payment pending full trial),[826] since any infringement of its autonomous undertaking to make a payment under a documentary credit would lead to considerable damage in respect of the bank's reputation as a trusted provider of payments in international trade.[827] In other words, the prejudice suffered by the bank could not be compensated by a subsequent award of damages.[828]

5.3.26 However, where the subject of the interlocutory injunction is to restrain the bank from honouring the credit from the account of, or debiting the account of, the applicant, the bank is free to honour the credit from its own assets. The bank might therefore preserve its reputation by taking the risk of honouring the credit. In this

[823] Section 37 (1) Senior Courts Act 1981; *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.
[824] *American Cyanamid Co v Ethicon Ltd* [1975] F.S.R. 101, 107.
[825] *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, 155 per Kerr J.
[826] Elinger and Neo, *The Law and Practice of Documentary Credit*, (1st edn, 2010) 159.
[827] *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, 155 per Kerr J; *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187, 191.
[828] *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, 155 per Kerr J; *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 Lloyd's Rep 251, 257; *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554, 566; *Tukan Timber Ltd v Barclays Bank Plc* [1987] 1 Lloyd's Rep 171, 174; *Consolidated Oil Ltd v. American Express Bank Ltd* [2002] C.L.C. 488, 497- 498.

case, the bank would be protected by the assurance of reimbursement from the petitioner's cross-undertaking in damages and proffered security, and applying the balance of convenience test such an injunction should be granted where, as above mentioned, there is strong corroborative evidence of both the fraud and the beneficiary's knowledge of the fraud..

5.3.27 Moreover, where the purpose of the interlocutory injunction is to restrain the beneficiary from presenting documents in furtherance of a fraud the bank's reputation will not be adversely affected, since in that event the bank is not the party being restrained and may not even be a party to the action.[829] Any suspension of the principle of appearance would not be taking place as between the bank and beneficiary or applicant but between the applicant and the beneficiary and the undermined. Alternatively, a *Mareva*[830] injunction to restrain the beneficiary from dissipating his assets might be an adequate protection for the applicant where sufficient assets of the beneficiary are susceptible to the jurisdiction of the court.

5.3.28 **Jordanian law.** Granting interim and ex parte injunctions must relate to categories which are spelled out in the Jordanian Civil Procedures Rules (1988) as follows:

"1) Urgent matters that it is feared that they might disappear by the elapsing of time;

2) to consider requests for appointment of a guardian on money, or prohibitory seizure, or guardianship, or travel bans;

3) an urgent detection to prove a state of affairs;

4) to hear a witness that it is feared that his testimony might disappear by the elapsing of time...".[831]

[829] *Themehelp Ltd v West* [1996] Q.B. 84.
[830] *Mareva Compania Naviera SA v International Bulkcarriers SA* (1975) 2 Lloyd's Rep. 509.
[831] Article 32 Jordanian Civil Procedural Rules (1988).

5.3.29 Unlike English law, there is an exclusive list of categories for an interim injunction. However, there is no direct underlying policy of "just and convenient" under Jordanian law for granting interim injunctions as will be explained below. There are no guidelines under Jordanian law that the court must follow in order to grant an injunction, and there are no doctrinal rules for injunctions in documentary credits. Under Jordanian law the initial task for the court is to scrutinise whether the subject matter of the application for the injunction fits into one of the exclusive categories, and in that the court has a wide discretion that is not doctrinally structured by particular guidelines. So, the initial question for granting an interlocutory injunction to restrain the payment in documentary credits is whether the restraint of payment in the case of fraud in a documentary credit is an urgent matter that might be defeated by the lapse of time. Of course, the court follows any precedent of the Court of Distinction in respect of a state of affairs that is categorised as a valid subject for interim injunctions.[832] There is a decision by the Court of Distinction treating an application to temporarily prevent the operation of a written debt as a valid subject fitting into the categories of interim injunctions.[833] By analogy, it is submitted that the prevention of payment under a documentary credit to a fraudulent beneficiary fits into the first category of article 32 of the Jordanian Civil Procedures Rules (1988), given the fact that fraud is a well-established exception to the autonomy principle in Jordanian law. [834]

5.3.30 There is no public access in Jordan to the Courts judgments regarding injunctions to restrain payments under documentary credits. However, the empirical findings did reveal that many interlocutory injunctions were granted by Jordanian courts to restrain payment under documentary credits.[835] They also reveal that the success

[832] The Formation and Structure of Courts Law (No. 17, 2011).
[833] Court of Distinction (Civil), *568/1994*, http://www.lob.gov.jo.
[834] Court of Distinction (Civil), *1215/2005,* Alkurtas programme.
[835] Annex I, para 42.

or otherwise of those applications might not even differ according to whether or not the beneficiary is domiciled within the Jordanian jurisdiction.[836] Thus, the Judges in the interviews emphasised the strength of the application of the policy that courts will not let their process be used by fraudsters with Judge A stating *"I am not going to enforce a payment to a fraudster".*[837] In this spirit, the empirical findings indicate that courts are willing to grant injunctions to restrain the issuing bank from payment, even where the payment had already been made to the beneficiary by the confirming bank.[838] So, the confirming bank which innocently pays out to the fraudulent beneficiary might not be able to enforce its right to reimbursement from the Jordanian issuing bank. This might damage the reputation of Jordanian banks as trusty providers for documentary credits, but the Judges are of the opinion that it is up to the issuing bank which wishes to preserve its reputation to voluntarily reimburse the confirming bank from the issuing bank's own account.[839] Accordingly, the tangible effect is that the priority for the Jordanian legal order is to protect innocent applicants. The fact that many injunctions were granted under Jordanian law is clearly due to the lack of the requirement for any balance of convenience. Such a fact may also indicate that the standard of evidence for the fraud exception at the pre-trial stage is not as strong as it is under English law, and an inference can be drawn from the empirical evidence that the degree of the beneficiary's knowledge as to fraud need not be actual knowledge but can extend to constructive knowledge.[840]

Types And Effects Of Fraud In Documentary Credits

5.3.31 Fraud might occur in the issue or presentation of the documents specified by a documentary credit or in the formation or performance of the contracts touching and

[836] Annex I, para 42.
[837] Annex I, para 42.
[838] Annex I, para 43.
[839] Annex I, para 43.
[840] Annex I, para 42: it can be inferred from the provided example by Judge A.

concerning documentary credits. The former can be characterised as documentary fraud and the latter as non-documentary fraud.

DOCUMENTARY FRAUD

5.3.32 Infringement of the appearance principle. A fraud in the issue or presentation of documents is the most common fraud in documentary credits. If Municipal legal orders were to allow documentary fraud to unravel the payment and reimbursement obligations under documentary credits, then that would lead to the departure from the appearance principle. Based on the common policy behind the fraud exception under English and Jordanian laws that the guilty party should not be assisted by the court,[841] the beneficiary of the credit must be guilty of fraud in order to permit the infringement of the appearance principle.[842] It is submitted that only a fraudulent misstatement, or forgery, in documents misrepresenting the actual facts that are required to be documentary proved by the credit with the knowledge of the beneficiary justifies the departure from the principle of appearance. This principle is based on the presumption of the honesty of the beneficiary and once the beneficiary can be seen to be dishonest that presumption is rebutted and the principle of appearance ought to collapse.[843] In that event, the actual conformity of documents would then be required; namely; the examination of documents to determine conformity would involve the question of whether documents actually represent the true facts or not. Although documentary fraud usually relates to a misstatement of fact in connection with the underlying contract, the deliberate presentation of false documents by the beneficiary infringes the principle of appearance and not the

[841] Above para 5.3.4-7.
[842] Above para 5.3.13.
[843] In the context of demand bonds a statement by Lord Dinning in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 Q.B. 159, 171 suggests that a bank's duty to pay is conditional upon the honesty of the demand: cited with approval by Mance LJ in *Solo Industries UK Ltd v Canara Bank* [2001] EWCA Civ 104; [2001] 1 W.L.R. 1800, [10]; it was expressed by the Court of Distinction that a documentary credit is a transaction that is assumed to be based on honesty: Court of Distinction (Civil), *1215/2005,* Alkurtas programme.

autonomy principle. Accordingly the right of the beneficiary to payment is not dependent upon the rights of the applicant against the beneficiary.

5.3.33 Scenario and claims. A documentary fraud commonly occurs when the beneficiary knowingly presents documents that appear to be in conformity but which in fact misrepresent the actual facts required to be proved by the credit[844] (e.g. a false statement as to the date of the bill of lading). The issuing or confirming bank is entitled to refuse to honour the credit if it discovers the documentary fraud, by or with the actual knowledge of the beneficiary, before payment. Similarly the bank is entitled to recover the money as paid under a mistake of fact if it finds out after payment.[845] If the bank fails to satisfy its evidential burden at trial, the bank would be liable to the beneficiary for non-payment,[846] and might also be liable to the applicant for breach of contract. The bank will in most cases also suffer damage to its reputation.[847] Where the issuing bank requests the confirming bank, or other nominated bank, to refrain from payment the other bank might nevertheless choose to make payment. In this situation, the issuing bank might apply for an injunction to restrain the other banks from payment, refuse to reimburse them, or sue them for wrongful reimbursement as the case may be.[848] Where the applicant, as in most cases, requires the bank to restrain the payment, the applicant would have the burden of proving the fraud and the beneficiary's complicity in the fraud.[849] In this situation, it is the applicant who might apply for an interlocutory injunction to restrain payment, refuse to reimburse the issuing bank, or sue it for wrongful reimbursement. However, documentary fraud could also arise both where a confirming or nominated bank passes the documents with the knowledge of the documentary fraud by the

[844] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168; *Standard Chartered Bank v Pakistan National Shipping Corp* [2001] Q.B. 167; Court of Distinction (Civil), *1215/2005,* Alkurtas programme.
[845] *Bank Russo-Iran v Gordon, Woodroffe & Co. Ltd* (Unreported), October 3, 1972 per Browne J.
[846] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168.
[847] *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] Q.B. 146, 155 per Kerr J; *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187, 191.
[848] Court of Distinction (Civil), *1215/2005*, Alkurtas programme.
[849] Above para 5.3.1.

beneficiary and, more extraordinary, where an issuing bank conspires with the beneficiary to defraud the applicant.

5.3.34 **Material fraud.** A documentary fraud must be material in order to be an operative exception to the appearance principle. The idea of material misstatement or false statement was highlighted by the House of Lords in *United City Merchants (Investments) Ltd v Royal Bank of Canada*[850] in which little guidance was given regarding the meaning of material. It is suggested in Jack in Documentary Credits that a misstatement is material where it affects the conformity of documents.[851] For example, if the actual date of 16th in the bill of lading in *United City* case was not falsified to be 15th but 17th, the fraud would have been immaterial to the credit obligation. It is submitted that the material misstatement requirement also applies under Jordanian law. Since false statements in documents cannot be an actionable delusion without onerous disadvantage.[852] This being manifested in a documentary presentation by some representation of fact that is essential to the conformity of the documents as in *Exports and Imports Bank v Jordanian Ahli Bank*.[853] Similarly, for a fraudulently false statement to be actionable under Jordanian law as fraud, the false statement must affect conformity.

Non-documentary fraud

5.3.35 A non-documentary fraud is fraud that is committed in the underlying contract or any one of the operative documentary credit contracts but is not related to the presented documents in that the presented documents truly represent the actual facts required to be proved by the credit. In this context, it is submitted that a distinction must be drawn between a non-documentary fraud in the credit contract

[850] [1983] AC 168, 184-185.
[851] Malek and Quest, *Jack: Documentary Credits,* (4th edn, Tottel 2009) para 9.17.
[852] Article 145 Civil Code (1976).
[853] Court of Distinction (Civil), *1215/2005,* Alkurtas programme.

itself between the issuing or confirming bank with the beneficiary, and a non-documentary fraud in the other operative contracts or the underlying contract.

5.3.36 Fraud in the credit contract between the bank and the beneficiary. On the one hand, giving effect to the legal consequences to a fraud that is committed in the credit contract between the issuing, or confirming, bank and the beneficiary does not impeach the principle of autonomy. Here, such fraud is to be considered as a challenge to the validity of the credit contract itself between the beneficiary and the bank.[854] Fraudulent misrepresentation makes the contract voidable under English law in that the injured party is entitled to rescind the contract *ab initio*[855] (i.e. the contract is set aside for all purposes)[856] but must provide restitution subject to its right to damages in tort for deceit. The consequence of rescission for delusion combines with onerous disadvantage under Jordanian law is substantially the same as under English law[857] albeit, unlike English law, the injured party has the right to claim damages based on contract.[858] However, fraudulent misrepresentation or delusion might render the contract void (i.e. the contract is treated as if it had never existed so that under English law innocent third parties disadvantaged by the invalidity have no protection in equity) where the fraud destroys the parties' substantive agreement so as to amount to a common mistake at law.[859] The refusal of payment on the basis of fraud in the credit contract itself does not require the bank to know, or to involve itself in, disputes between the beneficiary and the applicant.

[854] *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 W.L.R. 392, 393.
[855] *Johnson v Agnew* [1980] AC 367; Beale and others (eds), *Chitty on Contracts* (31st edn, Sweet and Maxwell 2012) para 6.111.
[856] Peel, *Treitel The Law of Contract*, (12th edn, Sweet and Maxwell 2007) para 9.81.
[857] Article 204 Civil Code (1979), Article 300 Civil Code (1976); Court of Distinction (Civil), *3837/2009,* Adalah Programme; Court of Distinction (Civil), *1082/1987*, http://www.lob.govjo; Court of Distinction (Civil), *845/1988*, http://www.lob.govjo; Court of Distinction (Civil), *3308/1999*, http://www.lob.govjo.
[858] Aljbouri, *The Concise in the Explanation of Jordanian Civil Code,* (1st, 2011) 456.
[859] *Bell v Lever Brothers Ltd* [1932] AC 161.

5.3.37 **Fraud in the underlying or operative contract.** On the other hand, giving effect to the legal consequences of a fraud that is committed in the underlying contract, or any of the other operative documentary credit contracts would impeach the principle of autonomy, since the right of the beneficiary to payment under a documentary credit would be dependent upon the rights of the applicant or other parties against the beneficiary. The question is whether or not such fraud justifies the infringement of the principle of autonomy. To answer this question it is essential to draw a distinction between fraud in the formation of the underlying or operative contract and fraud in the performance of that contract.

5.3.38 *Fraud in the performance.* It is postulated that fraud in the performance of the underlying contract (i.e. a deliberate breach by for instance agreeing to sell petrol but subsequently shipping crude oil) only taints the documentary credit contract between the beneficiary and the bank if it is a documentary fraud. It is neither understandable, nor justifiable, to allow to infringe the principle of autonomy on the basis of fraud in the performance of the underlying contract where the fraud does not relate to facts which are required to be proved by the presented documents. Unlike demand bonds, the role of documents in documentary credits is essential for they function as a documentary proof of performance of certain contractual terms that are perceived by the buyer as being essential for the security of his bargain.[860] It is not surprisingly therefore that Browne J underlined the right of the bank to refuse payment under documentary credits on the basis of a documentary fraud.[861] Moreover, the policy, under English and Jordanian laws, that *courts will not allow their process be used by a dishonest person* should not be so rigorously applied as to disentitle the beneficiary from benefiting from the credit contract simply because he is dishonest in the performance of the underlying contract. This would, as

[860] Elinger and Neo, *The Law and Practice of Documentary Credit*, (1st edn, Hart 2010), 143.
[861] *Bank Russo-Iran v Gordon, Woodroffe & Co. Ltd* (Unreported), October 3, 1972; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 Q.B. 159, 171, 172.

submitted, undermine the security of the credit by admitting the possibility of numerous claims for restraining the payment in documentary credits on the basis of a deliberate breach in the performance of underlying contracts.

5.3.39 *Fraud in the formation.* By contrast, it is postulated that the policy, under English and Jordanian laws,[862] *courts will not allow their process be used by a dishonest person* should necessarily apply to the situation where a fraud is committed by the beneficiary in the formation of the contract underlying the documentary credit contract between the beneficiary and the bank, otherwise a fraudster would be allowed to set up a sham transaction of which the documentary credit would be an integral part. In this scenario, the applicant, who is usually the buyer, is the victim of fraudulent misrepresentation that induces him to enter into the underlying sale contract.[863] Unlike fraud in the performance of the contract, he will not be able to require a documentary proof of performance in the credit since the fraud preceds the credit.[864] Thus, impeachment of the principle of autonomy should be justified for fraud in the formation of the underlying contract. Fraudulent misrepresentation vitiating the underlying contract, or any one of the operative documentary credit contracts, gives rise to rescission under English and Jordanian laws.[865] As a consequence of the policy *courts will not allow their process be used by a dishonest person* for fraud exception under English and Jordanian laws, only fraud on the part of the party ascertaining rights under the credit should justify the departure from the autonomy principle. Thus, the invalidity of the contract between the issuing bank and the confirming bank by reason of fraudulent misrepresentation should only

[862] English law: *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168, 183 per Lord Diplock; Jordanian law: *Hadith of the Prophet Mohammad,* Narrated by Abul-Hussain Muslim son of Habaj son of al Nishapuri*, Sahih Muslim Book 10 Business Transactions.*

[863] As it was alleged by the applicant in *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187.

[864] This would include the situation where the credit contract is opened as a financial facility to a third party contracting with the applicant who lends its name for opening a documentary credit: *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187.

[865] For general principles of rescession n the basis of fraud: English law: *Johnson v Agnew* [1980] AC 367; Jordanian law: Article 204 Civil Code (1979), Article 300 Civil Code (1976); Court of Distinction *3837/2009* (Civil) Adalah Programme; Court of Distinction *1082/1987* (Civil) http://www.lob.govjo; Court of Distinction (Civil), *845/1988*, http://www.lob.govjo; Court of Distinction *3308/1999* (Civil) http://www.lob.govjo.

discharge the confirming bank's binding unilateral offer or the credit contract to the beneficiary where the beneficiary is complicit as to the fraud. Similarly, as explained above under the heading of knowledge, fraud on the part of the beneficiary should not affect a bank's right to reimbursement where it pays against conforming documents unless the bank has knowledge or is complicit as to the fraud at or prior to the time of payment.

5.3.40 *Demand bonds to be distinguished*. Lord Denning eloquently described the nature of demand bonds in *Edward Owen Engineering Ltd v Barclays Bank International Ltd*[866] by saying:

"These performance guarantees are virtually promissory notes payable on demand. So long as the Libyan customers make an honest demand, the banks are bound to pay".[867]

Thus, unlike documentary credits, the role of documents in demand bonds functions as being a mere notice, usually as to the breach of the performance of the underlying contract,[868] triggering the demand of payment upon which the bank is unconditionally obliged to honour as long as the beneficiary is honest in making the demand. It follows a fraud that is committed by the beneficiary in the performance or formation[869] of the underlying contract in order to demand payment under the bond is to be considered as a dishonest demand which permits the infringement of the autonomy principle. Such an application of the fraud exception being broader in demand bonds than in documentary credits might be the reason that most cases of

[866] [1978] 1 Q.B. 159, 172.
[867] *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 Q.B. 159, 171, 172.
[868] See for instance: *Kvaerner John Brown Ltd v Midland Bank Plc* [1998] C.L.C. 446.
[869] *Themehelp Ltd v West* [1996] Q.B. 84.

fraud exception to the principle of autonomy under English law are in respect of demand bonds.[870]

[870] *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 Q.B. 159, 172-173; *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 Llyod's Rep 251; *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554, 561; *GKN Contractors Ltd v Lloyds Bank Plc* (1985) 30 B.L.R. 48, 63; *Themehelp Ltd v West* [1996] Q.B. 84; *Turkiye Is Bankasi AS v Bank of China* [1998] 1 Lloyd's Rep 250, 253; *Balfour Beatty Civil Engineering v Technical & General Guarantee Co Ltd* [2000] CLC 252; *Solo Industries UK Ltd v Canara Bank* [2001] EWCA Civ 1041; [2001] 1 W.L.R. 1800; *Consolidated Oil Ltd v American Express Bank Ltd* [2002] C.L.C. 488, 495; *Banque Saudi Fransi v Lear Siegler Services Inc* [2007] 2 Lloyd's Rep 47; *Enka Insaat Ve Sanayi AS v Banca Popolare dell'Alto Adige SpA* [2009] EWHC 2410 (Comm); [2009] C.I.L.L. 2777; *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] Q.B. 146, 155-156; *Tukan Timber Ltd v Barclays Bank Plc* [1987] 1 Lloyd's Rep 171, 174; *Kvaerner John Brown Ltd v Midland Bank Plc* [1998] C.L.C. 446.

ILLEGALITY

General View

5.4.1 Illegality as an abstract term is recognised under English law without being authoritatively classified or categorised. Cheshire, Fifoot and Furmston[871] distinguish between illegal and void contracts, whereas Treitel distinguishes between legal wrong and public policy.[872] The different approaches in classification amongst scholars do not represent disagreements regarding the substance of law. This chapter adopts the pragmatic approach as to the classification of illegality under English law undertaken in Chitty on Contracts. The classification is based on the effects of illegality which are contingent on whether illegality occurs in the formation or the performance of the contract.[873] Jordanian law does not linguistically recognise the use of the abstract term of "illegality", but its meaning in terms of committing a legal wrong (i.e. a forbidden act by a statute)[874] or an act that is contrary to public policy and good morals has an effective operation under Jordanian law. The notion of public policy denotes to the common good and interest of the society and social justice as perceived by society. Public policy is a dominant social norm that is contingent on time, place, manners, morals and politic and economic conditions.[875] Such meanings collectively constitute the term illegality, likewise is used in this research in relation to Jordanian law.

5.4.2 **How illegality occurs in documentary credits.** Illegality might occur in the following legal relationships within and in connection to a documentary credit chain of contracts or legal relationships. (1) Illegality in the documentary credit itself between the issuing or confirming bank and the beneficiary and in such a situation the general illegality principles of the law apply without the engagement of the

[871] Cheshire, Fifoot and Furmston, *Law of Contract*, (15th edn, Butterworths Asia 2007).
[872] Peel, *Treitel The Law of Contract*, (12th edn, Sweet and Maxwell 2007).
[873] Beale and others (eds), *Chitty on Contracts*, (31st edn, Sweet and Maxwell 2012), para 16.007.
[874] Articles 163 and 165 Civil Code (1976).
[875] English law: Buckley, *Illegality and Public Policy*, (2nd edn, Sweet and Maxwell 2009); Jordanian law: Jordan Laws and Rules, *Memorandum of Clarification of Civil Code*, (1977), 159.

principle of autonomy. (2) Illegality in one of the operative contracts in the documentary credit and such illegality would not justify the infringement of the autonomy principle where the payment of the credit to the beneficiary does not assist the realisation of the illegal operative contract. (3) Illegality in the underlying contract of the documentary credit which has the potential to infringe the principle of autonomy to the effect that the payment in the issuing or confirming bank credit contract with the beneficiary must not be performed due to the illegality in the underlying contract.

Meaning Of Illegality

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5.4.3 **Illegality as to formation.** For the purpose of exposition, there are two limbs of illegality as to the *formation* of the contract. Firstly, the *apparent terms* of the contract necessarily involve breaching a civil statute, criminal law or public policy. Secondly, the contractual parties *intend* to enter into the contract for an unlawful purpose or to perform the contract in an illegal way.

5.4.4 In respect of the first limb the civil illegality arises where the *making* of the contract is prohibited by a civil statute generally (e.g. trading in whisky when forbidden),[876] or where the parties agree to do the act that violates a civil statute (e.g. the financial value for the work exceeds the maximum permitted level without license)[877] or where the parties agree to avoid a statutory requirement the consequence of is to render the contract illegal or unenforceable as a whole as indicated by the statute (e.g. a licence being required by both parties for a sale of linseed oil).[878] Criminal illegality occurs where the term of the contract necessarily involves committing an offence

[876] *Foster v Driscoll* [1935] AC 148: the case was regarding smuggling whisky; *Mohamed v Alaga & Co* [2000] 1 W.L.R. 1815; *Archbolds (Freightage) Ltd v Spanglett Ltd* [1961] 1 Q.B. 374, 388.
[877] *Frank W. Clifford Ltd v Garth* [1956] 1 W.L.R. 570.
[878] *Re Mahmoud and Ispahani* [1921] 2 K.B*; Levy v Yates* (1838) 8 A. & E 129.

under Common law (e.g. a contract to publish criminal libel[879] or blasphemy),[880] or under statute (e.g. infringing food and drug legislation[881] or exchange control legislation[882] or the making of a bribe pursuant to the Bribery Act 2000). Contracts contrary to *public policy* in international trade are mainly those contracts that involve trading with an enemy[883] or deceiving a public authority (e.g. where an integral part of the contract is to illegality evade tax revenue).[884] In this limb (i.e. as to the formation of the contract) illegality generally renders the contract unenforceable against both parties regardless of the knowledge of the parties.[885]

5.4.5 Secondly, the contractual parties *intend* to enter into the contract for an unlawful purpose (e.g. the contract appears to be a sale of goods but in reality it aims to defeat the enforcement of exchange control regulation,[886] or an insolvent debtor undertakes payment obligations so as to defraud creditors,[887] the offering of inflated share prices to rig a financial market),[888] or to perform the contract illegally[889] or use the lawful subject matter of the contract for an upcoming unlawful purpose (e.g. the sale of juices to illegally flavour beer).[890]Illegality under this second limb is clearly relevant to ostensibly lawful documentary credit contracts entered into for an illegal purpose[891] that is not remote to the contract.[892] However, *knowledge* of such illegal purpose by both contracting parties is essential for that contract to be considered illegal under this limb.[893] Thus there must be an unlawful conspiracy by both parties

[879] *Fores v Johnes* (1802) 4 Esp 97.
[880] *Cowan v Milbourn* (1867) L.R. 2 Ex. 230*; cited; Beale and others (eds), Chitty on Contracts (*31st edn, Sweet and Maxwell 2012), para 16.014.
[881] *Langton v Hughes* (1813) 1 M. & S. 593; *Askey v Golden Wine Co* [1948] 2 All E.R. 3*5*.
[882] *Bigos v Bousted* [1951] 1 All E.R. 92.
[883] *Ertel Bieber & Co v Rio Tinto Co* [1918] AC 260, 273, 289*.*
[884] *Miller v Karlinski (1945) 62 T.L.R. 85*; *Napier v National Business Agency* [1951] 2 All E.R. 26*4*; *Beauvale Furnishings Ltd v Chapman* [2000] All E.R. (D) 2038.
[885] Beale and others (eds), *Chitty on Contracts*, (31stedn, Sweet and Maxwell 2010), para 16.007.
[886] As claimed by the confirming in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168.
[887] *Begbie v Phosphate Sewage Co Ltd* (1875) L.R. 10 Q.B. 491; *Cockshott v Bennett* (1788) 2 T.R. 763.
[888] *Scott v Brown* [1892] 2 Q.B. 724; *cited;.Harry Parker Ltd v Mason* [1940] 2 K.B. 590.
[889] *Apthorp v Neville* (1907) 23 T.L.R. 575; *cf; Stoneleigh Finance Ltd v Phillips* [1965] 2 Q.B. 537, 572, 580*.*
[890] *Langton v Hughes* (1813) 1 M. & S. 593; *cf*; *Gas Light & Cake Co v Turner* (1839) 6 Bing. N.C. 324; Peel, *Treitel The Law of Contract*, (12th edn, Sweet and Maxwell 2007) para 11.19.
[891] *Alexander v Rayson* [1936] 1. K.B. 169.
[892] *21 st Century Logistic Solutions Ltd v Madysen Ltd* [2004] Lloyd's Rep 92.
[893] *Ashmore, Benson, Pease & Co Ltd v A.V Dawson Ltd* [1973] 1 W.L.R. 828; Beale and others (eds), *Chitty on Contracts*, (31st edn, Sweet and Maxwell 2012), para 16.010.

and not merely an intent on one party to use a contract for an illegal purpose.[894] If there is only an illegal intention by one party that would not make the contract illegal *per se* - as it could still be performed by the other party - but merely disentitle the person with the illegal motive from enforcing the contract. The innocent party can only enforce the contract if the enforcement does not necessarily involve the commission of a legally objectionable act.[895] Yet, the innocent party can sue for the *quantum merit* (i.e. measure of damages) of what it has lawfully done in the contract.[896] Once the innocent party learns about the illegality mode of the performance it must not participate in the illegality and should make all reasonable efforts to prevent the illegal performance. But where the innocent party learns that the other party may have an unlawful purpose then such knowledge does not count unless the innocent party participates in carrying out the illegal purpose.[897] It is suggested by some scholars that knowledge without participation is sufficient to establish illegality if the unlawful purpose engages grave illegality.[898]

5.4.6 Illegality as to performance. The other type is illegality as to the *performance* of the contract. Here the parties do not have the intention when they enter into the contract to perform the contract in an illegal way, rather illegality occurs when one or both parties commit an objectionable legal act in the course of the performance of the contract. As, for instance, where a carriage contract was illegal because both parties were complicit in the overloading of a lorry.[899] The unlawful act never prevents the innocent party from enforcing the contract but may prevent the guilty party from doing so if the law is such as to prohibit such contractual performance and not merely penalise the unlawful act.[900] Where the statute does not clearly

[894] *Waugh v Morris* (1872-73) L.R. 8 Q.B. 202, 207-208; *Mason v Clarke* [1955] AC 778, 793, 805.
[895] *Mason v Clarke [1955]* AC 778, 793, 805.
[896] Beale and others (eds), *Chitty on Contracts (*31st edn, Sweet and Maxwell 2012), para 16.011.
[897] Beale and others (eds), *Chitty on Contracts (*31st edn, Sweet and Maxwell 2012), para 16.011.
[898] Buckley, *Illegality and Public Policy,* (2nd edn, Sweet and Maxwell 2009) para 4.21-27.
[899] *Ashmore, Benson, Pease & Co Ltd v A.V Dawson Ltd* [1973] 1 W.L.R. 828.
[900] *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 Q.B. 267, 283; Peel, *Treitel The Law of Contract*, (12th edn, Sweet and Maxwell 2007) para 11.20.

provide for a contractual consequence in the event of a statutory offence, then courts will assume no contractual consequence attends the statutory offence. This is due to the fact that some parties might otherwise be treated unjustly by being unfairly enriched or impoverished, since illegality in English law, unlike in Jordanian law, operates bluntly by eliminating contractually rights entirely or not at all.[901] The contract might be held illegal if the other party participates in the unlawful act, as the participation might be regarded as proof that the parties had the intention, when they entered into the contract, to perform it illegally.

5.4.7 **Severance**. Interestingly, there might be an application to the doctrine of severance in illegality in the sense that the legal parts of the contract might be enforced provided that the illegal elements of the contract can lawfully be severed from the remainder of the contract. This is only possible where the contractual consideration is not deemed entire in which case the illegality would render the contract unenforceable as a whole. Where the contractual bargain between the parties is not entire, but can be seen to be divisible into clearly distinguishable lawful and unlawful parts then the court might enforce the lawful part by applying the blue pencil test to strike out the unlawful parts.[902] For instance, in *Frank W. Clifford Ltd v Garth*[903] the contracted work violated a statute because its value exceeded the maximum permitted level and the court enforced the contract up to the permitted value. Another example is that of a stipulation in restraint of trade which may merely render that condition unenforceable without affecting the enforceability of other contractual terms.[904] The doctrine of severance does not apply where there is a criminal illegality,[905] because the gravity of criminal illegality engages the need to protect the public.

[901] *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 Q.B. 267, 288; Beale and others (eds), *Chitty on Contracts (*31st edn, Sweet and Maxwell 2012), para 16.149-154.
[902] Peel, *Treitel The Law of Contract*, (12th edn, Sweet and Maxwell 2007) para 11.51.
[903] [1956] 1 W.L.R. 570.
[904] *Rock Refrigeration Ltd v Jones* [1997] 1.C.R. 938, 948, 953.
[905] Beale and others (eds), *Chitty on Contracts*, (31st edn, Sweet and Maxwell 2010), para 16.007.

JORDANIAN LAW

5.4.8 Illegality under Jordanian law is associated with a want of legality in the subject matter (i.e. goods in sale of goods) and the cause of the contract (i.e. both the presumed cause of the contractual obligation and the underlying purpose of the contract).[906] The aim of the latter element of cause is to ensure the lawfulness of the contract.[907] Accordingly, illegality affects the validity of the contract only where it occurs in the formation of the contract. The Jordanian Civil Code simply provides that a contract is unenforceable where the subject matter[908] or the cause[909] of the contract is *prohibited* by law or is *contrary* to the public policy and public morals of Jordanian law. So, as under English law, the contract is unenforceable where the subject matter (e.g. wine in the sale of wine) or the substantive purpose (e.g. sale of grapes for the manufacture of wine) of the contract as evidenced by the stipulated terms of the contract is illegal. Also, a contract that appears legal is unenforceable where the guilty party, with the knowledge of the other party,[910] actually enters into the contract with an unlawful purpose.

5.4.9 Under Jordanian law, the scope of illegality is narrower than its scope under English law. Thus, under Jordanian law illegality is not merely confined to the formation of the contract, but also further to the fundamental elements of that formation which are identified as the subject matter and cause. But it is not clear what the position would be where an innocent party had lawfully entered into a contract and discovered later that the purpose of the other party was unlawful, or that in reality the

[906] Articles 165, 166 Civil Code (1976); Aljbouri, *The Breif of Explanation the Jordanian Civil Code,* (1st, 2011) 269.
[907] Ibn Qayem Aljawzeiah, *I'laam ul Muwaqqi'een 'an Rabb il 'Aalameen* (Information for Those who Write on Behalf of the Lord of the Worlds) (1320 AD), *republished*, (2000) 96, 98 Dar Albayan publication; *cited*; Jordan Laws and Rules, *Memorandum of Clarification of Civil Code*, (1977), 166.
[908] Articles 88 and 163 Civil Code (1976).
[909] Article 165 Civil Code (1976).
[910] Jordan Laws and Rules, *Memorandum of Clarification of Civil Code*, (1977), 167.

performance of the contract would necessarily involve unlawfulness. It is submitted that in this situation the guilty party cannot rely on illegality to invalidate what has been performed in the contract.[911] Still it is not clear whether the parties are obliged either to render, or to stop, further performance of such a contract. Interestingly, under Jordanian law where some parts of the illegal contract are legal and their consideration or price is determinable and can be severed from the illegal cause or subject matter, then such parts are enforceable (e.g. a contract to sell both sardine and tuna might be enforced for tuna even if illegal for sardines).[912] Contracts that are contrary to *public policy* in international trade are mainly those contracts of which their subject matter or cause involves breaching revenue laws (e.g. custom and tax revenues and exchange control regulation) or breaching criminal laws (e.g. trading with an enemy[913] or criminal libel[914]) or committing civil wrongs (e.g. attempting by a contractual condition to exclude liability for breach of tortious or contractual duties).[915] There is an overriding respect under the Jordanian legal order for the doctrine of "unjust enrichment" even in the case of illegality, so the innocent or guilty person who is unjustly enriched in an illegal contract is liable to relinquish any unjust enrichment.[916]

Illegality In The Documentary Credit Itself Between The Bank And The Beneficiary

5.4.10 For illegality in the documentary credit contract between the issuing, or conforming, bank and the beneficiary, the general illegality principles of law apply. In this case, the principle of autonomy is not engaged and thus no real difficulty would arise. A

[911] As can be inferred from article 238 Civil Code (1976).
[912] Article 169 Civil Code (1976); Jordan Laws and Rules, *Memorandum of Clarification of Civil Code*, (1977), 174.
[913] Article 118 Criminal Code (1960).
[914] Articles 132, 189, 195 and 197 Criminal Code (1960).
[915] Aljbouri, *The Breif of Explanation of the Jordanian Civil Code,* (1st, 2011) 244-246.
[916] Article 293 Civil Code (1976).

clear example is where the issuing of the credit is prohibited as the beneficiary for instance is from an enemy country. Another example is where the issuing of the credit is lawful but at the time of honouring the credit it has become illegal to honour the credit because the beneficiary is from a country that has become an enemy to the bank's country or due to a governmental order prohibiting the banks to honour the credit.[917] The second type is where the documentary credit is set up by the beneficiary as a facility to further an illegal act. This might occur in practice where a documentary credit is a facility to achieve money laundering, disguised money exchanging, defrauding creditors, abusing tax or revenue regulations or commercial bribery.

5.4.11 United City Merchants. In addition to the issue of documentary fraud, as explained above, the English case *United City Merchants (Investments) Ltd v Royal Bank of Canada*[918] provides an example of the second type of illegality in the credit itself where part of the payment under the documentary credit was a facility to contravene exchange control restrictions. Here, an English company sold a glass-fibre making plant to a Peruvian company and participated in a scheme whereby a US Dollar price was doubled to enable the Peruvian company to exchange Peruvian currency for the artificially increased contract price and thereby avoid Peruvian exchange control regulations. In connection with the transaction, a documentary credit – subject to the UCP (1974) - for both the genuine and fictional increased contract price was issued by Banco Continental S.A in Peru and confirmed by Royal Bank of Canada, the defendant, in London. The seller assigned its rights to the United City Merchants (Investments) Ltd. The confirming bank, Royal Bank of Canada, refused to honour the credit contending that the contract of sale was contrary to Peru's exchange control regulations and the UK was bound to give effect to such a foreign regulation

[917] After the ending of Iraqi regime in 2003 the Jordanian government ordered banks in Jordan to restrain payments of letters of credit to Iraqi beneficiaries as many credits involved transactions for the previous Iraqi government.
[918] [1983] AC 168.

since both the UK and Peru were contracting states ("members") to the International Monetary Fund Treaty ("Bretton Woods Agreement" having the force of law in the UK by the delegated legislation).

5.4.12 It was held by the House of Lords that the documentary credit payment was enforceable to the extent that it represented the true price of the sale contract. In a judgment agreed by all their Lordships Lord Diplock elucidated that the task of the court was to look at the substance of the transaction to which the enforcement of the contract will give effect in order to:

"Penetrate any disguise presented by the actual words the parties have used, to identify any monetary transaction ... which those words were intended to conceal and to refuse to enforce the contract to the extent that to do so would give effect to the monetary transaction".[919]

5.4.13 It was held that since it was not difficult to identify the monetary transaction that sought to be concealed by the actual words of both the documentary credit and the sale contract, only that part of the payment in the documentary credit that related to the monetary transaction was unenforceable. Although the policy that *a court must not lend its aid to enforce the contract that is unenforceable by law* was applicable, and thus the court must take the point itself, there was no illegality since the statue that had been breached was a non-UK statute and the effect of such a breach, pursuant to article VIIII (2) (b) of Bretton Wood Agreement, was to treat the transgressed act as unenforceable and nothing more.[920] Since the documentary credit was a facility to conceal the breach of the exchange control regulation the principle of autonomy was not engaged because the documentary credit contract was itself violating the legislation,[921] although it was not the payment of the money

[919] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168, 190-91 per Lord Diplock.
[920] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168, 189 per Lord Diplock.
[921] Enonchong, *The autonomy principle of letters of credit: an illegality exception?* [2006] L.M.C.L.Q, 406-407.

per se that was unenforceable but only the inflation of the contract price in the underlying contract.

Illegality In One Of The Other Operative Contracts Of The Documentary Credit

5.4.14 Illegality in one of the other operative contracts might occur in practice where the documentary credit contract of the issuing bank with the applicant, or the indemnity contract with the confirming bank, becomes illegal if the countries of the parties issue orders or enact laws prohibiting trading with each other. There is no direct authority under English and Jordanian laws regarding this issue. According to the general illegality principles under Jordanian law, the confirming bank might argue that because the cause of the contract with the beneficiary is the indemnity contract of the confirming bank with the issuing bank once the latter contract becomes illegal with the knowledge of the beneficiary the credit contract with the beneficiary would become illegal.[922] However, pursuant to the left hand of the principle of autonomy the documentary credit contract between the issuing or confirming bank and the beneficiary should not be affected by the illegality of the operative contracts. Indeed, since the payment of the credit does not assist the realisation of the illegal contract between the confirming bank and the issuing bank it is not justifiable to infringe the principle of autonomy for such illegality. Although the confirming bank would not be able to enforce the indemnity contract with the issuing bank due to the supervening illegality, it is a risk that banks must bear when they issue or confirm documentary credits as they promise to facilitate a secure method of payment and thus to honour the credit regardless to the banks circumstances. Under the general illegality principles of English law the credit contract with the confirming bank would be

[922] Above para 5.4.8.

enforced as the beneficiary would not base its claim on the illegal contract between the issuing bank and the confirming bank.[923]

Illegality In The Underlying Contract

5.4.15 The principle of autonomy would imply that illegality in the underlying contract ought not to affect the documentary credit contract between the issuing, or confirming, bank and the beneficiary. In that event, the beneficiary's payment right would be secure notwithstanding such illegality. Can this implication from the principle of autonomy be sustained even where the cause of illegality is a serious crime such as a sale of heroin[924] or a supply of arms to an enemy?[925] The answer must surely be in the negative because both the payment through the documentary credit is actually the payment or the consideration for such illegal contracts to the effect that it assists the realisation of these contracts, and such actions have been made illegal as they have the potential to cause grave harm to society. Thus it is essential that legal orders ensure high protection for society against such harm. The need for such protection needs to overrule other norms such as the norm of autonomy which materialises that documentary credits are a secure means of payment for sellers. Conversely, should the autonomy principle always be relegated below the illegality norms whatever – and however minor – the illegality in the underlying contract? For instance should the principle of autonomy be laid aside simply because the beneficiary in the performance of the underlying C.I.P. sale contract breaches the law by sending goods on an unlicensed means of transport, or the quantity of goods to be imported exceeds the maximum amount permitted in the applicant's country, or where the applicant, unbeknown to the beneficiary, had not procured the requisite importation licence? In order to address the inquiry we need to appreciate the

[923] *Holman v Johnson* (1775) 1 Cowp. 341, 343.
[924] *Mahonia Ltd v JP Morgan Chase Bank (No.1)* [2004] EWHC 1938, 2026 (Comm).
[925] As suggested by Staughton LJ in *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 W.L.R. 1152, 1163.

competing policies and norms of illegality in the context of documentary credits first, then to analyse the current position of English and Jordanian laws and finally it will be proposed when illegality in the underlying contract ought to be recognised as an exception to the autonomy principle under legal orders.

COMPETING POLICIES AND NORMS

5.4.16 Moral justification. Four dominant policies give rise to the law of illegality under the English enrichment norms. The autonomy norm (i.e. including the principles of independence and appearance) can also be seen as an opposing policy, even though it merely sounds in normative a fiction that connected contracts, and the documents they generate, are autonomous. Firstly, respect for the normative effect of mandatory law expressed in the English and Jordanian legal orders by the principle of parliamentary sovereignty (i.e. if something is forbidden it must not be done).[926] Secondly, the policy underlying the law of illegality is the protection of public interests and morals,[927] particularly where an action is criminalised.[928] The third, being generated from the second policy and has a higher formal realisability, is the policy under English law expressed by the maxim *ex dolo malo non oritur actio* (i.e. no court will lend its aid to a person who founds his cause of action upon an immoral or illegal act)[929] and the doctrine under Jordanian law that the contract is unenforceable where its cause is illegal with the knowledge of the parties.[930] The fourth is expressed by the maxim *ex turpi causa non oritur action* that "*courts will not recognise a benefit accruing to a criminal from his crime"*[931] and therefore courts

[926] *Pickin v British Railways Board* [1974] 2 W.L.R. 208; *Jordanian Constitution* (1952) chapter 5.
[927] The Law Commission (The Law Commission, *The Illegality Defence,* Consultation Paper 189, para 2.5: http://lawcommission.justice.govuk/docs/cp189_Illegality_Defence_Consultation.pdf) identified six rationales policy triggering illegality: (1) furthering the purpose of the rule which the claimant's illegal behaviour has infringed; (2) consistency; (3) the need to prevent the claimant profiting from his or her own wrong; (4) deterrence; (5) maintaining the integrity of the legal system; and (6) punishment. Except the first rationale the Commission did not provide decisive evidence as to the application of other rationales in the context of civil illegality.
[928] Smith and Hogan, *Criminal Law*, (13edn, OUP 2013) para 1.3.1.
[929] *Holman v Johnson* (1775) 1 Cowp. 341, 343 per Lord Mansfeild.
[930] Articles 165, 166 Civil Code (1976).
[931] *Beresford v Royal Insurance Company Limited* [1938] AC 586, 599 per Lord Atkin.

will not lend their aid to a guilty person to be benefited from his illegal act.[932] The *ex turpi causa* policy intersects with partially opposing equitable and unjust of each other and underlying facts. In consequence the policies of parliamentary sovereignty, the protection of society as a whole and *ex turpi causa* provide a moral justification for illegality to infringe the autonomy norm. But the application of those policies might, however, be unruly and be the cause of uncertainties, which could threaten the stability of transactions and undermine the security of documentary credit transactions.

5.4.17 Rational justification. However, the whole basis of the rational justification for the illegality exception is questionable, particularly in the context of international trade, because of the absence of transparency (i.e. both the problem of access to laws[933] and the problem of access to information concerning the underlying transaction). Thus, unlike fraud, there are many different types of illegality and these vary greatly internationally even across the legal orders that might operate in the same documentary credit transaction. Also in illegality, the confirming bank will face the dilemma of dealing with foreign laws in many cases, particularly since illegality often relates to the violation of the regulations of the buyer's country when the confirming bank is operating in the seller's country. Given the needs for assurance of reimbursement, manageable examination and speed banks do not enter documentary credit contracts with the expectation that they will have an extra duty to scrutinise both the laws appertaining to the underlying transaction and the underlying transaction itself. Given the growth of statutory law under legal orders, trading parties might unintentionally violate laws and even with careful scrutiny banks may well not be able to uncover such violations. Indeed the problem of the absence of transparency as to underlying performance and access to laws generates

[932] *Holman v Johnson* (1775) 1 Cowp. 341, 343 per Lord Mansfeild.
[933] Access to law is regarded as one of the eight principles of the rule of law identified by Lord Bingham extra judicially: Bingham, *The Rule of Law*, [2007] The Cambridge Law Journal (66), 76.

uncertainties that open the door for unnecessary litigation, and serves to encourage traders (acting without good faith, who simply aim to escape from their contractual obligations) to raise illegality as a defence to their payment obligation. Still the scope of illegality is broad under some jurisdictions (e.g. in the USA penalty clauses render the contract illegal) to the effect that permitting any type of illegality to interfere with the principle of autonomy might capture many documentary credits and thus undermine the reputation of documentary credits as being a secure method of payment. Hence, the focal issue is not whether an infringement or exception to the autonomy principle is right or wrong in itself, rather the issue is the containment of the effects of the exception on the security of documentary credits. Accordingly, an illegality exception to the principle of autonomy needs to be designed in a way that is responsive to the need of legal orders to safe guard society and the competing needs of the banks and traders as to the maintenance of the security of documentary credits in the absence of transparency as to illegality norm.

THE PRESENT POSITION OF ENGLISH AND JORDANIAN LAWS

5.4.18 **English law.** Although there is no decisive authority under English law regarding the illegality exception there are judicial opinions clearly supporting the recognition of illegality that has the effect of prohibiting the whole contract, whether it is civil or criminal illegality, as an exception to the autonomy principle where there is clear evidence of illegality with the knowledge of the bank prior the payment of the credit.

5.4.19 In ***Group Josi Re v Walbrook Insurance Co Ltd***[934] the underlying reinsurance contracts of the letters of credit, or demand bonds,[935] were alleged by the reinsurer to be illegal as the reinsurer was not authorised to carry out their business in the UK

[934] [1996] 1 W.L.R. 1152.
[935] They are called as letters of credit in the judgment but they have the function of demand bonds as they are set up to secure the right of insurance companies to draw on the credit in the case the liability for outstanding loss reserves under the reinsurance company's umbrella quota share facilities.

pursuant to the Insurance Companies Act 1982. The reinsurer succeeded in issuing an injunction restraining the beneficiaries, insurance companies, from drawing on the letters of credit on the ground that the credit was tainted by the illegality of the underlying reinsurance contract. In the Court of Appeal Staughton LJ stated *obiter* that:

"In my judgment illegality is a separate ground for non-payment under a letter of credit ... Take for example a contract for the sale of arms to Iraq, at a time when such a sale is illegal. The contract provides for the opening of a letter of credit, to operate on presentation of a bill of lading for 1,000 Kalashnikov rifles to be carried to the port of Basra. I do not suppose that a court would give judgment for the beneficiary against the bank in such a case".[936]

Staughton LJ considered that if the underlying reinsurance contracts were illegal the court would restrain the payment under the letters of credit, because the latter would have been used to carry out an illegal transaction. The learned judge went on to hold that the performance of letter of credit would be illegal if the beneficiary in the letter of credit would *rely*, or found its action, on the illegal contract to draw on the credit. He held that since beneficiaries in the *Group Josi* case must present a debit covering the liability for outstanding loss reserves under the reinsurance company's umbrella quota share facilities, their drawing on the letters of credit would be illegal. The leaned Judge was inclined that illegality, as fraud, would *"have to be clearly established and known to the bank before it could operate as a defence, or a ground for restraining payment by the bank".*[937]

5.4.20 In ***Mahonia Ltd v JP Morgan Chase Bank (No.2)***[938] the issuing bank West Bank accepted the application of Enron Corporation, one of the most successful companies

[936] *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 W.L.R. 1152, 1163.
[937] *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 W.L.R. 1152, 1163.
[938] [2004] EWHC 1938 (Comm).

worldwide at that time, to issue on 5th of October 2001 a standby letter of credit (i.e. demand bond) in support of the swap transaction between ENAC the subsidiary of Enron and Mahonia. The beneficiary Mahonia was entitled to draw $165 million on presentation of a statement of an event of default by ENAC. On 2nd of December 2001 Enron went into Chapter 11 Bankruptcy and subsequently Mahonia presented a statement of ENAC's default demanding the payment under the bond. But, West Bank refused to honour the demand bond on the ground of illegality, alleging that the underlying purpose of the transaction as a whole, including the swap contracts and the demand bond, was unlawful. West Bank alleged that the swap transaction was a disguised loan to enable Enron to manipulate its corporate accounts in contrary to the Generally Accepted Accounting Principles (GAAP) and the USA Securities Exchange Act 1934. At first instance, Cook J held that there was no proof of breach of the 1934 Act (and thus no illegality) but in the course of his judgment he went on to elucidate, as *obiter*, how illegality would be considered as an exception to the autonomy principle had the facts of illegality been established. The Judge explained that if the parties to the underling contract including the beneficiary, Mahonia, were complicit in an attempt to breach the laws of a foreign friendly country the court would not enforce the swap contracts and the demand bond. Cook J considered how the demand bond could have been regarded as being sufficiently close to the illegality of the underlying contract to justify the interference with the principle of autonomy.

5.4.21 Thus Cook J considered that the test of reliance set out, as *obiter*, by Staughton LJ in *Group Josi Re v Walbrook Insurance Co Ltd*[939] was not effective to determine the degree by which it can be said that a letter of credit is tainted by the illegality in the underlying contract, because in the Mahonia the fact that the beneficiary presented a document stating that the applicant went into bankruptcy - which was sufficient to draw on the credit – was not based on the alleged illegal swap contracts. As an

[939] [1996] 1 W.L.R. 1152.

alternative test, Cook J opined that the demand bond would have been tainted by illegality (had there been proof of illegality) as it was an important part of the scheme to facilitate the unlawful accounting, even though the demand bond – unlike the swap transaction - was not directly connected to the accounting malpractice. He considered that this conclusion was confirmed by the following assumptions:

"Furthermore, had the L/C's not been provided by October 9 th, the Swap transactions would have been terminated. Thus the L/C was brought into existence for the very purpose of being part of what was, on this hypothesis, an unlawful scheme... Equally, the doctrine of taint could be seen to apply inasmuch as the L/C is analogous to a form of security for the performance of ENAC's obligations ... so that the L/C was part of the overall arrangements and shared the same common purpose, since without it the transaction would not have gone ahead ".[940]

5.4.22 In addition, the learned judge considered that a breach of the USA Security Exchange Act 1934 would have given rise to illegality, and not a mere unenforceability, as there would have been an element of *deceit or intentional wrongdoing* triggering two of the dominant policies underpinning illegality under English law. Namely, in the absence of any issue of parliamentary sovereignty, that courts will not lend their aid to enforce an unlawful purpose and the protection of public interests and morals where the unlawfulness is such as to engage public policy.

5.4.23 **Jordanian law.** Given the fact that illegality as an exception to the autonomy principle is not the subject of discourse amongst Arabic commentators, it is perhaps not surprising that the defence of illegality in documentary credits has not arisen before Jordanian courts.[941] However, the empirical findings indicate that judges are

[940] *Mahonia Ltd v JP Morgan Chase Bank (No.2)* [2004] EWHC 1938, 2026 (Comm).
[941] The interviewed judges expressed the view that they have never heard about illegality exception to the autonomy principle in documentary credits: Annex I, para 44.

not willing to enforce payment under a documentary credit where the subject matter of the underlying contract could under Jordanian law be considered a grave crime such as the sale of heroin.[942]

A PROPOSAL FOR ILLEGALITY EXCEPTION

5.4.24 English judicial opinions, as explained above, support the view that illegality whether criminal or civil, that has the effect of rendering the underlying contract as being prohibited,[943] is an exception to the autonomy norm where it taints documentary credits.[944] Staughton LJ provided the reliance test as explained above to determine the degree of connection that permits illegality in the underlying contract to interfere with the autonomy principle.[945] Such a test was later challenged by Cook J who provided an alternative test for a sufficient connection in that the credit must be set up in the beginning as an integral part of the illegal scheme.[946] Professor Enonchong has suggested, quite rightly in the researcher's opinion from the perspective of the autonomy principle, that the enquiry should not be to establish the degree of connection between the illegality of the underlying contract and the documentary credit but rather to establish the degree of knowledge on the part of the beneficiary.[947] Being the payment or the reward for an underlying contract, the documentary credit is by default an integral part to the underlying contract. Thus the payment of the credit to the guilty beneficiary might simply be considered as a reward for his illegal act. The present research builds on that approach and proposes analyses as to the degree and the time of the beneficiary's knowledge that is required to infringe the autonomy principle. Furthermore, Staughton LJ opined that illegality

[942] Annex I, para 44.
[943] Harris, *The EC REACH Regulation and contractual supply obligations,* [2010] J.B.L. (5), 394, 407-411.
[944] *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 W.L.R. 1152, 1163; *Mahonia Ltd v JP Morgan Chase Bank (No.2)* [2004] EWHC 1938, 2026 (Comm).
[945] *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 W.L.R. 1152, 1163.
[946] *Mahonia Ltd v JP Morgan Chase Bank (No.2)* [2004] EWHC 1938, 2026 (Comm).
[947] Enonchong, *The autonomy principle of letters of credit: an illegality exception?* [2006] L.M.C.L.Q, 408.

with the knowledge of the bank must be clearly established by strong evidence,[948] such requirements are adopted in proposing illegality exception in this research in addition to offer further analysis as to the degree and the time of such knowledge. It is argued that beneficiary's knowledge, strong evidence and seriousness of illegality (i.e. deliberate wrongdoing by the beneficiary)[949] narrow the potential broad application of illegality exception under English law.[950]

5.4.25 Nevertheless, the dogmatic view simply rejects illegality as an exception to the embedded usage of autonomy due to the potential broad application of illegality. This is the convenient view in the USA as illegality has a broad application under both US federal and state laws with illegality extending, for example, to penalty clauses.[951] This approach interacts with the policies underpinning illegality in the sense that it is repugnant to the public conscience to enforce payment under a documentary credit for the type of illegality - in the underlying contract or operative credit contracts - that is considered as a grave crime such as a sale of heroin and the bank might be held criminally liable for the payment of a crime. McLaughlin thus argues in the USA for *criminal* illegality as being capable to infringe the autonomy principle.[952] To ensure the narrowness of the illegality exception it is submitted that the seriousness of illegality ought to denote both criminal illegality that has the effect of prohibiting the contract and civil illegality that also has the effect of prohibiting the underlying contract in addition of having the element of deceitful wrongdoing. Also, the actual knowledge of the bank as to such illegality must be required to the effect that the lack of such knowledge protects the right of banks for reimbursement.

[948] *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 W.L.R. 1152, 1163.
[949] The element of deliberate wrongdoing being an important factor to apprehend serious illegality as was implied in *Mahonia Ltd v JP Morgan Chase Bank (No.2)* [2004] EWHC 1938, 2026 (Comm).
[950] Enonchong, *The autonomy principle of letters of credit: an illegality exception?* [2006] L.M.C.L.Q, 408, 417.
[951] Enonchong, *The autonomy principle of letters of credit: an illegality exception?* [2006] L.M.C.L.Q, 408.
[952] McLaughlin, *Exploring Boundaries: A Legal and Structural Analysis of the Indepndence Principle of Letter of Credit Law*, [2002] Banking LJ 521; McLaughlin, *Letters of credit and illegal contracts: the limits of the independence principle,* [1988] 49 Ohio St. L.J. 1197.

Types of illegality to infringe the autonomy principle

5.4.26 It is submitted that criminal illegality, with the knowledge of the beneficiary and with the actual knowledge of the bank as explained below, in the underlying contract which renders the consideration, or the promise, of that contract unenforceable or void is the first type of illegality that should be permitted to infringe the principle of autonomy. Of course, an action is criminalised under a legal order for the protection of the whole society and for the safeguarding of a state, and the level of the engagement of such policy varies according to the severity of the crime as perceived by the state. Clearly punishment and deterrence are viable policies for criminal illegality, but ostensibly they have no application to civil illegality.[953] Also the maxim *ex turpi causa* emanate from the criminal context under English law,[954] and it is not generally applicable to civil illegality.[955] Being the policy triggering the fraud exception under English and Jordanian laws the *ex turpi causa* has an application in the context of criminal illegality where the beneficiary is guilty of such illegality.[956] Criminal illegality that renders the contract void or unenforceable involves any criminal illegality known by the parties at the formation of the contract under English and Jordanian laws,[957] or a criminal illegality in the performance that renders - under the applicable law - the underlying contract void or unenforceable (e.g. lawful sale of coffee but the seller in the performance of the contract uses slave workers to produce the coffee). Where the committed crime in the performance of the underlying contract does not affect the validity or the enforceability of the promise,

[953] *Tribe v Tribe* [1996] Ch 107, 133-134 per Millett LJ; *Tinsley v Milligan* [1992] Ch 310, 334 per Ralph Gibson LJ; although it was argued by the Law Commission (The Law Commission, *The Illegality Defence,* Consultation Paper 189, par 2.5: http://lawcommission.justice.govuk/docs/cp189_Illegality_Defence_Consultation.pdf) that deterrence and punishment were policies underpinning the civil illegality doctrine under English law, the empirical findings in their Consultation indicated that just over half of the respondents believed that deterrence is a rational policy behind civil illegality and the majority thought that punishment is not a rational policy underlying civil illegality.

[954] *Beresford v Royal Insurance Company Limited* [1938] AC 586, 599 per Lord Atkin.

[955] Except in tort where there is dishonesty: Beale and others (eds), *Chitty on Contracts*, (31st edn, Sweet and Maxwell 2012), para 16.165; under Jordanian law the maxim may operate in dishonesty in the formation of a contract: Hadith Narrated by Abul-Hussain Muslim son of Habaj son of al Nishapuri*, Sahih Muslim Book 10 Business Transactions.*

[956] Above para 5.3.7.

[957] Above para 5.4.3-8.

or the consideration, of the contract under the applicable law entails that the enforceability of the contract does not affect the public conscience under that legal regime, and therefore such criminal illegality should not affect the payment obligations in documentary credits. This has the effect of narrowing the scope of criminal illegality in a justified pragmatic way that associates public protection to the manifested measures by a state.

5.4.27 However, civil illegality in the underlying contract which renders the consideration, or the promise, of that contract unenforceable or void so as to prohibit the contract pursuant to a statute triggers the principle of parliamentary sovereignty which is a dominant norm under English law, and that might explain why English judges in *Group Josi* and *Mahonia* are of the opinion to accept such illegality to infringe the autonomy norm. But if such civil illegality was truly severe in the sense of affecting the whole society, and thus being a supervening norm ousting other norms such as the autonomy norm, it would be criminalised by the parliament. Hence, deceitful wrongdoing is (i.e. the underlying transaction is set up to deceit third parties and the letter of credit is used to secure such transaction) a further qualification that should be required, as it was opined per Cook J in *Mahonia*,[958] to civil illegality to give effect to the illegality exception, since the *ex turpi causa* maxim operates under such illegality though, unlike fraud exception, is used to prevent deceiving a party privy from the letter of credit. Accordingly, it is submitted that such civil illegality is the second type of illegality that is qualified to infringe the autonomy norm because: (1) having the effect of prohibiting the underlying contract clearly indicates the seriousness of illegality, though it is not severe as criminal illegality, and the intention of the legislation to safeguard the state;[959] (2) having the element of deceitful wrongdoing triggers the maxim *ex turi causa*; (3) the problem of the lack of

[958] *Mahonia Ltd v JP Morgan Chase Bank (No.2)* [2004] EWHC 1938, 2026 (Comm).
[959] For instance REACH Regulation prohibits substances requiring registration to be placed in the market of EEA for the objectives of protecting human health, environmnet and the free movement of goods in a single market: Harris, *The EC REACH Regulation and contractual supply obligations,* [2010] J.B.L. (5), 394-419.

transparency can be overcome by requiring the actual knowledge of the bank in order to protect the bank from unexpected liability as explained below.

Knowledge of the beneficiary

5.4.28 Knowledge is required. To infringe the principle of autonomy for illegality committed in the underlying contract without the knowledge of the beneficiary, where the payment of the credit does not itself perform an illegal act, is neither morally nor rationally justified.[960] The maxim *ex turpi causa* is not applicable in the absence of criminality or dishonesty on the part of the beneficiary. A recognition of such illegality whether or not the documents are nullity, which is unbeknown to the beneficiary, as an exception to the autonomy principle would give the opportunity to guilty parties to use documentary credits as means to avoid the consequences of their wrongdoing. For instance, the buyer who purchases goods knowing that are to be shipped illegally without the knowledge of the seller, might then be granted an injunctive relief restraining the bank from payment on the basis of illegality. Furthermore such recognition would substantially devastate the security underpinning documentary credits given the potential breadth of illegality. Thus the knowledge of the beneficiary as to the relevant illegality is essential under English and Jordanian laws as it should also be the case under any rational legal order.

5.4.29 Degree of knowledge. Yet, both the degree of the beneficiary's knowledge and the level of proof are contingent on different types of illegality. So, under English and Jordanian laws, where the underlying contract is ostensibly illegal in the place of the beneficiary's performance, then the knowledge of the beneficiary is presumed.[961] If,

[960] Above para 5.4.16.
[961] English law: *Waugh v Morris* (1873) L.R. 8 Q.B. 202, 208 per Blackburn J*;* Jordanian law: Aljbouri, *The Concise In The Explanation Of Jordanian Civil Law,* (1st, Wael 2011) 275.
The sale of goods that are not legally saleable in the buyer's country with the knowledge of the seller is a valid contract for the seller as long as the seller is not obliged to deliver the goods to the buyer's warehouse: *Sumner Permain and Company v Webb and Company* [1922] 1 K.B. 55.

however, such underlying contract does not necessarily involve the commission of an offence to the effect that the contract may be performed lawfully, then if it is performed illegally by a party other than the beneficiary the actual knowledge (i.e. including a wilful of shutting eyes) of the beneficiary of the fact of such illegal performance must be proved.[962] Where illegality in the formation of the underlying contract is not apparent (i.e. the parties entered into an ostensibly lawful contract to achieve an unlawful purpose or to perform the contract illegally, for example a lawful sale of medical thermometers for the unlawful purpose of the use of heroin), then the beneficiary's complicity under English law must include participation (e.g. producing unusual thermometers that fit for heroin)[963] and it is submitted that should also be the case under Jordanian law.[964] Illegality in the performance on the part of the beneficiary requires the knowledge of the beneficiary as explained above, but if that illegality related to the performance of the part of the applicant then the participation of the beneficiary is required.[965]

5.4.30 Time of the beneficiary's knowledge. For illegality in the formation, it is submitted that it must be proved that the beneficiary has knowledge as to the non-apparent illegality before or at the time when the contractual term for the payment by documentary credits in the underlying contract is concluded as it is a proof of the beneficiary's illegal intent at the time of forming the contract. It should not thus be sufficient to prove that the beneficiary has knowledge as to the illegality at the time of documents presented. For illegality in the performance which renders the contract void or unenforceable, it is submitted, the knowledge of the beneficiary must be proved prior to the time of honouring the credit, given that the ultimate risk – where all the parties are innocent prior the honour of the credit - must rest on the applicant

[962] As under fraud exception: above para 5.3.10.
[963] Beale and others (eds), *Chitty on Contracts (*31st edn, Sweet and Maxwell 2012), para 16.011.
[964] There are two schools under Sharia law regarding this issue where Hanfisim is of the opinion that the contract should be valid unless it is ostensibly illegal but Hanabilisim and Malikisim are of the opinion that the apparent lawful contract is illegal if the purpose of it is unlawful with the knowledge of the parties: Aljbouri, *The Concise In The Explanation Of Jordanian Civil Law,* (1st, Wael 2011) 275.
[965] *For analogy: Ashmore, Benson, Pease & Co Ltd v A.V Dawson Ltd* [1973] 1 W.L.R. 828.

and as such the beneficiary might enter into new contracts creating obligations upon himself on the confidence that the payment of the honoured credit would be realised.

Actual knowledge of the bank and no duty to investigate

5.4.31 Given the absence of transparency of illegality as to the underlying contract and the represented facts by documents in documentary credits, as analysed above,[966] the main problem in the recognition of an illegality exception is the potential exposure of banks to the risk of being innocently caught by illegality. The factual matrix that the bank is not a contracting party to the underlying contract, is not usually an expert in the underlying trade and needs to determine the conformity of documents on their face[967] within a short period of five banking days[968] justify that the bank should not be under a duty to investigate the illegality of the presented documents, or of the underlying contract.[969] As the bank is not obliged to investigate the fraud in documentary credits under English law,[970] it is *fortiori* that it is not obliged to do so for illegality and that in turn reflects the needs for speed and manageable examination. Therefore, for illegality to be recognised as an exception to the autonomy principle, the "actual knowledge" of the bank is required. Here it must be proved, by the person seeking to restrain the paying bank from payment on the ground of illegality,[971] that there is a wilful shutting of eyes by the bank to credible evidence as to illegality and its "effects" under the relevant law.

5.4.32 The bank's knowledge in this respect should not include a constructive knowledge based on what a reasonable bank should have known and must be established taking

[966] Para 5.4.17.
[967] Principle of appearance: article 4 and 14 UCP 600; there is an assumption that the documents are lawful and genuine: article 37 UCP 600; chapter 3.
[968] Sub-article 14 (d) UCP 600.
[969] To draw an analogy regarding the absence of transparency for illegality in a context other than documentary credits: *Bank für Gemeinwirtschaft Aktiengesellschaft v City of London Garages Ltd*close [1971] 1 W.L.R. 149.
[970] *Turkiye Is Bankasi AS v Bank of China* [1996] 2 Lloyd's Rep 611, 617; *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554, 560; *Gian Singh & Co. Ltd. v Banque de l'Indochine [1974] 1 W.L.R. 1234*.
[971] By analougy to fraud: *Deutsche Ruckversicherung AG v Walbrook Insurance Co Ltd* [1995] 1 W.L.R. 1017, 1030.

into account that the bank is not under a duty to make inquiries as to illegality. Only where there is credible evidence presented to the bank as to illegality and its general effects under the applicable law the bank should proceed in making inquiries to ensure the reliability of the evidence and the actual effects of illegality and the extent of that obligation should be responsive to the individual circumstances of the bank.[972] The time of the bank's actual knowledge must be prior to the payment of the credit.[973] The requirement of actual knowledge should operate as a protective to the bank's right of reimbursement. Therefore where the bank refuses to pay the credit on the basis of mere allegation of illegality, without having strong evidence and actual knowledge as to the illegality, and it turns out in the judgment that the underlying contract is actually prohibited due to criminal or civil illegality with the knowledge of the beneficiary the bank would not be liable for refusal of payment. One exception to the actual knowledge is to be that for crimes against humanity as defined by the Rome Statute of International Criminal Court, the constructive knowledge of the bank should be sufficient in relation to the effects of such illegality under the applicable law, but not as to the factual occurrence of such illegality in the underlying contract.

[972] In a different context (trusts) it was said that a wilfully or recklessly failing to make inquiries which an honest person would have made constitutes part of actual knowledge: *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437,CA.

[973] By analogy to fraud exception: *European Asian Bank AG v Punjab & Sind Bank* (No.2) [1983] 1 W.L.R. 642, 658; *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554, 560; *Credit Agricole Indosuez v Generale Bank* [1999] 2 All E.R. (Comm) 1009, 1015; *DCD Factors Plc v Ramada Trading Ltd* [2007] EWHC 2820 (Q.B.), [2008] Bus L.R 654; *Group Josi Re v Walbrook Insurance Co* [1996] 1 W.L.R. 1152, 1161.

EVALUATION OF FRAUD AND ILLEGALITY EXCEPTIONS AND THE UCP

Evaluation Under English And Jordanian Laws

5.5.1 **Substance and procedures.** English and Jordanian laws share the same underlying policy for the exception of fraud. Indeed, both legal systems require the knowledge of the parties against whom the fraud exception is to be executed. However, the tangible results and effects vary. On the one hand, many interlocutory injunctions for fraud exceptions have been granted by Jordanian courts.[974] On the other hand, there are only two cases for fraud where the granting of an injunction was confirmed at pre-trial by English courts and those were in respect of demand bonds.[975] This is mainly due to the procedural rules which differ under these legal systems. It is an illustration of how substantive law is affected by procedural law.

5.5.2 **No right to response and evidential strength.** The problem under Jordanian law is that the respondent does not have the right to reply to the application for an injunction; the respondent only has the right to appeal against the injunction after it has been implemented.[976] This right to reply allows the respondent to challenge the strength of evidence submitted by the petitioner and the merits of that challenge are taken into account by the court when exercising the discretion upon which it decides whether to grant or refuse the requested injunction. The risk that arises where the discretion is exercised without the input of the respondent is that a door is thereby opened for traders – who wish to restrain payment under documentary credits – to

[974] Annex I, para 42.
[975] *Themehelp Ltd v West* [1996] Q.B. 84; *Kvaerner John Brown Ltd v Midland Bank Plc* [1998] C.L.C. 446: in the latter case the issue of balance of convenience was not addressed before the court and therefore the case is not to be regarded as an authority as to the availability of injunctions in the light of the balance of convenience.
[976] Article 170 Jordanian Civil Procedures Rules (1988).

act in bad faith. Traders may advance allegations of fraud or ostensible illegality on the part of the respondent that have no foundation in fact, in the knowledge that a court will accept those allegations at face value.

5.5.3 This is a particular issue in the context of allegations of illegality, because of the breadth of the illegality concept, and the very significant risk of illegality arising without the respondent being party to it, or having any knowledge of it at the material time. This would threaten the stability of documentary credits as a reliable payment mechanism as genuine payment obligations would be undermined by spurious injunctions. For that to be remedied under Jordanian law would require revision of the Jordanian Civil Procedures Rules, since the Court of Distinction does not itself have the authority to impose conditions on procedural rights for injunctions (such as giving the respondent the right to reply). The Court of Distinction could nevertheless improve the position significantly by the setting of an appropriate guideline as to the strength of the evidence required to obtain an injunction to restrain payment under a documentary credit. For instance, guideline can be issued to the effect that illegality (and indeed fraud) involving the respondent (or, to the knowledge of the respondent at the material time, involving the beneficiary) must be the only realistic inference to be drawn from the submitted evidence.

5.5.4 **The strictness of the balance of convenience.** However, the high resistance by the English courts to the issue of injunctions restraining banks from honouring credits based on the fraud exception might lead to results that are not in accordance with the policy that *courts will not let their process be used by a fraudster.* Thus the English court process might actually benefit fraudsters particularly those who are domiciled in a jurisdiction other than the UK, by facilitating their receipt of payment under documentary credits so that they achieve their fraudulent aim. It is submitted that such results might be avoided if injunctions are sought to restrain the bank from honouring the credit from the account of the applicant. In this context, courts could

relax the strictness of the application of the balance of convenience as banks have the option to pay the credit (to preserve their reputation as a trusted providerof payment facilities under documentary credits) from their own assets on the reliance that they will be reimbursed by the cross-undertaking of the applicant if fraud is not proved at trial.

5.5.5 The applicant must bear the ultimate risk of fraud. The empirical findings of this research indicate that courts in Jordan might issue an injunction or a judgment restraining issuing banks from honouring a credit, even where the credit has already been paid by the innocent confirming bank.[977] This leaves the innocent confirming bank without the ability to enforce reimbursement from the issuing bank and is not coherent with the policy of *whoever commits a fraud is not one of us.* Indeed, the confirming bank usually adds its confirmation on the basis of the trust and security that it will be reimbursed by the issuing bank. The latter relies on the reimbursement by the applicant who is the customer, who is usually domiciled in the same country as the issuing bank. It is submitted that the applicant, even though innocent, must bear the ultimate risk of fraud. Firstly, he is the party who chose to deal with the beneficiary in the first place. Secondly, he is the contracting party in the underlying contract which is the subject, or at least the cause, of fraud. Thirdly, there is no moral justification to invalidate the indemnity agreements in the documentary credit between the banks and with the applicant because of fraud in the underlying contract of the documentary credit, where the banks make payment without knowledge of the fraud. The situation might differ where the issuing bank takes the role as a business advisor to the applicant, as in this case it might be appropriate for the issuing bank to bear the risk of fraud.

[977] Annex I, para 43.

Proposition Under The UCP

5.5.6 **Archetypal issues for legal orders.** There is no revision in the UCP and their interpretative aids that address the issue of whether fraud and illegality operate as exceptions to the principles of autonomy and appearance. It is the ICC's view that the issue of fraud, alike with illegality and enforcement, is the product of the applicable Municipal laws.[978] Indeed, it is prudent to appreciate that fraud and illegality have the effects of being overriding mandatory doctrines (i.e. they override other legal doctrines and communicated trade usages in that the parties cannot contract out of them) and thus any communicated agreement or trade practice by the international banking community opposing illegality and fraud exceptions would be futile. But, does this mean that the issues of fraud and illegality should not be addressed by the UCP? Surely this is one area that requires the UCP to exercise its power of seduction by nudging legal orders towards appropriate outcomes.

5.5.7 **Ambiguity and confusion.** The generated data from the interviews that were conducted by the researcher with some Jordanian judges indicate that judges are keen to deepen their understanding as to the concerns of the actors to documentary credits in relation to illegality.[979] This might be due to the lack of legal and commercial discourse regarding these issues in Arabic countries, and this could also be the case for other non-Arabic developing countries. Also, whether illegality in the underlying contract is regarded as an exception to the principle of autonomy is still uncertain under English law[980] and has never been subject to any authority or legal discourse under Jordanian jurisdiction. Moreover, the time of the bank's knowledge as to fraud is not certain under Jordanian law and there is a risk that courts might issue injunctions restraining the issuing bank from reimbursing the innocent confirming

[978] *Opinions 2009-2011,* R.744.
[979] Annex I, para 44.
[980] Above para 5.4.18.

bank, which at the time of making payment had no knowledge as to the fraud.[981] Finally, the strength of evidence in granting an injunction for fraud under Jordanian law is questionable because the respondent does not have the right to respond.[982]

5.5.8 The sociological value underlying documentary credits and the needs of the parties must be addressed. It is, therefore, submitted that there is a need to buttress the sociological value of the documentary credits (i.e. critical balancing of the distinct archetypal security needs of each of the four groups of contracting parties who typically transact documentary credits) by explicitly reflecting the respective transactional needs of the parties to documentary credits regarding the fraud and illegality exceptions. This can be achieved in the UCP through the means of communication. This is not to say that the purpose is to regulate by the means of certainty how illegality and fraud may be operated as exceptions to the independence and appearance principles: because such an attempt would be repugnant to most if not all legal orders due to the overriding nature of illegality and fraud norms. Rather, it must be the task of the UCP to provide guidance highlighting the sociological value underpinning documentary credit transactions and the prominent needs of the parties to documentary credits in the context of illegality and fraud. Here, the means of flexibility should be paramount in order to ensure the adaptability of such UCP guidance across the different range of legal orders and factual circumstances. In other words, it must be made clear in any upcoming UCP iteration that the purpose is not, and cannot be, to envision legal rules or standard contractual terms, but merely to express the expectation of the UCP community as to the narrow operation of illegality and fraud against the embedded trade usage of autonomy, in the light of the security value underpinning documentary credits and the dominant needs of the parties to documentary credits.

[981] Annex I, para 43.
[982] Article 170 Jordanian Civil Procedures Rules (1988).

5.5.9 Of course this should not be taken as inviting legal orders to accept fraud or illegality as exceptions to the embedded usage of autonomy. The aim is that such reflective guidance would achieve uniformity in the approach, and not in particular rules, towards illegality and fraud. Accordingly it is hoped - through the means of communication, responsiveness, flexibility and clarity - that an upcoming iteration of the UCP would contain an article that is similar to the following proposed provision:

"The fundamental international trade usage of autonomy, including the principle of appearance, must be highly guarded in order to facilitate a secure method of payment to beneficiaries and to protect banks reputation and their right to reimbursement. Fraud and illegality are idiosyncratic issues that are associated to Municipal Laws and are outside the scope of the UCP. It is, however, the expectation of international banking community that the Municipal Laws that recognise fraud and illegality as exceptions to the fundamental trade usage of autonomy should merely permit a narrow application to these exceptions that takes into consideration the following.

(i). There must be strong evidence of high probability as to fraud with the actual knowledge of the beneficiary and the bank prior to the payment of the credit, and the bank is under no obligation to investigate whether there is fraud or not.

(ii). The type of illegality must be confined to grave crimes, or to an illegal action that is regarded as being against the fundamental principles of safeguarding the state.

(iii). Banks do not have access to foreign laws and to the facts in the underlying contracts, they need to examine the documents within a short period of time, they need to preserve their reputation and thus they are not obliged to investigate whether there is illegality or not.

(iv). There must be strong evidence as to illegality, in the underlying contract, with the knowledge of the beneficiary and the actual knowledge of the bank prior to the payment".

CONCLUSION

5.6.1 It is postulated that both the principles of independence and appearance constitute the embedded trade usage of autonomy, since otherwise the right of the beneficiary to payment under a documentary credit would be dependent upon the rights of the applicant or other parties against the beneficiary. On the basis of the developed conceptual model in chapter 1, the terms of UCP 600 were evaluated (in the context of their reiteration of UCP 500) for their transnational effectiveness; particularly as to whether they are responsive to the functional nature of the embedded usage of autonomy and their clarity and quality of ruleness. A thorough understanding of the elements of the embedded usage of autonomy and its functions lays the rational ground for the communication of the transaction of documentary credit within legal orders.

5.6.2 The principle of independence consists of two hands. The right hand of the principle of independence denotes that the documentary credit is independent from the underlying contract between the applicant and the beneficiary, whereas the left hand means that the operative contracts in the documentary credit are themselves independent from one another. Subject to the exceptions generated by Municipal legal orders, the right hand of the principle of independence captures all cases and has a high quality of "formal realisability" under UCP 600, English law and Jordanian law. There is consistency between the positions of UCP 600 and the aforementioned legal orders, and this serves both certainty and uniformity. This reflects the notion that autonomy is an embedded trade usage for the use of documentary credits that operate across borders.[983] The new changes in sub-article 4 (b) of UCP 600 heighten the protection of the right hand of independence by imposing a duty on the issuing bank which is responsive to the legal principle of duty of care under English and

[983] Hwaidi and Ferris 'The Existence of International Unchangeable and Changeable Trade Usage' (SLS Conference, Edinburgh, September 2013) <http://archive.legalscholars.ac.uk/edinburgh/restricted/paper.cfm?id=107>.

Jordanian laws and such a duty under these legal orders would operate as a general rule in the principle of independence which in turn enhances the "formal realisability" of the independence principle.

5.6.3 Although, the left hand of the principle of independence is not addressed in UCP 600 as was the case in the previous iterations, it is well established under English law[984] and there is empirical evidence of its judicial recognition in Jordan since it is part of the embedded trade usage of the autonomy of documentary credits.[985] It needs however to be expressed clearer under these legal orders. In developing countries, that have similar conditions to Jordan, such as Egypt, Syria, Kuwait and UAE, where there is a need to enrich the legal discourse in documentary credits, a court might *not* take into account the left hand of the principle of independence.[986] So the contract between the confirming bank and the issuing bank would be rendered void, where its cause (i.e. the contract between the applicant and the issuing bank) is void for a mistake in the subject matter or for lack of formality. It is hoped that the next revision of the UCP would adopt the means of certainty regarding this issue and thus would eliminate the lacunae and confirm through clear stipulations the status of the left hand of independence as part of embedded usage of autonomy in order to promote the commonality of documentary credits. It is hoped that a new revision of the UCP would adopt a comprehensive formula in the form of both principle and general rule capturing all cases with a high level of "formal realisability". Such formula must therefore define the independence and appearance principles as elements of the embedded trade usage of autonomy in order to signify that such concepts are international *lex mercatoria* having a high hierarchical status.

[984] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, 182, 183 per Lord Diplock.
[985] Annex I, para 44.
[986] Even where such an approach might threaten the viability of documentary credits in that country.

5.6.4 It is necessary to realise that the principle of appearance is a normative presumption that the presented documents in documentary credits are lawful and genuine, and such a presumption constitutes part of the embedded trade usage of autonomy. Such a recognition assists the analysis of the legal effects of fraud under Municipal legal orders. UCP 600, as in the previous iteration, has successfully addressed the appearance principle by adopting the means of certainty and clarity.

5.6.5 It is a dominant legal communication, or doctrine, under English and Jordanian legal orders that *courts do not let their process be used by a fraudster, or by a guilty party to enforce an illegal act*.[987] Hence, fraud is a well-established exception to the embedded trade usage of autonomy under English and Jordanian laws. To enhance the simplicity and precision in dealing with fraud in documentary credits, the distinction between the principle of appearance and the principle of independence must be emphasised in order to draw a clear distinction between fraud in the contract of the beneficiary and the issuing or confirming bank, and fraud in the formation of the underlying contract, or in the operative contracts in a documentary credit. Accordingly, documentary fraud is the type of fraud that is clearly established as an exception to the principle of appearance in the embedded usage of autonomy under English and Jordanian laws, to the effect that there is an implied promise as to the honesty of the beneficiary in the issuance or presentation of documents and once dishonesty of the beneficiary becomes apparent the appearance principle ought to collapse.

5.6.6 There is no current English and Jordanian legal authorities dealing with non-documentary fraud in documentary credits. It is postulated that, where non-documentary fraud occurs in the credit contract between the bank and the beneficiary, the embedded usage of autonomy is not engaged and the general

[987] Above para 5.3.4-7.

principles of the law of fraud apply. But where non-documentary fraud occurs in the performance or formation of the underlying contract or operative contracts, the principle of independence in the embedded usage of autonomy would militate against it in order to protect its main function, namely, assurance of payment. It is submitted that the departure from the independence principle should not be permitted on the ground of non-documentary fraud in the performance of the underlying contract or operative contracts, as such fraud does not relate to facts which have been required to be proved by the presentation of documents. Thus, the role of documents in documentary credits is essential, because they function as a documentary proof of performance of certain contractual terms that are perceived by the buyer as being essential for the security of his bargain. On the other hand, where non-documentary fraud occurs in the formation of either the underlying contract or any of the operative contracts in the documentary credit transaction, it is suggested that English and Jordanian legal orders would recognise such a fraud (when carried out with the complicity of the beneficiary) as an exception to the independence principle as the fraud would precede, and could therefore undermine, the credit.

5.6.7 The challenge is that courts need to ensure that claims for reliance on the fraud exception are genuine (in that fraud has clearly taken place and the person otherwise entitled to enforce the payment obligation under the credit had knowledge of the fraud prior to them becoming entitled to claim under the credit) and therefore not subject to abuse. The requirements are simple in that a bank should not honour the credit where there is available strong evidence – given the need for speed the bank is not under a duty to investigate in order to find fraud - that the beneficiary is guilty of fraud. The bank, however, faces the challenge as to whether or not the evidence for fraud is adequately strong to be upheld at trial.

5.6.8 Interestingly, the policies of English and Jordanian law are the same in approaching the fraud exception, but the function differs due to the procedural rules. It is almost

impossible for the fraud exception to be the subject of abuse under English law due mainly to the requirements that: (1) the parties asserting the right to payment under the documentary credit have actual knowledge as to the fraud and (2) it be "just and convenient" to grant injunctive relief at pre-trial in the context of the disputants' respective security interests. Whilst any injustice vis–à–vis the applicant or another paying party is probably alleviated by their right to seek a *Mareva* injunction or an injunction restraining the bank from being reimbursed from the account of the applicant.

5.6.9 On the other hand, the empirical findings clarify that in many cases injunctions infringing the embedded usage of autonomy were granted under Jordanian law on the basis of the applicant's case for fraud without any careful analysis of either the case for fraud or the beneficiary's involvement in the fraud.[988] This of course opens the door for a possible acceptance of spurious fraud allegations. It is submitted that guidelines should be implemented under Jordanian law as to the strength of evidence for injunctions in documentary credit cases.

5.6.10 Yet, the bank faces far more challenges to decide whether or not it is obliged to honour the credit where there is an alleged illegality as it is an unruly area that is much more complex than fraud partly because, in the context of a transnational documentary credit transaction, it often involves the violation of laws which are foreign to the confirming bank. There is an absence of transparency in terms that banks lack access to both knowledge of the applicable law (unless it be that of their own place of business) is the law appertaining and the facts of the underlying contract. However, the moral justification for the illegality exception is even higher than that of fraud exception. Under illegality, it is not only the principle that *courts do not let their process be used by the guilty to enforce an illegal act* that is engaged,

[988] Above paras 5.3.28, 21; Annex I, para; 42.

but also that transactions and activities are prohibited and thus illegal frequently to protect society as a whole or certain sectors or fundamental concepts in society. If such illegal activities are criminalised, it is usually for the protection of society as a whole.

5.6.11 To avoid confusion, a distinction must be drawn between: (1) illegality in the formation or performance of the credit contract itself between the bank and the beneficiary, (2) illegality in one of the operating contracts in the documentary credit transactions themselves and (3) illegality in the underlying contract. No difficulty arises in the first category as the embedded usage of autonomy is not engaged, so the general principles of the law of illegality apply. Under the second category, it is submitted that the materialisation of the illegality that would occur in reality would not be assisted by the payment of the credit to the beneficiary and therefore, particularly where the beneficiary has no knowledge of the illegality, there is no justification to infringe the embedded usage of autonomy, although of course it might have the effect of denying a bank reimbursement where claimed under an illegal credit. English judicial *obiter dictum* recognises the third category as being an exception to the embedded usage of autonomy, but the conditions that need to be fulfilled for the exception of the illegality of the third category have never been fully addressed. The empirical findings of the present research indicate that Jordanian courts are willing to recognise illegality as an exception to the embedded usage of autonomy.[989]

5.6.12 The challenge is how to regulate the illegality exception in a way that both serves an appropriately narrow application and accommodates the public policy interests of regulating illegal payments. The illegality exception must be sensitive to the sociological value of the documentary credit transaction (i.e. critical balancing of the

[989] Annex I, para 44.

distinct archetypal security needs of each of the four groups of contracting parties who typically transact documentary credits) by taking into consideration the underlying needs of the parties to documentary credits for an assurance of payment, documentary assurance of the shipment of the required goods, speed, manageable presentation and manageable examination of documents. Four conditions have been suggested and analysed to achieve such an equation, these are that: (1) illegality must be confined to criminal and civil illegality in the formation of the underlying contract or in the performance of such a contract if that illegality renders the whole underlying contract unenforceable by the beneficiary; (2) of requiring the knowledge of the beneficiary as to the illegality and allowing the extent of such knowledge to vary from that of actual participation to a constructive knowledge as the extent of knowledge required must take into account the nature of the illegality; (3) of requiring the actual knowledge of the bank and obviating the bank from any obligation to investigate as to whether there is illegality or not; and (4) of requiring strong detailed evidence as to illegality rendering it highly probable that the transaction is undermined by illegality to the knowledge of the party seeking payment.

5.6.13 The understandable need for caution in addressing fraud and illegality in the UCP must not be exaggerated. Given the potential risk of exceptions to the embedded usage of autonomy being evolved by legal orders worldwide in a haphazard manner, which might undermine the sociological value of documentary credit transactions, the UCP community must utilise the means of communication to influence legal orders towards outcomes that are not repugnant to that value. A UCP provision addressing fraud and illegality is the key to materialising how such norms can be permitted to infringe the embedded usage of autonomy without being repugnant to the sociological value of documentary credit transactions. Such a provision must highlight the prominent needs of the parties in the context of the pragmatic difficulties of fraud and illegality that face the parties who usually transact

documentary credits (i.e. problems such as the lack of transparency as to national laws and as to the underlying transaction and the bank's need for speed and that for the bank's actions to be tainted with illegality it must be proved that the bank has actual knowledge of the illegality). This means of communication can be achieved by utilising the means of clarity and flexibility. The means of flexibility is strategically crucial to ensure the adaptability of a UCP provision in relation to illegality and fraud, so as to avoid the provisions of the UCP being repugnant to legal orders. The content of such a provision was proposed in this chapter and it is hoped that a similar provision, through the means of reflective flexibility and clarity, might be adopted under a prospective UCP iteration. Surely, it is now time for the UCP Drafting Group to use the power of seduction to nudge legal orders towards appropriate outcomes. The present lacunae in provision only serves to invite further disunity amongst legal orders in the formulation and utilisation of fraud and illegality exceptions, which disunity could both undermine the sociological value of documentary credit transactions and make it too late for the UCP Drafting Group to act.

CONCLUSION

6.1.1 The thesis has developed a conceptual model for the evaluation of the transnational effectiveness of terms regulating documentary credits, and it was applied in the evaluation of UCP 600. Normative effectiveness was central to evaluation because the perceived effectiveness, by enabling the parties to realise their ends, will determine the reputation of law which will determine its use by being chosen by traders and accepted by Municipal legal orders in a transnational context. The developed conceptual model was close to the reality of the transaction of documentary credits as the perspective of effectiveness was based on the standpoint of the bargain at the heart of the transaction of the documentary credit itself. This according to John Commons is the harmony of conflicts between parties' interests. At the heart of the conceptual model was the hypothesis that the usages of irrevocability, conformity and autonomy are "embedded" to a documentary credit transaction to the effect that the absence of any of these embedded usages threatens the social validity of documentary credit transactions.

6.1.2 It was from the functions of each of the above embedded usages that the underlying contested needs of those parties who typically transact documentary credits were rationally deducted, namely: issuing and confirming banks' needs for assurance of payment and speedy manageable examination of documents; applicants' need for a speedy documentary assurance (for the shipment of the required goods) and beneficiaries' needs for a speedy assurance of payment and manageable presentation. The sociological value of documentary credits was determined from the collective function of the embedded usages of the documentary credit transaction: representing the critical balancing of the distinct archetypal security needs of each

of the four groups of contracting parties who typically transact documentary credits. It is the commonly accepted and applied median compromise that is made concrete by the embedded usages. Such a sociological value in addition to the above contested needs as well as the functional element of the embedded usages constitute the substance of documentary credits.

6.1.3 The second part of the conceptual model was the means that are capable to reflectively convey the substance of documentary credits in a determinable way in face of both envisaged and foreseen future circumstances. For the UCP (as a body of self-regulatory terms) to be selected by the parties the governing rules for their transaction they (alike with autopoietic Municipal legal systems) must, by the means of responsiveness, be aligned to the substance of documentary credits as represented by the embedded usages. They also need to be responsive to documentary credits' usages (e.g. peripheral usages as discussed below) and practices. Unlike embedded usages however, such peripheral usages and practices can be challenged by the UCP, always provided that once the postulated challenges by the UCP are rejected by actors (including legal orders), the UCP must give way to practices. Still, responsiveness denotes the avoidance of repugnancy to the common overriding doctrines of Municipal legal orders.

6.1.4 A further means was certainty in that the parties must have knowledge in advance as to their legal position. Terms governing documentary credits must accordingly be coherent in achieving uniformity in interpretation. The means of certainty is essential for the materialisation of the need of banks and sellers to assurance of payment, and in order for certainty to be operative and realised the means of responsiveness (discussed above) and clarity (discussed below) must be utilised. On the other hand the means of flexibility is important as any transnational norm is not comprehensively absolute as it can be subject to overriding mandatory rules of Municipal legal orders. Also the means of flexibility is important to reflect the need of banks for manageable examination. A fourth means was communication. Given

the soft power of acclamation (i.e. acceptance, adoption and encouragement of adoption by social actors), the UCP can influence parties and actors involved in documentary credits, and third party actors such as legal orders, towards uniform outcomes or effects that are consistent with the sociological value of documentary credits. Clarity was a fifth means which is essential for the realisation of the purpose of all other means. To achieve clarity both the semantic expression and the ordinary, or the technical, meaning of the words of a UCP term should convey an obvious exclusive interpretation when they are read together with its interpretative aids (the guidance of ISBP and ICC Opinions or Papers). Such clarity demands comprehensibility, in that UCP terms need to be understandable to the worldwide transnational banking, trading and legal audience to which it is addressed. Finally, terms governing documentary credits such as the UCP must be cognisant of, and be deliberative as to, distinctions in the nature and form of legal rules, distinguishing as appropriate between principles, general rules and particular rules (mainly to determine the level of formal realisability) as discussed in chapter1.[990]

6.1.5 The premise in this thesis as to the nature of law was based on the adaptation of systems theory. It was contended in chapter 2 that free actors (such as traders, bankers or insurers)[991] who resolve controversial behaviours by firstly testing them against their own usages (so conflicts are defined as divergence of expectation) and, secondly, by their actions, classifying them as being acceptable or unacceptable (through the use of the code acceptance/rejection) are essentially creating socially diffuse law. The element of the 'sense of being binding' in usages, as confirmed by the empirical findings in this research,[992] is essential for the operation of the code acceptance/rejection. Such a normative proposition of usages in relation to locality or a particular transaction (as it must have some means of functional coherence at

[990] Para 1.2.26.
[991] On the basis of exchange on intangibles in social groups under a system of exchange in the free market: Coleman, *Foundations of Social Theory*, (1st ed Harvard University Press 1990) ch 2.
[992] Annex I, para 12.

a particular time) generates the further structural components of process, decision and identity that form *lex mercatoria*.

6.1.6 It was postulated in chapter 2 that the peripheral aspect of usage (i.e. the absence of which does not threaten the existence or viability of the relevant transaction) must be expressly distinguished from the embedded aspect of usage. Although the empirical findings of this research indicated that being perceived as binding is an essential element to elevate the level of practice to usage (and this is a shared element between peripheral and embedded aspects of usage),[993] it is only embedded usages of transnational commercial transactions that can be regarded as an international *lex mercatoria* capable of binding Municipal legal orders and overriding not only inconsistent default legal norms, but also inconsistent mandatory laws that are not fundamental and overriding.

6.1.7 Unlike peripheral usages, the decision by a Municipal legal order to refuse recognition of, or to dramatically change, an embedded usage of a particular transaction would functionally lead to a rejection of the whole transaction. Parties in a transnational context could not be expected to choose a governing law that consistently failed to meet their needs. Hence, given the force of globalisation, the soft power of international acclamation (acceptance and application by actors across borders) has equipped transnational embedded usages with a normative force having the potential to become part of the structure of many Municipal legal orders without the need to fulfil their external criteria (known as *de jure* usage). Thus the embedded usage of irrevocability was accepted in *Hamzeh Malas Sons v British Imex Industries Ltd*[994] regardless of the fact that it violates the Common law requirement that consideration be reciprocal. The embedded usage of irrevocability was established under both the

[993] Annex I, para 12.
[994] [1958] 2 Q.B. 127, 129.

English[995] and Jordanian [996] legal orders without the need to be proved by expert evidence; the inference must be that the embedded usage of irrevocability is well-known law.

6.1.8 The deletion of the reference to revocable documentary credits in article 2 of UCP 600 reflects the normative force of the embedded usage of irrevocability, and was a necessary change to be responsive to the sociological value of documentary credits. Article 1 of UCP 600 provides now that documentary credit parties need to "expressly" incorporate the UCP into their documentary credit contracts. This is due to the fact that the application of the UCP is not embedded usage: it is peripheral usage in Jordan as indicated by the empirical findings of this research[997] and it does have the force of law by legislation in many legal orders or in case law as under English law and many legal orders. Yet an expressed incorporation as to the application of the self-regulatory rules of the UCP warrants a high hierarchical status for the effectiveness of the application of UCP 600. Such a change is responsive to the freedom to contract as perceived by many legal orders. It was finally evaluated in chapter 2 that there is a lack of clarity in UCP 600 as to the status of the UCP interpretative aids and such evaluation is confirmed by the empirical findings in this research.[998] It is to be hoped that the status of the UCP's interpretative aids will be expressly addressed in future texts of the UCP.

6.1.9 Chapter 3 went on to investigate the sociological meaning of the embedded usage of conformity. It was postulated that since the embedded usage of conformity encounters the opposing security needs of the parties to documentary credits, it has become an elastic concept. In sociological terms, it can be regarded as a wide scale concept capable of having divergent meanings some of which are very close to the

[995] *Hamzeh Malas Sons v British Imex Industries Ltd* [1958] 2 Q.B. 127.
[996] Court of Distinction (Civil), *152/1975*, Adalah Programme.
[997] Annex I, para 12.
[998] Annex I, para 14.

main function of the usage of conformity (i.e. documentary assurance for buyers), whereas some other meanings travel between, or serve, various other functions (e.g. seller's security to have manageable presentation) in addition to the main function of conformity. Accordingly, chapter 3 identified the opposing security needs and postulated, on the basis of the literature review of commercial and legal sources, that there are seven meanings or dimensions of the elastic concept of conformity. A first step for effective terms governing the embedded usage of conformity is to adopt a dimension of conformity that reflects the sociological value of documentary credits, as such a dimension would operate as the definitive dominant meaning and provide the general test for determining whether or not documents are in conformity with the terms of the documentary credit. Article 14 of UCP 600 does attempt to formulate a specific dimension of conformity, which is evaluated in the thesis. This selected dimension can be seen to reflect the sociological value of documentary credits, but it is undermined by a lack of clarity. The main element of this dimension is only made clear in the Commentary of the Drafting Group of UCP 600 which, according to the empirical findings of this research,[999] is not reviewed by many bankers in Jordan and, furthermore, is not regarded as a binding interpretative aid for the UCP 600 by either the English or the Jordanian legal orders.

6.1.10 Unfortunately, alike with its predecessors, UCP 600 lacks responsiveness to the rule of linkage (i.e. that documents must be linked to the identification of goods) which is an element in the embedded usage of conformity that is necessary for the buyers' security. The result is a low degree of "formal realisability" [1000] within legal orders, since English law, by the legal communication of construing contractual terms, would not give effect to sub-article 14 (e) of UCP 600, and banks and traders are left perplexed as to whether or not Jordanian law, being a developing legal system, would give effect to such a UCP provision. Being a general rule, the requirement of linkage

[999] Annex I, paras 14; 24.
[1000] For the concept of formal realisability: chapter 1, para 1.1.6.

might capture many cases. The core aim underlying the majority of the introduced changes in UCP 600 was to enhance the "formal realisability" by providing particular rules (as general rules have a lower level of formal realisability but a wider application) directing bankers to respond to each listed distinguishable fact by intervening in a determinative way. The emphasis was to respond to the sellers' needs for a manageable presentation, and thus the assurance of payment, by reassuring sellers that the decision of banks as to the conformity of documents was objectively standardised in terms that would not be contingent on subjective circumstances (such as the relationship between banks with their customers). Whereas chapter 3 evaluated the general rules governing conformity in UCP 600, chapter 4 evaluated the particular rules.

6.1.11 The themes underpinning the changes to the particular rules governing conformity in UCP 600 are the needs of sellers and banks for manageable presentation and manageable examination respectively, in order to meet the need for an assurance of payment. The formulation of some particular rules (e.g. sub-articles 14 (h) and the prohibition of transhipment in articles 20 to 24) promotes the means of certainty and clarity but departs from the means of responsive as they serve to erode the fundamental doctrine of freedom to contract under legal orders. The result of this hard-power approach may be to promote the rejection of such rules under English and Jordanian laws. Interestingly, and alternatively, such rejection could have been avoided if the rules had been responsive to the right equation of the contested needs of the parties (i.e. the sociological value of documentary credits), as the empirical findings of this research indicate that many banks in Jordan exclude the above UCP provision, since it opposes buyers' needs for security.[1001] This was successfully achieved by the reforms regarding the requirements of the addresses of the parties in sub-article 14 (j) of UCP 600. Thus not every expressed term by the parties is

[1001] Annex I, para 17.

truly intended to be effective, and that can be revealed both by the rational understanding of the dominant needs of the parties and the observed practices of the parties. But a clear intention of the parties should not and cannot be replaced by the UCP. Given the nature of the UCP and its international influence through its so called "soft-power", it is evidently mistaken to attempt to impose a mandatory UCP rule that seeks to exclude the intention of the parties. Of course the provisions of ISBP 2013 enhance the "formal realisability" of the conformity rules particularly by amplifying clarity to the provisions that are responsive to the dominant needs of buyers. This is a welcome step since the particular conformity rules of the UCP 600 were mainly reformed to satisfy the need of manageable presentation for sellers.

6.1.12 It was further evaluated in chapter 4 that the standardisation of banking procedures in the refusal of documents for the purpose of avoiding unnecessary disputes was the theme underpinning the amendments of the requirements for refusal under article 16. Thus the Drafting Group has strictly adopted the means of certainty and clarity at the expense of flexibility to govern the refusal of documents. The result is the introduction of formalities that might have a long term benefit by achieving uniformity in the practices of refusal in order to avoid disputes. However, formality would not outweigh substance (e.g. reasonableness and good faith) under English and Jordanian legal orders, so an unequivocal communication of refusal would be effective, regardless of a lack of formality as required by UCP 600. Contrary to the long term purpose underpinning formalities, opportunist litigation might now arise on the basis of a mere lack of formality and it is not surprising therefore that substance would prevail under legal orders.

6.1.13 The legal nature of the bank's inspection activity was analysed in chapter 3 to determine the legal obligations of the parties under English and Jordanian laws and it was determined that the deletion by UCP 600 of the reference to banks having a duty of "reasonable care" was a welcome step to avoid claims that are based on its

inherited meaning in service contracts under legal orders. Given the limited "formal realisability" of any law regulating the ministerial discretion of banks, since it would be incapable of governing the entire range of various circumstances in a determinative way, the means of flexibility and communication must be utilised by having an objective standard in the UCP (as articulated in chapter 3) against which the decision of the bank should be assessed whenever the status of the conformity of presented documents is uncertain. In this way uncertainty might not lead to a deviation from the underlying sociological value of documentary credits.

6.1.14 Finally, it was evaluated in chapter 5 that there is a lack of clarity in the responsiveness to the elements of the embedded usage of autonomy under UCP 600 and the English and Jordanian legal orders. It was analysed that both the independence and appearance principles are the elements that constitute the embedded trade usage of autonomy. Hence the independence principle is in reality a normative fiction that is efficient to materialise the underlying sociological value of documentary credits to the effect that the seller's right of payment by a bank is not contingent on the underlying disputes with the buyer or on related disputes between other documentary credit parties. The appearance principle is a normative presumption that reflects the needs for speed and manageable presentation.

6.1.15 It was therefore contended in chapter 5 that the so called documentary fraud must be a well-established exception to the principle of appearance under English and Jordanian laws rather than, as it is commonly misperceived, the principle of independence. It was postulated that for a non-documentary fraud a distinction must be drawn between a non-documentary fraud in the credit contract itself, as here the principle of independence is immaterial, and a non-documentary fraud in the underlying contract. It was argued that the principle of independence can be overstepped by a non-documentary fraud in the underlying contract only if it was a fraud in the formation of the underlying contract, because such a fraud cannot be

avoided by requiring documentary proof in the credit and this directly triggers the application of the dominant policy for fraud exception under the English and Jordanian legal orders that *courts will not allow their process be used by a dishonest person*.

6.1.16 Chapter 5 went on to evaluate on the basis of the balance of moral and rational justifications that criminal and civil illegality having the effect of prohibiting the underlying transaction of documentary credit must be permitted to infringe the autonomy norm under the English and Jordanian legal orders, subject to the following qualification. In order to restrain the potential broadness of the illegality exception, and to tackle the dilemma of the lack of transparency to determine what might be illegal in transnational transaction, the fact of such illegality prohibiting the underlying transaction must be known (or rather proved by corroborative evidence to have been known) by the beneficiary and the actual knowledge of the bank and, as the case might be, the bank. The relevant dates for such knowledge ought to be determined as: for the beneficiary, at the moment they changed their position in reliance upon the credit; and, for the bank, at the moment the payment obligation under the credit was triggered. Furthermore, as far as the bank is concerned actual knowledge rather than constructive or deemed knowledge should be required.

6.1.17 Although the cautiousness of regulating fraud and illegality exceptions to the embedded usage of autonomy under the UCP is understandable, the failure to address these issues does not generate practical benefits. In order to promote uniformity across legal orders in respect of their approaches in communicating the norm of autonomy, it was recommended that the UCP should utilise the means of communication to address fraud and illegality exceptions mainly through the means of flexibility in order to nudge legal orders towards appropriate outcomes. A drafted provision was proposed for that reason as an illustration of how the means of flexibility forms a reflective context to the sociological value of documentary credits

that competes with the protection of society in the light of pragmatic problems such as the lack of transparency. Otherwise silence in this area over a long period will feed the unsystematic evolution of legal propositions under Municipal laws in connection with fraud and illegality exceptions. Some of those propositions are likely to be irreconcilable with the sociological value of documentary credits and the development of conflicting municipal norms may reach a point at which it would become too late for the Drafting Group to disseminate an alternative uniform approach.

6.1.18 Accordingly, as demonstrated in this thesis, the conceptual model described above for evaluating the normative effectiveness of the UCP 600 has considerable utility and has revealed that the UCP 600 is not as effective as it could have been. It is to be hoped that the next iteration of the UCP can be more deliberative in its use of the means (of responsiveness, certainty, flexibility, communication and clarity) to deliver the contested needs (of assurance of payment, assurance of shipment of required goods, manageable presentation, manageable examination and speed) by protecting the transnational recognition and application of the embedded trade usages of irrevocability, conformity and autonomy.

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Annex I

EMPIRICAL FINDINGS

General overview

1. The total number of conducted interviews was fourteen. Each interview was conducted face-to-face separately with each interviewee.

2. Six interviewees were expert bankers as identified in table 1:

Table 1

Name of the Banker	Positions
Mr Muhammad Burjaq	The head of DC department at Al-Itihad Bank. He represented Jordan and Middle East in the ICC Consulting Group for the revision of UCP 600. He has been lecturing on DC and other payment and finance facilities for more than 10 years.
Mr Qhaleb Joudeh	The predecessor head of DC department at the Central Bank. He has been lecturing on DC and other payment and finance facilities for more than 10 years.
Mrs Koloud Alkalaldeh	The head of DC department at Arab-Bank Alquwaysmah Branch.
Mr Nart Farouk Lambaz	The head of DC department at BLOM Bank.
Mr A Banker (Identity is concealed)	The head of DC department at his bank which is one of the main leading banks in Jordan.
Mr B Banker (Identity is concealed)	The head of DC department at his bank which is one of the main leading banks in Jordan.

3. Three participants were Traders as identified in table 2:

Table 2

Name of Trader	Positions
Ayman Hatahet	The head of Jordan Chamber of Industry. He is also a well-known trader in Jordan.
Ali Melham	An importer who mainly deals with military outfits.
Jamal Abu- Shamat	An importer who mainly deals with military outfits. He has a branch in China assisting him to directly receive the amount of DC.

4. Three interviewees were Judges as identified in table 3:

Table 3

Name of Judge	Positions
Judge A (Identity is concealed)	A Judge in the High Court who deals with many cases of documentary credits.
Judge B (Identity is concealed)	A Judge in the High Court who deals with many cases of documentary credits.
Judge C (Identity is concealed)	A Judge in the High Court who has dealt with some cases of documentary credits.

5. Two interviewees were Ministers as identified in table 4:

Table 4

Name of the Minister	Positions
Muhammad Asfour	A predecessor Minister for trade and industry. He is the president of the ICC Chamber in Jordan.
Hatem Halawani	The current Minister for trade and industry.

THE COMMERCIALITY OF DOCUMENTARY CREDITS (DC)

REASONS FOR THE USE OF DOCUMENTARY CREDITS

6. There is always some residual risk in commercial transactions. The findings confirm that security, in terms of minimising the risk, is the underlying policy of DC. This shared view was stated by one of the bankers: *"documentary credits are meant to minimise the risk of both the seller's evasion from delivery and the buyer's evasion from payment"* (Muhammad Burjaq). Thus all the participating bankers responded to the question regarding the reasons that draw traders to deal with DC by stating that the lack of trust between exporters and importers lead traders to use DC as a method that provides security for both exporters and importers. Nart Lambaz stated *"first time sellers prefer to use documentary credits. Big companies prefer documentary credits with traders in developing countries. A documentary credit can also be a financial tool".*

7. The participating traders stated that DC is a kind of a guarantee for their rights. Jamal Abushamat summarised this view, stating *"as sellers we will be assured that the payment will be made before the arrival of the goods".* However, Ali Melham said that the matter depends on the trust between the parties. He added that he does not prefer to use DC as it is "*complex, costly and can be risky as the documents might be refused".*

8. In respect of the reasons that draw banks to deal with DC, all the participating bankers confirmed that the banks prefer DC because it is profitable for them. Qhaleb Joudeh added *"risks are low for issuing banks since almost every bank (more than 95%) requires the bill of lading to be consigned to the bank's order".*

ADVISING BANK

9. As DC transactions contain chains of contracts of which some might be regarded as agency contracts, it is essential to identify who usually appoints the advising bank. All the participating bankers stated that the applicant appoints the advising bank in the credit contract. However, there is no common practice as to whether the issuing bank accepts the appointed bank. The common practice is that if the appointed advising bank is not one of the issuing bank's authenticated correspondent banks in SWIFT then the issuing bank will choose another bank as the advising bank. Muhammad Burjaq and Mr B stated that in this case they do not inform the applicant regarding the advising bank. Mr A stated that

they inform the applicant regarding the substituted advising bank. Mr B added *"in the general conditions in the credit contract there is a condition authorising the bank to choose the advising or the correspondent bank without being liable to do so".* Muhammad Burjaq and Mr A confirmed that the applicant might appoint a bank other than that chosen by the issuing bank. Distinctively, the practice for BLOM bank is that, as stated by Nart Lambaz, in negotiating credits the issuing bank always nominates the negotiating bank. Nart Lambaz added *"we are not responsible for the advising or correspondent banks errors. I do not think that it is fair for the issuing bank to be responsible of such errors"*. As a unique practice, Qhaleb Joudeh stated "*we always choose another bank [other than the appointed one by the applicant] as a correspondent bank, in negotiation credits the issuing bank is the one which nominates the negotiating bank".*

10. The participating traders stated that the issuing bank always appoints the correspondent bank in such a way as to ensure that the trader is not one of its customers. The traders added, as stated by Jamal Abushamat, *"it is not fair that the issuing bank is not responsible for the error of the advising bank as the issuing bank always appoints the advising bank and the issuing bank refuses to appoint the bank that the applicant had initially appointed in the credit".*

CONCLUSION

11. The empirical findings confirm the common knowledge that providing security for buyers and sellers is the underlying policy of DC. Bankers found DC a profitable and a secure transaction. Some traders, however, complained about DC complexity and the risk of refusing documents. Such findings foster the evaluative standpoint in this research in the sense that security is the underlying policy and manageable presentation is the dominant need for sellers.[1002] Interestingly, although it is not the usage or the market practice, it is clarified that the issuing bank is the party which in many cases nominates the correspondent banks, this means under legal orders the correspondent bank is in many cases regarded as an agent for the issuing bank. Moreover, there is an indication that an issuing bank in Jordan is very cautious in negotiation credits in terms of, as expressed by two bankers and such statements were not tested before other bankers, ensuring that the issuing bank is the party that nominates the negotiating banks.

Nature of UCP 600

THE LEGAL STATUS OF UCP 600

12. The bankers participating in the study were asked whether they incorporate the UCP as part of their DC transactions, and if so, whether or not they think that their banks are obliged to do so. All bankers stated that their banks and Jordanian banks apply the UCP on DC and nothing else in terms that there are no Jordanian banking practices, or codes, other than the UCP regulating DC.[1003] In respect of the status of the UCP Muhammed Burjaq expressed the view *"the UCP is not law, it is a kind of standard contractual terms. We can exclude some UCP terms or apply something else".* Qhaleb Joudeh stated that the UCP is not considered as law in the sense of a *de jure*, but as a matter of fact it is law for banks as the bank which deals with DC not subject to the UCP might suffer negative

[1002] Above para 1.1.34.
[1003] Below under the heading of "periods for conformity" para 2.4.10: there is a strong indication that there is a spontaneous Jordanian practice.

consequences the harshest of which is the exclusion from the DC business community. In this respect he said "*we exclude some of the UCP terms but we cannot actually dare to exclude its essence or spirit"*. The four other bankers stated that their *"banks are obliged"* to apply the UCP and that the banks cannot entirely exclude the application of the UCP, but they can merely exclude and change some of the UCP terms. So there is a common sense that the application of the UCP is binding upon banks.

13. The participating traders view the UCP as law in terms that they must apply it to their DC transactions, as strikingly said by Jamal Abushamat *"both the state and the banks impose the UCP".*

LEGAL STATUS OF ISBP AND ICC OPINIONS

14. Now, the question is whether or not the application of UCP 600 entails, in the view of bankers, an obligation to apply ISBP and ICC Opinions. Thus, the bankers were asked whether they apply ISBP in examining the presented documents, and if so, whether or not they think that their banks are obliged to do so. By the same token, the bankers were also asked about the applicability of ICC Opinions in both the examination of documents and the interpretation of UCP 600. Muhammad Burjaq said *"the bank is not obliged to apply ISBP as the deletion of the capital letters in UCP 600 in the reference to ISBP signifies this position. But the bank is obliged to apply ICC Opinions as they reflect the international banking practices. The bank must apply ISBP where there is no guidance in the ICC Opinions"*. Such a practice and view was not shared by any other bankers regarding the ISBP, as all other bankers stated that their banks apply the ISBP to the examination of the documents along with UCP 600 and they are obliged to do so. The reason behind the obligation to apply the ISBP was explained by Qhaleb Joudeh and Koloud Alkalaldeh in terms that the ISBP is part of UCP 600 and moreover, Mr A and B praised the ISBP for simplifying issues and easing the task for the determination of the status of conformity. However, almost every bank has its own practice and view as to the application of the ICC Opinions. Thus Qhaleb Joudeh stated *"since the introduction of ISBP we stopped applying ICC Opinions, because such a collection of Opinions became the final version of what is known ISBP. I used to be guided by ICC Opinions. In the case of fraud we do not look at ISBP or ICC Opinions".* Nart Lambaz said *"the Opinions are important to determine a dispute between banks, so we do not refer to ICC Opinions to interpret UCP 600. I do not know whether banks in Jordan refer to ICC Opinions".* Koloud Alkalaldeh stated *"we refer to ICC Opinions if there is a dispute with other banks in relation to discrepancies in the presented documents".* Mr A said *"we do not usually apply ICC Opinions. We only check them if we have a dispute or arguments in our bank regarding the conformity of documents".* Mr B said that the ICC Opinions apply *"where there is a matter that is not dealt by UCP 600 and ISBP".*

15. Unsurprisingly, the traders participating in this study stated that they were not aware about ISBP and ICC Opinions.

16. In this context *His Excellency* Muhammad Asfour stated *"I would like to see the documentary credit actors – including courts – in Jordan interpret the UCP through an international lens as Jordan is part of the global business community, and therefore we [ICC] brought French experts to Jordan to explain the way of interpreting the UCP".*

THE COMMERCIAL STATUS OF UCP 600

17. Although the application of UCP 600 is dominant in the banking community, not all UCP 600's articles are strictly followed or even applied by banks**.** Thus Muhammed Burjaq stated that Alitihad Bank does not usually exclude any of UCP 600 terms, but some banks exclude article 17 of UCP 600 as they require a hand-written signature for documents to be original. He added, some banks also exclude sub-article 18 (b) of UCP 600 to enable them to reject a commercial invoice which has a value in exceeds of the permitted amount in the credit. In the same spirit, Qhaleb Joudeh expressed the observation that in practice, Central Bank does not usually exclude any of UCP 600 terms, but other banks often exclude UCP 600 terms in relation to both transhipment (i.e. sub-article 20 (c) UCP 600) and the bank's right to make the credit conditional upon payment of the bank's charges by the beneficiary (i.e. part of sub-article 37 (c) UCP 600). Thus BLOM Bank usually excludes sub-article 18 (b) UCP 600 as stated by Nart Lambaz. He commented that such exclusion "*is important for our customer [the applicant] as if the value of the goods exceeds the amount stated in the credit, then our customer will face customs' difficulties and he might not be able to clear the goods for the extra customs' costs which he has to pay. It is also important to avoid money laundering. We do not, however, mind giving effect to sub-article 18 (c) if our customer requires that"*. His bank also excludes the following provisions: the full effects of article 17 of UCP 600 (i.e. the rules for originality in documents), sub-article 20 (c) of UCP 600, part of sub-article 37 (c) of UCP 600 in relation to the beneficiary's charges and sub-article 14 (k) of UCP 600 which permits the shipper of the goods to be an entity other than the beneficiary. He also commented on the reasons behind the exclusion of article 14 (k) by saying *"a documentary credit is meant to be a method of payment rather than a facility for chain-contracts. We need to be secure as to whom we, and our customer, deal with".* In defiance of UCP 600, it is standard practice for Arabic Bank to exclude transhipment as provided for in sub-articles 20 (c), 20 (d), 23 (c) and 24 (e) of UCP 600. Koloud Alkalaldeh gave the researcher a draft of the Arabic Bank's standard form for DC which has influenced many other banks in Jordan. The form, in order to exclude some UCP 600 provisions, states:

"- Transhipment as stated in Article Nos. 20 (C), 22 (D), 23 (C), and 24 (E) is not acceptable (where applicable).

- Commercial Invoices issued for Amounts in excess of credit value are not acceptable.

- Any document showing Shipper or Consignor other than Beneficiary is not acceptable.

- Documents showing any alterations / corrections without authentication by the issuer is not acceptable".

Koloud Alkalaldeh emphasised the clarity of the inapplicability of UCP 600 terms in relation to the transhipment as such terms have been expressly excluded. She said that the other UCP 600 terms in relation to the value of the commercial invoice, the name of the shipper and the authenticity of alterations are excluded by the fact that the expressed requirements in the standard form for DC provides for the contrary. She added that the transhipment problem usually arises in road transport documents. Mr B stated that his bank also excludes the same UCP 600 provisions in relation to: transhipment, the name of the shipper and the value of the commercial invoice. However, Mr A said that his bank only excludes the above issue in relation to the value of commercial invoice. In conclusion, although is not shared practice it is quite common amongst banks to exclude the above articles regarding transhipment, the name of shipper and the authenticity of corrections. It is common practice to exclude the provision regarding the value of commercial invoices.

18. The perception of the participating traders in respect of the legal status of the UCP has lead them to avoid attempts to exclude or change the terms of UCP 600. Moreover, traders stated that they are unable to even exclude any term of bank's DC form. Thus Ali Melham stated *"they [banks] always apply their form. I have never tried to change or to exclude their conditions and they will not let me to do that"*. However, the participating traders have never faced any difficulty or litigation in respect of UCP 600.

THE IMPACT OF UCP 600

19. The participating bankers stated that UCP 600 was immediately implemented at their banks at the same date as UCP 600 was promulgated. The training for UCP 600 had already been going on prior the date of UCP 600's promulgation. As Muhammad Burjaq said *"the application of UCP 600 had been ready to be automatically implemented at our bank at the date of its promulgation by the ICC. The training had already been going on for a year prior to the promulgation's date".* The training, however, for Central Bank's staff – as provided by Qhaleb Joudeh – started just after the promulgation of UCP 600. It seems that the unity to apply UCP 600 at its promulgation's date reflects the finding in respect of the obligatory nature of UCP 600.[1004]

20. The impact of UCP 600 on banking practices and bankers views varied from bank to bank, even though most of the participating bankers were of the opinion that there are no substantive differences between UCP 600 and UCP 500. Thus Qhaleb Joudeh stated that UCP 600 and 500 are substantively the same and he is of the opinion that there is more clarity in the language of UCP 600. Both Qhaleb Joudeh and Mr A expressed the view that UCP 600 was revised for the benefits of sellers. Nart Lambaz expressed his view regarding the changes and the impact of UCP 600 on the practice of his bank by saying *"there are some changes such as the period of examination as we now put a pressure on our staff to examine the documents before 5 banking days. No substantive changes".* Mr B positively said that UCP 600 is clearly structured and the new language assists banks to understand UCP 600. However, Muhammad Burjaq expressed his observation regarding the impact of UCP 600 on the Jordanian banking practices by saying that after the promulgation of UCP 600 some banks started to exclude the originality provision (i.e. part of article 17 UCP 600) as they require a hand-written signature. He added other banks started to exclude the provision in relation to the value of the commercial invoice. Koloud Alkalaldeh expressed the view that *"there are some changes and differences such as the new requirement for addresses".* Indeed, the participating bankers, as presented under the heading of the commerciality of UCP 600 and as elucidated by Muhammad Burjaq under this section, expressed the observation that the impact of UCP 600 on the practices of banks is that many banks now exclude the UCP 600 provisions in relation to the value of invoices, transhipment and the deeming provisions for originality.

21. Interestingly, there was no general or particular reaction by the Jordanian government in relation to the introduction of UCP 600. As *His Excellency* Muhammad Asfour stated *"there was no particular reaction due to the lack of awareness, and I have heard that there was a willingness to amend the Commercial Code. But it is difficult to implement new amendments in the Code due to the bureaucratic procedures. We introduced as the ICC in Jordan many sessions and trainings regarding UCP 600. Unfortunately, the government does not give attention to the importance of the impact of the UCP so that even the Central*

[1004] For the legal nature of the UCP: chapter 2, para 2.3.8.

Bank refused to be a member in the ICC". After I explained to his *Excellency* the risk of amending the Commercial Code in order to implement the UCP he agreed and stated that "*the Commercial Code should not be amended"*. He assisted the researcher to arrange an interview with the current minister to address such an issue. His *Excellency* Hatem Halawani stated that as far as he was aware there is no intention to implement amendments in the Commercial Code.

CONCLUSION

22. All the represented banks in the study apply the UCP to their DC transactions. They do not apply another code. It is clear that the UCP is regarded as law from the perspective of most bankers (5 out of 6) and traders. This clearly supports the view that the application of UCP is trade usage in Jordan.[1005] UCP 600 was immediately implemented by Jordanian banks. Such an action was spontaneous. Qhaleb Joudeh stated that the UCP is not formally regarded as law, but it operates as law as a matter of fact. So he functionally treats the UCP as law. However, as an exception, Muhammad Burjaq – who was the only one amongst the participants involved in ICC's revision as to UCP 600 – is of the opinion that the UCP is not law but compromises standard contractual terms. So his bank can apply a totally different code, or another standard contract, other than the UCP. None of the other bankers are of the opinion that their banks can completely exclude the application of the UCP. They are, however, of the opinion that they can exclude some terms, but not all, of the UCP. It is revealed, in the findings as to the impact of the introduction of UCP 600 on the practices of banks, that it is quite common for Jordanian banks to exclude some parts of the provisions in UCP 600 in respect of transhipment, the amount of commercial invoices and the originality of documents. The bankers stated that there is no particular Jordanian practice dealing with DC issues. Nevertheless, under the heading of conformity we will notice that Jordanian banks impliedly apply a set of practices that differ from some of the UCP terms. The participating traders in the study felt that the UCP is a type of a mandatory law that they cannot exclude even any part of it. They also said that they cannot actually exclude or amend the banks' DC forms. Interestingly, we will notice later when the researcher flags up issues that substantively affect the traders' rights, the traders stated that they will exclude some of UCP 600 terms.

23. It is evident that all bankers, except Muhammad Burjaq, were of the opinion that their banks are obliged to apply ISBP as it is part of UCP 600 for the conformity of documents. However, the status of ICC Opinions was disputed. Thus Muhammad Burjaq, or Alitihad Bank, prioritises the application of ICC Opinions on ISBP. Some banks do not apply ICC Opinions. Other banks apply ICC Opinions only where there is a dispute with other banks or a disagreement between the employees at the same bank in respect of the conformity of documents. The represented traders, however, were not aware about ISBP and ICC Opinions. The differences amongst bankers regarding the status of ICC Opinions might lead to incoherent interpretations.[1006] Finally, it is clarified that there is no intention by the current Jordanian government to implement the UCP in the Commercial Code. *His Excellency* Muhammad Asfor, from his particular viewpoint as the head of the ICC in

[1005] Chapter 2, para 2.3.8.
[1006] Chapter 2, para 2.3.13-14.

Jordan, stated that he wishes to see the UCP being interpreted through an international lens.

Conformity

NATURE OF CONFORMITY

24. The participating banks in the study were asked about their respective banks' understanding and practices as to the concept of conformity under UCP 600. Muhammad Burjaq stated *"we examine the appearance of documents on their face in accordance with the DC contract, UCP and international banking practice as reflected in ICC Opinions and ISBP".* He added that the DC having a high payment value is examined by three employees where the payment value is not high the DC is examined by two employees. Qhaleb Joudeh stated:

"We examine the appearance of documents in accordance to the DC contract and a collected checklist from both UCP and ISBP. The examination is done by one employee and if there is a difference in the documents, it will be discussed with a supervisor. If the decision will conclude that the difference reaches the level of discrepancy, the documents will be handed to the manager. He will in turn hand the documents to a different employee. The manager will get involve of where the latter employee disagrees about the discrepancy".

Nart Lambaz said:

"We examine the appearance of documents in accordance with the DC along with UCP and ISBP. Where there is a conflict between a DC contractual term and a UCP term the DC term prevails. The discrepancy needs to be a material one that affects the essence of the commercial transaction. For example, the address is required only in relation to the name of the country in UCP 600, we used to apply this rule under UCP 500 because we regarded the discrepancy in the details of the address - except as to the name of the country - as not being a material one".

Koloud Alkalaldeh stated *"we examine the appearance of documents in accordance with the DC terms. If there are discrepancies we will check UCP and ISBP. We compare the documents with each other. The material discrepancy is the one that affects the rights of the bank".* Mr A and Mr B stated that they examine the appearance of documents in accordance with the DC contract, UCP and ISBP. Mr A said regarding the bank's procedures "*there are always two stages. The check of one employee as to the documents then that check is followed by a check from another employee. If there is a disagreement between these two employees the documents will then to be checked by the manager. The ICC Opinions are studied if a disputed matter leads to different opinions in the bank"*. All the participating bankers stated that there is no acknowledged Jordanian banking practices for checking the documents. Although the approach to conformity is the same, namely, DC contractual terms and UCP 600 with ISBP are followed in the examination by five out of six banks, there is no uniformity in the steps to examine the presented documents. Also there is no uniformity as to the interpretation of the concept of "material" in respect of conflict. Mr B stated that on one occasion the bank made a wrong decision on conformity where the documents had not actually been in conformity.

25. Most of the interviewed traders have the impression that the presented documents must be a mirror image with the conditions of the credit. Jamal Abushamat stated *"the documents must be letter by letter in conformity".* However, Ayman Hatahet stated that conformity does not assist them when they deal with countries such as Iraq where the banks lack experience in dealing with DC. On the same lines, *His Excellency* Muhammad Asfor stated *"we have, as traders, difficulties such as late shipment and the fact that employees in banks are not aware of international practices in many areas in trade and transport. The dilemma is that the banks DC forms are extremely difficult to be changed due to the fact that the decision can only be made by the head of a department".* Jamal Abu Shamat and Ali Melham stated that the bank is remarkably superior to traders in spotting discrepancies. They also said that they have never had the situation where the bank made a mistake in deciding the conformity of the appearance of the documents. Jamal Abushamat added that his bank has had many situations where the beneficiary in China presents documents that are not in conformity in respect of the originality of documents as they need to be authenticated by the Jordanian embassy in China. All the participating traders stated that the bank is only concerned with the appearance of documents as stated by Ayman Hatahet *"the appearance is essential as it guarantees to us as exporters to Libya for instance that we will be paid regardless of the claims by importers in respect of the goods".*

CONFORMITY OR NON-CONFORMITY

26. Although the banking procedures for checking conformity are not uniform, the participating bankers, in all bar one case, stated that the documents must either be in conformity or not with the consequences that: reasonable bankers must reach the same decision as to conformity. Mr B agreed with this statement, but he added that the banker in this context must be treated as any reasonable banker (i.e. an ordinary documents checker) and not an expert banker in checking the documents. However, Qhaleb Joudeh stated that:

"The discrepancy is a discrepancy but the decision for conformity depends on the bank and its customer circumstances … there is no bank that deals with conformity with utmost good faith because the standard for whether the discrepancy is material or not depends on the circumstances. So, if the applicant is well known and the bank is assured that it will be reimbursed from the applicant then the bank will not regard any discrepancy as a material one. I cannot distinguish between a material and a non-material discrepancy even though it theoretically exists. For example, suppose the bank, and not the customer, requires a condition in the credit such that documents must link with each other in respect of the descriptions of the goods. Here if one of the presented documents does not link with the other documents in respect of the descriptions of the goods, it will totally be for the discretion of the bank to decide whether this is a material discrepancy or not. Another example, suppose that the customer requires three copies of a certain document to be presented but the beneficiary only presents two copies of the required document. I can in this case either print another copy or refuse the documents. So the decision for conformity depends on the circumstances of the customer, the bank and the beneficiary. The changes in conformity under UCP 600 are for the benefits of sellers. This would increase the possibility of fraud. I know that the high rate of rejections badly affects the economy, but such a high rate is due to the lack of training and guidance booklets. Any discrepancy is a discrepancy: there cannot be a material or a non-material discrepancy. For example, the apostrophe in the form of (') instead of the apostrophe in the form of (') might be a material element for the size of the goods, so you do not know if it is really a material discrepancy or not. For instance, it cannot be determined whether a percentage of sugar

99% instead of 98% is a printing error or not and I cannot know whether or not this difference affects the commercial purpose. As a further instance, it cannot be known if a discrepancy in the spelling of Mohammad instead of Mohamad is a material discrepancy or not".

All the participating bankers expressed the view that the bank bears the consequences of making a mistake as to the determination of conformity. Muhammad Burjaq stated *"we have never had such a situation. It is the right of the applicant to refuse to reimburse the bank on the basis of the apparent discrepancies"* and Mr B stated *"we had this situation in one of the DC transaction, we tried to solve the problem by negotiation and reconciliation with our customer".*

AMBIGUOUS INSTRUCTIONS

27. The issue here regarded the actual Jordanian banking standards or practices of conformity where the instructions from the applicant or the issuing bank are ambiguous. Muhammad Burjaq stated that, as a UCP rule, the non-documentary condition is ignored. He elucidated *"we face these problems with Iraqi banks where we deal as a confirming bank. We ask the issuing bank to amend the instructions, since, indeed prevention is better than cure. We explain to them in advance that instructions such as non-documentary conditions will be ignored. It is not fair for the applicant, and the issuing bank must advise the applicant regarding the consequences of such ambiguous instructions".* Mr B stated *"it happens a lot with Iraqi banks, we receive ambiguous instructions. We disregard non-documentary conditions".* It can be inferred from these statements that the lack of banks (i.e. Iraqi banks) experience and training are the main reasons for ambiguous instructions. However, the Jordanian banks in this situation tend to treat ambiguous instructions as non-documentary conditions, as stated by the participating banks. There is also a sense that the issuing bank owes a duty of care to the applicant.

28. The participating traders stated that it is not fair for the applicant for a work to impose a condition in the credit which will be disregarded as being a non-documentary condition. Ali Melham said *"I have never had such a situation, but it is not fair for traders".*

ELECTRONIC DOCUMENTS

29. As all the participating bankers stated that documents are not, and have never been, presented by electronic means, there is no need to conduct any further investigations in respect of electronic documents.

ORIGINALITY

30. The findings in the study under the heading of "the nature of UCP 600" indicate that some Jordanian banks exclude that part of article 17 of UCP 600 which deals with originality. It is a step further to know how banks in Jordan differentiate between original and copy documents. The response by Muhammad Burjaq, who expected the treatment of this issue to be in alignment with that of the international community, was that they follow UCP 600 and thus they do not require the original documents to have a handwritten signature. By contrast, Nart Lambaz said *"we impose a condition that the original documents must have a handwritten signature. This is to ensure whether or not the documents are original. Our customers do not mind that but we have a lot of complaints from beneficiaries".* This is the same position of Mr A's Bank. Arabic Bank has more relaxing approach: Koloud Alkalaldeh stated *"we require that the documents must be signed. It can be signed in*

handwriting or by other means". Mr B stated "*we do not require a handwritten signature on documents in order for them to be regarded as original. But we are thinking to implement such a requirement for bills of lading".* Thus there is a trend to require a signature and more strictly some banks require such a signature to be a handwritten one. Although the faxed documents are regarded as valid evidence under the Evidence Code,[1007] the participating bankers stated that telefaxed or faxed documents are regarded as copy documents and banks do not check or rely on the Jordanian Evidence Code.

BILLS OF EXCHANGE

31. As the Jordanian Commercial Code regulates bills of exchange, the participating bankers were asked whether or not they check the conformity of bills of exchange with the articles of the Commercial Code. They were also asked about the drawee in bills of exchange. The participating bankers, in all bar one case, stated that they do not check the Commercial Code in order to determine the conformity of the presented bills of exchange. Qhaleb Joudeh added that there is a common standard for the structure of a bill of exchange. Muhammad Burjaq stated that *"bills of exchange are meant to be negotiable instruments".* Thus, there are no specific requirements outside the regime of UCP 600 for the conformity of bills of exchanges. However, Koloud Alkalaldeh said *"a bill of exchange must be in accordance with both the Commercial Code and ICC Opinions".* Mr B stated that bills of exchange must not contain a condition such as being drafted as a means of insurance. He also added *"we might advise the beneficiary to present a bill of exchange according to the law of the applicant's country".* All the participating bankers stated that a bill of exchange that is drawn on the applicant is treated as an additional document and is therefore disregarded. Nevertheless, the participating bankers clarified that they use bills of exchange in acceptance credits and that bills of exchange are drawn by applicants on issuing or confirming banks.

BILLS OF LADING

32. All the participating bankers stated that their banks do not check the Jordanian Maritime Commercial Code 1972 in order to determine the conformity of bills of lading. As to the question of whether banks impose special requirements for the conformity of bills of lading, Koloud Alkalaldeh stated *"a bill of lading must be consigned to our order and when we release the bill of lading we ask the applicant to sign a bill of exchange to our order as a guarantee of our rights".* Nart Lambarz stated *"we impose a condition that bills of lading must be issued from the actual carrier and not from forwarders. We expressly exclude the relevant UCP article and we stipulate our condition in the DC contract".*

PERIODS FOR CONFORMITY

33. After understanding the practices and the main issues as to the determination of conformity, it was necessary to ask the participating bankers as to how long their banks and other Jordanian banks take to examine documents. Muhammad Burjaq, Nart Lambaz and Mr A responded that it takes one to two banking days for their bank to examine documents. Qhaleb Joudeh and Mr B stated that it takes one to three banking days. Qhaleb Joudeh added that as a matter of good practice the bank needs to examine the documents in a maximum of three banking days, even though it has a five banking days period for

[1007] Jordanian Evidence Code (1952).

examination pursuant to UCP 600. As an exception, Koloud Alkalaldeh said *"it takes five banking days with our bank to examine the documents. We always send to our customer [the applicant] a form attached with a letter stating that the documents have been examined and no discrepancy is found. He has the right to look at the documents to check whether there is any discrepancy. The customer needs to sign on the form that he accepts the documents. In practice the customer always signs his acceptance in the form. In any event the time should not exceed five banking days".* Accordingly, it can comfortably be inferred that there is a Jordanian banking practice in respect of the period of the examination of documents which is two to three banking days, but it is a practice that not shared by Arabic Bank.

34. Furthermore, the participating bankers were asked about the period that their banks and other Jordanian banks take to honour the credit after a decision is made that the documents are in conformity. All bankers stated that they honour the credit on the same day as the decision to accept the documents.

35. The bankers were also asked regarding the period of refusing documents that are not in conformity. The participating bankers, in all bar one case, stated that the refusal decision is made and sent to the beneficiary on the same day as discrepancies are found. It is common amongst banks to choose the option in the refusal notice that the documents are held at the disposal of the beneficiary in order to consult the applicant. However, the bank in which Mr B is the head of DC department approaches the refusal differently. Mr B stated *"we refuse the documents on the same day we find discrepancies where such discrepancies affect the bank and we hold the documents at the disposal of the beneficiary in order to consult the applicant. If the discrepancies do not affect the bank or are immaterial we will wait to refuse until the fifth banking days, in order to have sufficient time to ask the applicant as to whether he wishes to accept the documents or to refuse them".*

36. Regarding the period of holding the presented documents after refusal, the participating bankers were asked whether their banks and other Jordanian banks return the documents after refusal, and if so, how long it takes to return the documents. All the participating bankers said that they hold the documents until they receive instructions from the applicant or the beneficiary. The reason for holding documents is that *"banks are keen to fulfil the function of the commercial transactions as this is beneficial for the parties and for the reputation of the bank"* as wisely stated by Muhammad Burjaq. The bankers stated that when they decide to return the documents they return them on the same or the next banking day. Most bankers said that the maximum period that their banks hold the documents was one month. It was emphasised by Koloud Alkalaldeh *"it should not exceed one month".* However, Qhaleb Joudeh said that *"it happened where we held the documents for two years as we did not want to end the ongoing negotiation between the parties".* Mr B stated that the maximum period to return the documents is three to four months. All the participating bankers stated that the expiration of the credit period does not affect the period to return the documents.

REFUSAL'S COMMUNICATION

37. The bankers were asked whether their banks only use SWIFT in informing the beneficiary about the decision of refusal. Muhammad Burjaq and Nart Lambaz stated that in the vast majority of cases they use SWIFT but sometimes they use fax to inform beneficiaries. Muhammad Burjaq added that they sometimes also use non-authenticated SWIFT

messages. All other bankers stated that their banks only use SWIFT. Muhammad Burjaq stated *"where the content clearly conveys the meaning of refusal it will be regarded as a refusal notice and it makes no sense that the notice must in this situation spell out the statements that 'the bank refuses the documents' or 'refusal notice'".* All participating bankers were of the same opinion in that respect.

CONCLUSION

38. Although the targeted sources to check conformity by banks are the same, there is no uniformity in the steps of the examination as to the presented documents. However, bankers confirmed that the banks must reach the same decision as to the conformity of the presented documents. Ambiguous instructions, for instance, are treated by bankers in the same way. As an exception Qhaleb Joudeh who is a retired banker and expert in DC stated that discrepancy is a discrepancy, but whether it is a material or not depends on the discretion of the bank in the light of the parties' circumstances. He said it is not about the purpose of the commercial transaction. Such a view reflects the challenge any regulation of conformity may face, the main challenge being the subjectivity in the decision of conformity. Traders have the impression that conforming documents must be in a mirror image to the terms of the credit. Such a perception might reflect the fact that there is a high rate of refusals in DC. Ironically, the findings regarding the perception of banks and traders as to the meaning of conformity under UCP 600 indicate that many bankers and traders do not actually apply the concept of material conflict introduced by article 14 of UCP 600 as it was intended by the Drafting Group to operate.[1008] Of course all the participating bankers said that the bank is liable for a wrong decision of conformity. The findings reveal that banks do not deal with electronic documents, and therefore studying EUCP is not an essential matter in this research. The findings also indicate that there is a trend in Jordan to implement a requirement for a handwritten, or other means of, signature to evidence the originality of documents. This might reflect the social fact that as Jordan is a developing country traditional means of authenticity are still in demand.[1009] Banks do not check the Jordanian Commercial Code for bills of exchange, as it seems that there is a common structure for bills of exchange that is in alignment to the Commercial Code. Bills of lading are issued for the order of the issuing banks in most cases and therefore banks find DC a secure method of payment. In addition, some banks require the bill of lading to be issued by the actual carrier. Such a requirement might be contrary to the practices in the transport industry. Strikingly, the findings indicate that there is a spontaneous Jordanian practice as to the period of the examination of documents which is two to three banking days. However, the period to hold the documents does not in most cases exceed one month, but there are circumstances where the parties would wish the bank to continue holding documents during negotiation until an agreement is reached.

Principle of autonomy

39. The participating bankers were asked whether they had been required to integrate the underlying sale contract into the credit contract, and if so what their action was. All bankers stated that many times the applicants tried to integrate the sale contract into the credit contract, but the banks refuse to do so as they adhere to the principle of autonomy. The bankers were also asked whether the applicants tried to restrain the banks from making payment on the basis of faulty goods, fraud or illegality. The bankers stated that many

[1008] Chapter 4, para 4.4.27.
[1009] Chapter 4, para 4.4.18.

times the applicants tried to do so, but the banks refused to accept that on the basis of the autonomy principle. Thus, Muhammad Burjaq stated *"we advise the customer that the credit is separate from the underlying contract and that we refuse to integrate such a contract with the credit contract".* He also commented in respect of faulty goods that *"many times the applicants tried to influence our decision to pay, but the applicants never produced solid evidence. The only evidence we accept is a decision from courts".* In respect of fraud and illegality four of the bankers stated that they only consider a decision from the court in order to restrain payment. Muhammad Burjaq stated "*we have never had a situation of fraud. The bank must check at the first instance the situation of the customer. You can tell where there is a fraud or not from the beginning*". However, Qhaleb Joudeh and Koloud Alkalaldeh stated that when the bank is informed about the fraud it will examine the documents in a very cautious way. Thus Qhaleb Joudeh stated:

"If we hear about it [fraud] we will check the documents in a cautious way so that any discrepancy is regarded as a material one. Fraud usually happens in relation to goods such as seeds, oil, sugar, phosphate in charter vessels. We had a situation where every document bore the same signature and that was clearly fraud. The applicant applied for an injunction which was granted by the judge and we then orally requested the judge to change the language of the injunction. The initial injunction stated that we must restrain payment and the subsequent changed injunction stated "we must endeavour to restrain payment". The reason for this was that we felt that we had to pay in order to save the reputation of Jordanian banks as we were the issuing bank that had to reimburse the confirming bank which had paid against the documents. We could not restrain the confirming bank to make payment as it was domiciled in a different jurisdiction and the fraud was discovered after the payment was made by the confirming bank".

40. On the same lines, the participating traders stated that they are unable to restrain the bank from payment, even where the delivered goods are contrary to the sale contract or they are damaged, or there is a fraud committed by the beneficiary. The traders confirmed that the bank is only concerned with the presented documents. Jamal Abushamat said *"I cannot stop the payment".*

41. Consequently, the main actors in DC appreciate and respect the autonomy principle. They accept the negative consequences of such a principle, as they understand the hierarchy of the DC's advantages and disadvantages.

INJUNCTIONS BASED ON FRAUD

42. The judges participating in the study were asked about their discretion in granting injunctions (i.e. to restrain payment or to freeze assets) to restrain payment in documentary credits on the basis of fraud. The guidelines for an injunction in documentary credits under English law were briefly explained to the judges.[1010] All the participating judges stated that in order to grant an injunction, there must be very strong documentary and apparent evidence of fraud on the part of the beneficiary, and the bank would need to have knowledge about the fraud. The participating judges confirmed that the matter depends on whether the court is convinced as to the evidence of fraud. In respect of the balance of convenience which is an essential stage under English law, the judges stated that the balance of convenience in terms of weighing damages and benefits is born in

[1010] Chapter 5, para 5.5.3.

mind. But the judges commented that the most influential factor is that if the beneficiary was a fraudster he would receive payment under the documentary credit and would endeavour to escape from any future enforced judgment, given the fact that all cases before the judges involved a beneficiary who was not domiciled within the Jordanian jurisdiction. Thus the priority is to restrain payment to the beneficiary if there was strong evidence that he is a fraudster. Judge A gave an example of the evidence: *"Documents issued by the Jordanian custom confirming that the goods are water mixed with chemical instead of being petrol as required by the credit"*. He added *"I am not going to enforce a payment to a fraudster".* Ironically, the participating judges confirmed that they granted many interlocutory injunctions restraining payment in documentary credits.

43. The participating judges were asked whether they would grant an injunction to restrain the issuing bank to pay the credit in the case where the confirming bank has already made payment. The judges said that they will grant an injunction if there is strong evidence of fraud. In this line, the judges were asked: would granting an injunction in such a situation damage the reputation of the issuing banks in Jordan as trusty providers of payment? The judges replied that it is up to the banks to preserve their reputation. It was suggested to Judges A and B that it might be safer to grant an injunction aiming to restrain the bank from paying the credit from the account of the applicant and not to restrain payment as such. They replied that an injunction only aims to restrain the bank from the payment of the credit, so the issuing bank might voluntarily reimburse the confirming bank to preserve its reputation. Judge A added "*but the issuing bank [in this situation] risks the fact that it will not be able to recover the amount from the beneficiary as he is a fraudster".*

ILLEGALITY

44. It was discussed with the judges that fraud is an exception to the autonomy principle, and the requirements for such an exception are both the misrepresentation of facts and the knowledge of the beneficiary. In this context Judge B commented that *"it is the fundamental structure of documentary credits that each contract is independent from one another".* The participating judges where asked whether illegality (i.e. committing a crime, acting contrary to public policy or committing an act prohibited by a civil statute) is also regarded as an exception to the autonomy principle. The following scenarios were briefly explained to the Judges:

- The purpose of the parties in the underlying sale contract is to commit a crime (e.g. selling drugs). Judge A commented that such a scenario is almost impossible to prove.

- The underlying contract is a service contract that is against public policy (e.g. where a movie slanders the prophet Mohammad). Judge A stated that the cases they deal with have never involved service contracts. He added *"we need to see evidence about the goods where the issue of an exception to the autonomy principle is involved".*

- The subject matter of the underlying contract is to import goods the specifications of which are contrary to the Jordanian Health and Safety Standards law.

- The dealing with the beneficiary, applicant or the seller in the documentary credit contract, or the underlying sale contract, is prohibited by a governmental decision.

All the participating Judges stated that illegality as an exception to the autonomy principle has never arisen before them and it needed to be researched by studying the available textbooks and articles. However, Judge A stated *"as fraud is an operative exception to the autonomy principle, it is a fortiori that a crime or an act which is contrary to the public*

policy is regarded as an operative exception to the autonomy". Judge C asked the researcher to provide him with articles regarding fraud and illegality.

CONCLUSION

45. The sanctity of the autonomy principle can be inferred from the way the participating banks and traders perceive the autonomy principle. Thus the participating bankers emphasised that even where there is an allegation of fraud they will not infringe the principle of autonomy unless there is a court injunction. However, as we will see later, under Jordanian law a bank is not entitled to honour the credit, so it cannot enforce its reimbursement, if the bank is aware - prior to the due date to honour the credit - of the allegation of fraud which is supported by strong evidence.[1011] Still the empirical findings indicate that banks are very concerned about their reputation as documentary credit providers. Thus on one occasion the Central Bank dealing in the capacity as an issuing bank honoured a credit by reimbursing the paying bank (which had already honoured as a confirming bank), even though the beneficiary was a fraudster and there was an injunction entitling the Central Bank to restrain the payment. Furthermore, the findings clarify that the participating traders perceive the autonomy principle as being absolute in the sense that it has no exceptions. The empirical findings confirm that the autonomy principle is understood comprehensively by judges in that each contract in the documentary credit, including the underlying contract, is considered to be independent from one another. It is revealed, somewhat ironically, by the empirical findings that a fair number of injunctions restraining payment of DC by reason of fraud have been granted by the Jordanian courts. Although, it is also clarified that Jordanian judges do require documentary evidence to grant such injunctions. The empirical findings indicate that the illegality exception has never arisen before courts and the judges are not aware of the arising discourse about the illegality exception. Interestingly, the participating judges indicate that there is a good possibility to recognise illegality as an exception to the autonomy principle.

[1011] Chapter 5, para 5.3.9.