

WHAT IS COMPLIANT PRESENTATION UNDER THE LAW OF DOCUMENTARY LETTERS OF CREDIT? A CRITICAL ANALYSIS OF ARTICLE 14 OF THE UCP 600

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ABSTRACT

Documentary letters of credit are among the most popular methods of payment in international transactions. The key to their success is in reducing the risk for exporters by replacing importers' financial undertakings with a guarantee of payment from a bank. Within the framework of a complicated process, a bank will guarantee to honour the seller's presentation of complying documents with terms of credit on behalf of the creditworthy buyer, who will compensate the bank based on another contract. By applying two principles of autonomy and strict compliance, documentary credit mitigates the existing commercial risk of trade between a buyer and seller who are in different countries and have no information about the financial capacities of each other's businesses. These two principles are regulated under the Unified Customs and Practices for Documentary Letters of Credit (the UCP), which was promulgated by the International Chamber of Commerce for the first time in 1933. The constant revisions of the UCP (current version UCP 600), which reflected current market practices, resulted in a global turnout of traders and its recognition as one of the most successful sets of rules introduced by the private sector. The main idea behind the introduction of the UCP (as confirmed by ICC officials) was to harmonise rules applicable to international LC transactions at the global level. However, it should be noted that the UCP has no power of law, and in case of any conflict between its provisions with national law or absence thereof among its provisions, national law will prevail. Therefore, it is of crucial importance that its degree of harmonisation with national laws in preventing possible losses to traders and bankers active in the practice of international trade finance be defined.

This paper studied general requirements for compliant presentation within 14 articles of the UCP 600 in comparison with requirements under English Law. In order to provide a complete picture to the reader, this paper analysed the respective sections of other ICC publications, including ISBP 745745, DOCDEX decisions, and ICC Banking Commission Opinions along with the UCP. The main purpose behind this paper is two-fold: Firstly, it tries to provide a legal analysis of the general framework of compliance requirements for documents under the UCP 600. Secondly, it strives to find existing conflicts between respective provisions in the UCP 600 and English Law. Recognition of such conflicting areas can be used as advice for the drafting committee of the UCP to achieve their goal of further harmonising the practice of international trade finance.

KEYWORDS: Documentary Letters of Credit, Principle of Strict Compliance, Presentation, Examination of Documents, UCP 600, English Law.

1. Introduction

Documentary Credits, Documentary Letters of Credit or Banker's Documentary Letters of Credit, are one of the oldest and most appreciated existing instruments for financing international trade. The long history of Documentary Letters of Credit resulted in their being considered as the "Life Blood of Commerce".¹

¹ *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* [1978], Q.B. 159, 155 (Kerr, L.J.).

In today's world, Letters of Credit are considered one of the most attractive areas of research for legal, international trade and finance scholars. In this respect, Professor Roy Goode defines Documentary Letters of Credit as: "A monetary promise that is independent of the transaction that gives birth to it and that is considered binding when received by the beneficiary without acceptance, consideration, reliance, or execution of a solemn form".²

Although Documentary Credits have a very extensive mercantile history, their involvement in the utilisation of credit arrangements practically goes back to the second half of the 19th century.³

A review of the legal history of Documentary Letters of Credit shows that *Rose v Von Mierop and Hopkins* is one of the first lawsuits and landmarks of LC Law in the English legal system.⁴ In the absence of internationally harmonised regulations, national laws regulate the operation of documentary letters of credit in different countries. However, in 1933, the International Chamber of Commerce introduced the Unified Customs and Practices for Documentary Letters of Credit (the UCP). According to an ICC official: "the objective [of the UCP] is to create a set of contractual rules that would establish the [letter of credit] practice, so that practitioners would not have to cope with the plethora of often conflicting national regulations".⁵ This is a challenging responsibility. On the one hand, international business and its requirements are an ever-changing phenomenon due to constant technology developments. On the other hand, national laws on the same legal phenomena differ substantially. As a result, to be adequately practical in harmonising such a diversion, the UCP should be constantly updated and modified in this context. In this way, the UCP has been undated six times since its first promulgation (the current version is the UCP 600).

A global welcome of international business activists to the UCP shows the essential need for the existence of such a harmonising tool in the practice of trade finance. However, the UCP does not have the power of law, as the ICC is a private international organisation and its publications will not play the role of law. Additionally, the UCP is not a convention. Therefore, in cases of conflict between the contents of the UCP and national law, national law will prevail. Since the diversity of national laws can create huge problems for international business practitioners, it is necessary for the UCP to provide a sufficiently clear and adequately comprehensive set of rules for smooth operation of international LC transactions with a minimum level of conflict with its provisions in national law. This complicated task is performed by a Drafting Commission, which tries to achieve harmonisation among national committees before the promulgation of each new version of rules.

Despite the existence of a huge body of literature on different aspects of international LC transactions, there is a visible research gap in analysing the adequacy of particular aspects of the UCP. Presentation compliance is one of the most important issues in the smooth operation of international LC as it is the sole condition for payment to the seller. Among others, Maritime transport documents are an important part of the presentation bundle due to their particular requirements as document of title and security in shipped goods, which they provide for banks. It is also worth mentioning that more than 90 percent of global trade is transported by sea.⁶ Additionally, this issue is of particular importance as the international business society has started requiring the ICC to start revision of the current UCP.⁷ However, there is a visible gap in scientific literature regarding the legal analysis of the existing provisions of the UCP 600 on the requirements for the compliance of maritime transport

² Goode. R, "Abstract Payment Undertakings" in Peter Cane and Jane Stapleton (eds), *Essays for Patrick Atiyah* (Clarendon 1991), 230.

³ Garcia RLF "Autonomy principle of the letter of credit", *Mexican Law Review*, (2009), 69.

⁴ *Pillans and Rose Van Mierop and Hopkins*; McCurdy. W, "Commercial Letters of Credit", *Harvard Law Review*, (1922) 539.

⁵ UCP600, 4.

⁶ IMO Maritime Knowledge Centre International Shipping and World Trade Facts and Figures, October 2009, available at: www.imo.org/KnowledgeCentre/ShippingFactsAndNews/TheRoleandImportanceofInternationalShipping/Documents/International%20Shipping%20and%20World%20Trad%20facts%20and%20figures%20oct%202009%20rev1___tmp65768b4.pdf [accessed on 30 Oct 2017].

⁷ The Institute of International Banking Law and Practice confirmed that at the 2015 American Annual Survey Conference, a list of items was compiled to consider for the next UCP revision. www.iiblp.org/the/community-speaks-the-UCP700-wish-list/ [accessed 30 Oct 2017].

documents and possible areas of problems that can be improved in subsequent revisions of the rules. This paper endeavoured to fill the existing research gap by providing maritime transport in the UCP 600 with a legal analysis from relevant articles and studying their adequacy in the international operation of documentary letters of credit. Due to the direct reference of the ICC to its other publications, namely the International Standard Banking Practice, DOCDEX decisions, and ICC Banking Commissions Opinions, their relevant provisions were also studied as a complementary companion to the UCP in comparison with the English Law approach to the subject matter.

The paper delimitates itself to studying the requirements for the compliance of sea transport documents under the UCP 600 and the adequacy of those provisions in comparison with English Law.

Issues relevant to the presentation compliance of other documents and bank security provided by transport documents are left outside the scope of this paper due to delimitations.

This paper is structured as follows: after the introductory part, Chapter Two provides an overview of the legal nature of the UCP. Chapter Three discusses the principle of strict compliance in international LC transactions and requirements for documentary compliance in letter of credit law with a focus on Article 14 of the UCP 600 ISBP 475 and DOCDEX decisions. The same chapter also compares and contrasts the general requirements of compliance between English Law and the UCP 600. For this purpose, research will follow the scientific approach to the subject matter by trying to find answers to the following questions: First, what are the characteristics of compliant presentation for maritime transport documents under the UCP 600? Second, what are the areas of confusion for traders and document checkers in relevant articles within the framework of the UCP 600? Third, are the UCP 600 rules regarding general conditions for the compliance of documents in international LC transactions adequately practical?

2. The Legal Nature of the UCP

Although the UCP has been present in the international trade environment for the last 80 years and achieved a global application in LC transactions, its legal nature is still debatable.⁸ The fundamental question is whether the UCP has the power of law or if it is merely effective as being incorporated by parties to a contract. Scholars offer different positions by considering the UCP as a part of the international commercial custom⁹ for mere contractual terms, which should be expressly referred to by the parties to any credit.¹⁰ Despite the fact that the question does not generally arise due to the constant requirements of banks for incorporation of the UCP in the credit, its legal nature has raised a valid theoretical question among legal experts. Supporters of the idea that the UCP is more than mere contractual terms refer to its long-term existence in the modern practice of letter of credit transactions as well as its global application.¹¹ Others argue that the International Chamber of Commerce as an issuer of the UCP is not a public authority; therefore, its promulgated rules do not have the force of law.¹² Additionally, they defer to Article 1 of the UCP 600, which provides:

“The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 (‘UCP’) are rules that apply to any documentary credit (‘credit’) (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly

⁸ Hugo, C. The Legal Nature of the Uniform Customs and Practice for Documentary Credits: Lex Mercatoria, Custom, or Contracts. *S. Afr. Mercantile LJ*, 6, (1994), 168.

⁹ Chhina, R. K. (2015). The Uniform Customs and Practice for Documentary Credit (the UCP): Are They Merely a Set of Contractual Terms? *Banking & Finance Law Review*, 30 (2), 245.

¹⁰ Malek, A., & Quest, D. Jack: Documentary Credits. (London, Toddle, 2009), 300.

¹¹ Chhina 2015, 265.

¹² Alavi, H. Documentary Letters of Credit, Legal Nature and Sources of Law. *Journal of legal studies*, 17 (31), (2016 d), 120.

indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded by the credit.”

From the perspective of English Law practitioners, the legal nature of the UCP can be approached either as contractual terms applicable to the credit by agreement of parties, or an independent source of law.¹³

In the English legal system, an independent source of law would be either custom or usage. In the case of *Lockwood v Wood* it was held that: “A custom which has existed from time immemorial, without interruption, within a certain place, and which is certain and reasonable in itself, obtains the force of law, and is, in effect, the common law within that place to which it extends, although contrary to the general law of the realm.”¹⁴ Using the same line of reasoning, Halsbury’s Law of England defines custom as: “...a particular rule which has existed either actually, or presumptively from time immemorial and obtained the force of law in a particular locality although, contrary to, or not consistent with the general common law of the realm.”¹⁵

Therefore, in order to constitute a custom, a rule should be: immemorial, reasonable, certain (in terms of the nature and relevance to the locality), and its application should not be disrupted from inception.¹⁶ Clearly, the UCP cannot meet the requirements of qualifying as a custom. This is reputedly confirmed by English legal commentators. Donaldson J. in *Golodetz & Co v Czarnikow –Rionda Inc*¹⁷ held that: “The UCP rules do not have the force of law.” Additionally, it is argued that *Banque de l’Indochine et de Suez S.A. v J.H. Rayner (Mincing Lane)*¹⁸ is an authority that does not recognise the UCP as a custom or usage.¹⁹ The general line of reasoning is that permanent revisions of the UCP do not match the necessity for constant and uninterrupted use of a custom from its immemorial inception. Additionally, under English Law, a custom would be immemorial if its origins go back prior to 1189.²⁰ The local application of the custom is another requirement in recognising a custom that does not apply to the UCP due to its global acceptance.

On the other hand, Black’s Law Dictionary defines a usage as:

“Usage is a reasonable and lawful public custom concerning transactions of the same nature as those which are to be effected thereby, existing at the place where the obligation is to be performed, and either known to the parties, or so well established, general, and uniform that they must be presumed to have acted with reference thereto.”²¹

A usage can be recognised with the following attributes: it is certain, reasonable, and not acting against any legislation. Therefore, some aspects of the UCP may qualify as a usage while others do not. Issues like the autonomy of the credit from the underlying contract and the necessity for strict compliance of the presentation with the terms and conditions stipulated in the credit can be good examples. However, treating the UCP as a usage received no support among English legal commentators.²² Therefore, by rejecting the legal nature of the UCP as a trade usage and custom, English Law recognises it as contractual terms that should be incorporated into the credit by the agreement of the parties. This position is confirmed

¹³ Ellinger, E. P. The uniform customs—their nature and the 1983 Revision. *Lloyd’s Maritime and Commercial Law Quarterly*, (1984), 578.

¹⁴ *Lockwood v Wood* (1844) 6 QB 50 64 (115 ER 19 24–25).

¹⁵ Halsbury’s Law of England 1975, 2.

¹⁶ Halsbury’s Law of England 1975, 2.

¹⁷ *Golodetz & Co v Czarnikow—Rionda Inc* [1979] 2 Lloyd’s Rep. 450 (QB) 455.

¹⁸ *Banque de l’Indochine et de Suez S.A. v J.H. Rayner (Mincing Lane)* (1983) 1 Lloyd’s Rep. 228.

¹⁹ Schmitthoff, C. M. Clive M. *Schmitthoff’s Select Essays on International Trade Law*. (BRILL, 1988) 460.

²⁰ Halsbury 1975, 5.

²¹ Black, H.C. Nolan, J.R, Connolly, M.J, and Nolan-Haley, J.M. *Black’s law dictionary: definitions of the terms and phrases of American and English jurisprudence, ancient and modern*. St. Paul, MN: West Publishing Company, 1990.

²² Schmitthoff 1988, 280; King, R. *Gutteridge and Megrah’s Law of Bankers’ Commercial Credits 8th Edition*, Routledge, 2003, 18

on many occasions by considering the UCP as “a set of standard terms and definitions that apply subject to the agreement between the parties”²³ or “a body of rules binding on those...who have adopted them”²⁴ or “[it] appl[ies] only if the parties have incorporated them into their contract.”²⁵

3. Framework for Defining the Compliance of Presentation under the Letter of Credit Law

To determine the compliance of presentation made by a beneficiary, the standard for examination of documents is encapsulated in Article 14 of the UCP 600.²⁶ The following guidelines in Article 14 are necessary for a beneficiary exporter to be certain about the general compliance of its presentation before looking at the specific requirements of each particular document provided in other articles of the UCP 600. However, to grasp a complete picture about the necessities for a compliant presentation, the reader must look into other ICC publications in addition to the UCP. DOCDEX decisions, Banking Commission Opinions and International Banking Practice (ISBP) are essential in determining presentation compliance as they also provide clarifications and some additional rules to the UCP 600. This paper will refer to them on numerous occasions. It is also necessary to point out the comprehensive body of English Common Law in this respect. However, this paper does not intend to compare and contrast ICC publications and Common Law, and in case of any conflict between them, it will be clarified which one should prevail.

3.1. Standard of Examination

Article 14 (a) sets the duty of a bank in examination of documents. Following the principle of autonomy, a bank will check the presentation only with reference to documents and their compliance with the terms and conditions on their face. The complying presentation is defined under Article 2 of the UCP 600: “in accordance with the terms and conditions of [1.] the credit, [2.] the applicable provisions of [the UCP] and [3.] international standard banking practice.” To proceed, author starts with the principle of autonomy, and moves forward with the duty to examine “on the face”. Finally, three elements of a compliant presentation will be studied: credit, the UCP, and international standard banking practice.

3.1.1. Autonomy Principle

It seems that the reference of Article 14 (a) to the duty of a bank to determine the compliance of a presentation “on the basis of documents alone” reflects the principle of autonomy embodied in Article 4. Accordingly, “a separate transaction from the sale or another contract...[and] banks is in no way concerned or bound by such contract.”²⁷ As a result, determining the compliance of presentation does not have anything to do with the existence of a conflict between parties over the performance of the underlying contract.²⁸ This is in accordance with the principle of autonomy of contracts in Common Law that confines document checkers to looking only at presented documents and neglecting any other sources of information.²⁹

²³ Ellinger 1984, 583.

²⁴ King 2003, 6.

²⁵ Todd, P. *Bills of Lading and Bankers' Documentary Credits*. (London, Taylor& Francis, 2013) 18.

²⁶ Presentation has been defined by UCP 600 Art. 2 titled “Definitions” as: the delivery of documents.

²⁷ UCP 600, Article 4.

²⁸ Alavi, H., “Autonomy Principle and Fraud Exception in Documentary Letters of Credit, a Comparative Study between the United States and England”. *International and Comparative Law Review*, Vol. 15, No. 2, (2015), 50.

²⁹ *Hamzeh Malas & Sons v. British Imex Industries Ltd* [1958] 2 Q.B. 127; [1978] Q.B. 159; *United City Merchants (Investments Ltd v. Royal Bank of Canada* [1982] 2 Lloyd's Rep. 1; Alavi, H. “Comparative study of Unconscionability exception to the principle of autonomy in law of Letter of Credits.” *Acta Universitatis Danubius. Juridica* 12.2 (2016). 98.

3.1.2. “On the Face”³⁰

Article 13 of the UCP 500 as the predecessor of Article 14 of the UCP 600 contained a reference to the duty of document checkers to examine documents “on their face” to determine the compliance of presentation. The outcome was confusing because some banks misunderstood the phrase, as a document checker is supposed to examine documents only on their front page.³¹ It has been submitted that during consultation sessions for preparation of the UCP 600, there was an agreement to delete the phrase, but it still appears in Article 14 (a).³² Adodo suggests that “on their face” refers to the autonomy principle, as a bank should only examine documents in the presentation as their entirety, and not seeking facts outside the presentation.³³ This is in addition to Article 5, which clarifies that “a bank only deals with documents and not with goods.” Reemphasising the autonomy principle in Article 14 seems redundant, as Articles 4 and 5 already do the same in the appropriate section of the code. As a result, the insertion of the phrase in Article 14 (a) confirming the autonomy of the credit seems not to be the correct action. Additionally, if it is inserted for another purpose, then the correct meaning should be provided in the ISBP. The author considers this area of the UCP 600 in need of correction or elimination in future revisions.

3.2. Reasonable Care

This is an issue directly relevant to the standard of the duty of care supposed to be provided by banks during examination of documents. Article 13 (a) of the UCP 500 commented on “reasonable care” as a required standard for banks to examine the documents. The standard of “reasonable care” was imposing the requirement “to adopt a professional and diligent approach” in the determination of compliance.³⁴ However, the phrase is eliminated from the UCP 600 as the ICC argues that it is “superseded” by “more comprehensive and precise” provisions of Article 2 and Article 14 (a).³⁵ Therefore, the requirement that presentation should comply with international standard banking practices implies the necessity for the application of “reasonable care” in the determination of compliance by banks. The article seems confusing; however, it is believed that with the elimination of the phrase, banks must exercise reasonable care in determination of presentation compliance rather than thoroughly analysing the document.³⁶ The question of why a standard of care is not provided in ISBP 745 if banks should perform their duty in accordance with standard banking practices still remains.

3.3. Conditions Stipulated in Credit

From among the three components for defining compliant presentation, it seems the conditions stipulated in the credit are the most important ones. It is possible for parties to the credit to agree on exclusion of any part of the UCP.³⁷ Even in case of not excluding provisions of the UCP, in case of occurrence of any conflict between them, there is a strong argument in favour of the prevailing terms and conditions of the credit over the UCP provisions.³⁸

³⁰ Article 14 (a), UCP 600.

³¹ Isaacs, M. and Barnet, M. International Trade Finance—letters of credit, UCP 600 and examination of documents *J.I.B.L.R.* (2007) 22 (12) 661.

³² Debattista, C, “The new UCP 600—changes to the tender of sellers’ shipping documents under letters of credit” *J.B.L.* (2007), 338.

³³ Adodo, E, “A Presentee Bank’s Duty When Examining a Tender of Documents Under the Uniform Customs and Practice for Documentary Credits 600”, *J.I.B.L.R.*, 24 (11), (2009), 567.

³⁴ Bridge, M. *Benjamin’s Sale of Goods First Supplement to 7th Edition*, (London, Sweet and Maxwell 2008), 236.

³⁵ ICC Commentary, 62.

³⁶ Debattista 2007, 338.

³⁷ Article 1 UCP 600.

³⁸ Debattista 2007, 338.

The ICC also confirms that in any conflict with local law and the UCP, “local law will always rule in a dispute situation... unless the credit states otherwise.”³⁹ Therefore, banks have the duty of examining the presentation and defining its compliance with the terms and conditions of the credit. The extent of compliance of documents under English Law is subject to the principle of Strict Compliance; however, such notion is not provided in the UCP.⁴⁰ To add to the confusion, experts agree that using the UCP will result in losing the ground for the standard of Strict Compliance.⁴¹

The principle of Strict Compliance under English Law is clarified by Viscount Sumner in *Equitable Trust Co of New York v. Dawson Partners Ltd.*⁴² “There is no room for documents that are almost the same, or that will do just as well.” The documents must strictly comply, and in case the bank “does [not do] as it is told...[and] departs from the conditions laid down, it acts at its own risk”⁴³ where it jeopardises its own reimbursement.

Evidently, when the credit calls for particular documents, the bank should examine the compliance of stipulated documents against the terms and conditions of said credit. According to common law, documents are supposed to be exactly the same as “there is no room for documents that are almost the same.”⁴⁴ However, it is almost impossible to have presented documents exactly the same as required by the credit. After all, the beneficiary does not exercise any control over the production of documents prepared by a third party. Therefore, strict compliance cannot “extend to the dotting of i’s and the crossing of t’s”,⁴⁵ and “some margin must and can be allowed, but it is slight.”⁴⁶ For example, under common law, if the place of delivery is mentioned as “SloveniO”, the document might be considered as compliant. A typographical error of using “O” instead of “a” will not change the meaning of the word and does not create confusion for the document checker.⁴⁷ However, “SlovANia” might be rejected as a discrepancy because there is confusion over the place of delivery being “Slovakia” or “Slovenia”.⁴⁸ The ICC takes a similar approach to typographical errors. ISBP 745 clarifies that the main criteria for considering a typographical error as a discrepancy is whether or not it will affect the meaning of the word or sentence.⁴⁹ Banking Commission Opinion R209 considered the surname of the “attention party” on a transport document mentioned as “Chai” instead of “Chan” as a discrepancy. However, “industrial parl” instead of “industrial park” was compliant.⁵⁰

Under the UCP 600, it is unclear how a document checker should be aware of all places and phrases in order to be able to understand which typographical error renders the presentation as a discrepancy and which does not. It is suggested that the test would be more effective and efficient if it considered the resulting confusion of a typographical error.⁵¹ As a result,

³⁹ Banking Commission Opinion R515 No. 321. p. 37.

⁴⁰ DOCDEX decision 221: the UCP 500 has no reference to the strict compliance standard.

⁴¹ Downes, P. UCP 600: not so strict compliance 4 *J.I.B.F.L.* (2007) 19, 196; Dolan, J.F. The strict compliance rule in a recession in *DC Insight* Vol. 15 (4) (2009), 8.

⁴² *Equitable Trust Co of New York v. Dawson Partners Ltd.* (1926) 27 Ll Lrep, 49.

⁴³ (1926) 27 Ll L Rep. 49.

⁴⁴ (1926) 27 Ll L Rep. 49.

⁴⁵ King 2003, 186.

⁴⁶ [1982] 2 Lloyd’s Rep. 476.

⁴⁷ *Hing Hip Hing Fat Co Ltd v. Daiwa Bank Ltd* [1991] 2 HKLR 35 (Hong Kong) where “industries” instead of “industrial” was held to be an obvious typographical error and caused no confusion.

⁴⁸ [1985] *Beyene v. Irving Trust Co.*, 596 F. Supp. 438 (American Case) where the misspelling of the name “Sofan” as “Soran” was considered a material discrepancy.

⁴⁹ ISBP 745, paragraph A23.

⁵⁰ No. 55 in 1995–2000 published; DOCDEX decision 205 when quoting Banking Commission Opinion R209 accepted that the address St. Blass instead of St. Glass was not a discrepancy.

⁵¹ Isaacs & Barnet 2007, 664.

it would be logical to propose upgrading the test within the framework of Paragraph A 23 of ISBP 745 to whether or not an informed document checker can unequivocally establish that a typographical kind of error will not affect the meaning of a word.

3.4. Conditions in the UCP

As was mentioned in the previous section, the conditions stipulated in the credit are the most important components in determining the compliance of the credit. The UCP provides conditions for documents that, when meeting them, will result in the test of compliance for the presentation being passed. As this paper is about compliance of transport documents, the requirements for specific transport documents will be discussed in future chapters. However, at present, the discussion will cover presentation compliance in its entirety. This section will discuss consistency among presented documents, the UCP position on non-documentary requirements, description of goods, linkage, timeframe for examination, and combined documents.

There is a general agreement that the UCP offers a less stringent rule regarding the principle of strict compliance than English Law.⁵² However, some case law indicates that it merely offers a certain degree more of discretion.⁵³ To start with, the UCP provides tolerance equal to 5% for the quantity of the goods in contrary to restrictions applied in common law on the de minimis rule.⁵⁴ In the case of *Moralice (London) Ltd v. E D and F Man*⁵⁵ (not subjected to the UCP), the court ruled a discrepancy of the presentation where the bill of lading showed three bags of sugar fewer than the amount indicated in the credit. It is submitted that a court will rule for the application of tolerance in credits subjected to the UCP. This is despite the fact that in conflict with national law and the UCP, national law will prevail, and the outcome would be impractical. One reason is that in the reality of international commodity trading, the majority of credits are issued for bulk shipments and it is practically impossible to ascertain the exact amount of a shipment at the time of issuing credit. Secondly, the agreement of parties to subject the credit to UCP rules indicates that they understand and intend to apply the 5% tolerance. As a result, the court should not deny the decision of the parties for governing their credit by UCP rules. Thirdly, other sections of the UCP 600 also signify its departure from strict compliance. For example, Article 14 (j) and 14 (i), which are both introduced in the 2007 revision of the UCP, can be mentioned for this purpose. The former deals with addresses and contact information, and the latter refers to dates indicated on documents.

3.4.1. Addresses

Article 14 (j) of the UCP 600 provides:

“[it] need not be the same...as [the address] stated in the credit or indeed the same as an address in another document. It must however be “within the same country as the respective addresses mentioned in the credit.”

This sub-article offers a great degree of flexibility in the application of strict compliance, which was not previously available in the UCP. There are many questions regarding the application of Article 14 (j). To start with, do the exceptions to addresses apply to individuals as parties to the credit? It is logical that big companies would have different addresses and they might

⁵² Alavi, H. Documentary Letters of Credit, Principle of Strict Compliance and Risk of Documentary Discrepancy. *Kor. UL Rev.*, (2016 e). 19, 8.

⁵³ *Indian Overseas Bank in Fortis SA/NV v. Indian Overseas Bank* [2010] 1 Lloyd's Rep. 227; [2009] 2 C.L.C. 550 at 554 – 555.

⁵⁴ UCP 600—Article 30 (b).

⁵⁵ *Moralice (London) Ltd v. E D and F Man* [1954] 2 Lloyd's Rep. 526.

use addresses in different locations in relevant documents and this is acceptable as long as both addresses are within the same country. However, it is suggested that the same exception does not apply to individual parties to the credit. Another question would be the situation that no address is mentioned in the credit or the address details are incomplete. It is suggested that presentation is a discrepancy in both cases, i.e. when no address is presented and/or when the credit provides a phone number to notify the party with a country code but the phone number of the same party in the bill of lading indicates no such information.⁵⁶

3.4.2. Dates

It is provided by Article 14 (i) that: “[Transport document] may be dated prior to the issuance date of the credit, but must not be dated later than its date of presentation.” Paragraph A11iii of ISBP 745 emphasises that transport documents should be dated even in the absence of such requirement by the credit. The need for the presence of a date of issuance on other documents depends on their nature and content. The main idea behind this article is that presented documents should not show dates after the date of presentation. Accordingly, the ICC comments that the article intends to prevent a situation in which banks reject documents dated after the day of shipment.⁵⁷

The abovementioned examples show the inclination of the UCP to distance itself from strict compliance. The issue will be analysed further in the discussion below regarding non-documentary conditions.

3.4.3. Non-documentary conditions

The problem of non-documentary conditions is a source of the occurrence of a great deal of problems in international LC transactions. In the practice of international LC transactions, non-documentary conditions are situations when a requirement has been placed in the credit but no document is demanded to satisfy that requirement. For example, in the credit, it is asked that goods should have a Norwegian origin but there is no requirement for a Certificate of Origin to be coupled with the condition. Under English Law, courts respect the principle of the freedom of contract.⁵⁸ Therefore, they rule in favour of any express agreement reached by parties in the credit with or without a document having been called for satisfying it. On the other hand, Article 14 (h) of the UCP 600 provides: “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.” This is the easiest approach, which might have been taken by simply disregarding the document that is not called for in the credit. The ICC efforts to tackle the problem of non-documentary conditions go back to Position Paper no. 3 under the UCP 500, which is not applicable today.⁵⁹ According to Position Paper no. 3, if the credit requires a particular piece of information but does not require a document for this purpose, a document providing such data will not be disregarded. The Position Paper tried to clarify misunderstandings about the UCP 500; however, the ICC did not incorporate it in the UCP 600 due to the creation of further confusion. Confusion arose from the possibility for the existence of discrepancies in documents that were not required by the credit but were examined.⁶⁰ The current situation under the UCP 600 has been endorsed by DOCDEX decision 201, which provides that requiring a purchase order’s addressee to sign any document without asking for the presentation of the purchase order should be disregarded as a non-documentary condition.

⁵⁶ Antoniou. Anna Mari, Doctoral Thesis, *Complying Shipping Documents Under the UCP*, University of Southampton. (2011), 120.

⁵⁷ ICC Commentary, 66.

⁵⁸ (1983) 1 Lloyd’s Rep. 717.

⁵⁹ Commission on Banking Technique and Practice, 1994, 110.

⁶⁰ ICC Commentary, 66.

In fact, application of Article 14 of the UCP 600 is in accordance with the principle of autonomy of the credit. Since a bank is only obliged to examine the documents in defining presentation compliance, requiring anything out of documents called by the credit in the examination process is *ipso facto* undermining the independence of the credit. As a result, if banks examine non-documentary conditions, they not only violate the autonomy of the credit, but also fail to perform their duties in accordance with their obligations in Articles 4, 5 and 14 (a) of the UCP 600.⁶¹

It should not be forgotten that the UCP does not have the power of law, and courts particularly in England will not hesitate to strike down Article 14 (h). It is crucial for banks to remember that such conditions are effective under English Law.⁶²

3.4.4. Consistency

Article 14 (d) provides: “data in [one] document...need not be identical to, but must not conflict with...data in any other document.”⁶³ Consistency refers to the correlation between presented documents. In fact, the bank is obliged to compare data in one document against data in another document within the framework of the same presentation. Establishing consistency between presented documents can be an extremely time-consuming job for a document checker.⁶⁴ It is not difficult to imagine the time necessary for checking numerous documents in a complicated presentation against the terms and conditions of the credit, the UCP 600 and each other. The main idea behind requiring consistency among presented documents is to prevent a situation under which presentation is dishonoured due to a difference of documents but not an inconsistency in the context. A very easy example is the possibility to have different names for the consignee on the bill of lading and certificate of origin. An informed document checker will not consider the existence of different names on the abovementioned documents as an inconsistency since in the practice of international trade it happens a lot when the buyer is named in the certificate of origin as the consignee but on the bill of lading the bank’s name is mentioned in the same field.

3.4.5. Description

Article 14 (e) provides that: “the description of the goods, services and performance, if stated [in a document] may be in general terms not conflicting with the description in the credit.” The sub-article applies to the condition when the description of goods is provided in a given document.⁶⁵ However, not providing a description of goods on a document or lack of sufficient description will not amount to a discrepancy.⁶⁶ It should be recalled that Article 14 (e) does not apply to the description of goods on the Commercial Invoice.⁶⁷ Common law takes a similar approach.⁶⁸ However, the exception applies to the situation in which the description of the goods on the credit and on the given document are not the same. In such a situation, the goods described on the document should be clearly identified as the same goods mentioned in the credit. Otherwise, presentation would be correctly rejected due to such discrepancy.⁶⁹ This requirement refers to the important principle of linkage in common law.

⁶¹ Antoniou 2011, 130

⁶² Alavi, H. “Risk Analysis in Documentary Letter of Credit Operation.” *Financial Law Review* 1, no. 4 (2016 b): 27-45.

⁶³ UCP600—Article 14 (d).

⁶⁴ Ulph, J *The UCP 600: documentary credits in the 21st Century J.B.L.* (2007), 366.

⁶⁵ ICC Commentary, 65.

⁶⁶ Opinion R260 No. 59.

⁶⁷ TA 681rev in *DC Insight* Vol. 15 (3) 2009, 22.

⁶⁸ *Midland Bank Ltd v. Seymour* [1955] 2 *Lloyd’s Rep.* 147.

⁶⁹ [1983] 1 *Lloyd’s Rep.* 228.

3.4.6. Linkage

Under common law, linkage refers to the possibility to link goods presented in documents to goods that represent the underlying transaction. Therefore, banks will accept the presentation made by a beneficiary as compliant when it is clearly linked to goods in the underlying transaction. This issue is supported by some scholars, as in the absence of the requirement for linkage, an exporter can present any document in a compliant format without reference to goods in the contract of sales.⁷⁰ In addition to the *de minimis* rule and non-documentary requirements, the absence of a linkage requirement is the third argument in favour of providing more discretion in checking presented a document by the UCP than common law. Apparently, application of the principle of autonomy (Articles 4 & 5) in addition to the absence of responsibility for a bank to determine the genuineness of documents (Article 34) are the reasons behind not referencing to the linkage principle in the UCP 600. In the absence of linkage equipment under the UCP 600, it is suggested that national law should govern the issue (in the case of our discussion, English Law). However, this can be a problematic area and it is better to be considered by the ICC Banking Commission in future revisions of the UCP.

It worth mentioning that in the absence of reference to the linkage requirement, Article 14 (f) of the UCP 600 tries to solve the problem: “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).”⁷¹ For example, when a packing list is required under the credit with no further detail regarding its data and format, the bank will consider a document presented as a packing list as long as it meets the general requirements to be considered as a packing list.

3.4.7. Combined Documents

In the absence of any reference to combined documents in the UCP, paragraph A40 of the ISBP 745 provides: “documents required by the credit should be presented as separate documents.” It provides two exceptions: it gives permission for packing and weight list to be presented as a single document when two original documents are presented and each of them shows packing and weight details. Another exception is when a document can be combined with another one without the need for a signature and date as long as the document that contains it shows the signature and date inserted by the same entity in charge of making it. Currently, there is no case law regarding combined documents under the UCP 600. However, DOCDEX decision 211 provides that the use of combined decisions under the UCP 500 is neither allowed nor prohibited. Therefore, compliance of presentation including combined documents should be checked against existence or absence of permission for it under the credit itself.

The ISBP 745 has a clear position regarding combined documents, but in the absence of any guidance in the UCP 600, there is a risk of the inclusion of such documents by the beneficiary in the presentation resulting in its rejection by the bank. This is a risk that should be considered in subsequent revisions of the UCP.

3.4.8. Time for Examination

The last section to be discussed in this chapter is about the timeframe provided by the UCP 600 for examination of documents by a bank. The issue of timeframe is important for both the beneficiary exporter and bank, as not acting properly within the

⁷⁰ Ulph 2007, 365.

⁷¹ Article 14 (d), UCP 600.

timeframe provided by the UCP can result in them being precluded from receiving due payment under the credit.⁷² Article 14 (b) provides that: “[bank] shall have a *maximum* of five banking days following the day of presentation” regardless of the fact that the expiry date of the credit might be during or on the last day of these five days. This includes each of the nominated, confirming and issuing banks. It is submitted that a bank should not speed up the process of checking documents due to their proximity to the expiry date.⁷³ The time span provided for checking documents under the UCP 500 was a maximum of seven working days, which was reduced to five days in the 2007 revision based on the votes of the ICC National Committees. The agreement was two-fold: First, to reduce the timeframe for examining presentation compliance. Second, to remove the notion of “reasonable time”.⁷⁴ According to the ICC, the reason for removing the notion of reasonable time was the lack of harmony in understanding the notion at the global level.⁷⁵ In fact, defining a reasonable time for checking compliance of presentation depends on the particular number and type of documents required by each credit.⁷⁶ Other important factors can be the language of documents, consisting of the presentation and complexity of the presentation in its entirety.⁷⁷

Therefore, in order for the bank not to be precluded from claiming its own reimbursement from the applicant (under Article 16) it should consider the presentation as compliant and pay the credit amount to the beneficiary (in accordance with Article 15 (a)) or issue the notice of rejection and refuse to pay the beneficiary (Article 16 (d)) before the end of the fifth banking day.⁷⁸ On the other hand, it is submitted that even 5 banking days is too much, and the timeframe for checking documents should not be more than 3 days.⁷⁹

In order to reconcile diverging opinions regarding the reasonable time for checking the documents by banks it is possible to refer to Banking Commission Opinion R264 Ref. 63 on the UCP 500: “The seven-banking day rule...is intended to be the outer guideline...Local practices and legal precedents...dictate the ‘reasonable time’ that a bank should take to check the documents.”⁸⁰

Using the same line of reasoning, it is possible to argue that five banking days is the maximum period provided for banks to examine presentation compliance, and local law will decide whether or not the bank could wait for the fifth day to announce the result if it was available earlier.⁸¹ Other crucial issues relevant to the time of examination covered in the UCP 600 are the notion of “banking day” and “day of presentation”. However, the timeframe for examination of documents is a debated issue and it seems to need further clarification in subsequent revisions of the UCP.

3.5. International Standard Banking Practice

According to the ICC Commentary,⁸² the final concept in compliant presentation goes back to banking practice. However, it should be noted that banking practice refers to day-to-day practice in the international banking industry, and it is not

⁷² Alavi, H. Comparative Study of Issuing Bank’s Obligations towards the Beneficiary of a Letter of Credit under UCP and English Law. *Hasanuddin Law Review*, 2 (3), (2016 a), 289.

⁷³ ICC Commentary, 63.

⁷⁴ UCP 500—Article 13 (b).

⁷⁵ ICC Commentary, 63.

⁷⁶ *Seaconsar Far East Ltd. V. Bank Markazi Jomhourī Islami Iran* [1999] 1 Lloyd’s Rep. 36 at 41.

⁷⁷ Ellinger, P, Reasonable time for examination of documents, *J.B.L.*, (1985), 408.

⁷⁸ Debattista 2007, 339.

⁷⁹ Yen Low, H. UCP 600: the new rules on documentary compliance. *International Journal of Law and Management*, (2010) 52 (3), 203.

⁸⁰ ICC Collected Opinions 1995—2001, 134.

⁸¹ Banking Commission Opinion R534 No. 339 in Opinions 1995–2004.

⁸² ICC Commentary, p. 16.

limited to ICC document ISBP 745. Due to the unawareness of a beneficiary, details of such practice in the international banking sector can be a big advantage for banks and work as “A wild card that banks can play at their convenience.”⁸³ Despite the fact that it will never be the main source of reference in determining the compliance of a presentation (in the presence of the UCP), its fluid nature is a huge obstacle in the way of creating a comprehensive picture from such a practice among international traders. The practice between Norway and Russia is definitely not the same as the practice between Norway and the US, and no guideline can provide a full picture from such practice at the global level, let alone the need for constant revisions to meet the requirements of technological change. To solve this issue, the main sources of international standard banking practices are defined by the ICC advisor as: “ISBP (currently version 745) as a ‘necessary company’ to the UCP and ‘inevitable aid’ to LC practitioners,”⁸⁴ DOCDEX decisions, made by an arbitration tribunal consisting of three experts on the subject matter, and ICC Banking Committee Opinions. For the purpose of this paper, recourse will be made to one of the abovementioned sources in clarification of the problem at hand.

4. Conclusion

As it is mentioned in the introductory part of the UCP 600, the high rate of rejections in international LC transactions was among the reasons for further updating of the rules.⁸⁵ The discussion in this chapter followed the goal of informing exporters about the requirements of compliant presentation in the current situation and the manners in which banks will define presentation compliance.

It is not possible to fit such an investigation into just a few words, but we can summarise that exporters should present all stipulated documents (not conflicting with each other) that are called for under the credit at the counter of the appropriate bank where the credit is available before the expiry date of the credit. Making a checklist from the documents to be presented and their quality in the sales agreement with an applicant is a definite way a seller can protect themselves from facing the risk of rejection due to a discrepancy. The issues of non-documentary conditions and consistency among documents in presentation are complicated issues that call for particular attention. Paper also strived to analyse areas in which the requirements of compliance in the UCP and the ISBP 745 are in conflict with market practice. Awareness of such conflicting areas will be useful for beneficiary exporters so they are not trapped by them, and can also be considered by the ICC in future revisions of the rules.

⁸³ Reynolds, F. and Smith, D. Reports from the UCP seminars (part 2) *DCInsight* Vol. 14 (1) (2008). 6.

⁸⁴ ICC publication 681, 11.

⁸⁵ Introduction to the UCP 600, p. 11.