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New rules for Letters of Credit: Time to update the UCP 600

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ABSTRACT

This article addresses the need for a revision of the UCP 600, international rules governing letters of credit. It identifies key articles that need amendments and is the first legal article to draft new provisions for the potential 'UCP 700'. The significance of updating the rules can be pinpointed as increasing bank operation efficiency and faster completion of international trade transactions.

INTRODUCTION

Since 2015 there have been whispers¹ of a revision to the Uniform Customs and Practice for Documentary Credits (UCP 600²). Thus far, these whispers are mostly from financial executives and bankers who, having worked with the 2007 version of the rules for nine years have found that they are in need of several updates. This paper, takes a legal perspective on the key articles that need to be updated and presents the first list of requirements for the potential 'UCP 700'. There have of course, been many comments on the UCP 600 but this is the first paper to closely consider what a complete new version of the UCP could look like. It provides newly drafted articles as recommendations and proposals for consideration as the new articles of the 'UCP 700' to coincide with the development in letter of credit practice and technological advancements.

The significance of updates and harmonisation

As expressed by Guy Sebban, the Secretary General of the International Chamber of Commerce, "the objective [of the UCP is] to create a set of contractual rules that would establish uniformity in [letter of credit] practice, so that practitioners would not have to cope with a plethora of often conflicting national regulation"³. The primary aim is to harmonise letter of credit law so that any financial institution anywhere in the world applies the same procedures and policies to the examination of documents and determination of compliance under a letter of credit. The importance of this objective and the challenge of harmonising the rules can still be seen today. When participants of the ICC Global Trade and Finance Survey 2016⁴ were asked to describe the extent to which the *lack* of harmonisation between jurisdictions posed a challenge to the trade finance industry, 36.3% described it as 'great'. Only 6.6% said there was no impact. Banks themselves are recognising that lack of harmonisation is a great challenge to trade finance. To combat this deficiency, the UCP rules need to continuously strive for uniformity and this means, that regular updates are necessary. It has been almost ten years since

¹ The Institute of International Banking Law and Practice confirmed that at the 2015 Americas Annual Survey conference members were compiling a list of items to consider for the next UCP revision. See www.iiblp.org/the-community-speaks-the-ucp700-wish-list/

² *ICC Uniform Customs and Practice for Documentary Credits*, ICC Publication no. 600, ISBN: 9789284212576

³ *ICC Uniform Customs and Practice for Documentary Credits*, ICC Publication no. 600, page 4. ISBN: 9789284212576

⁴ ICC Global Trade and Finance Survey 2016, Figure 43, page 75, available at: http://store.iccwbo.org/content/uploaded/pdf/ICC_Global_Trade_and_Finance_Survey_2016.pdf

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the rules were updated in 2007. It is understandable that updating requires a great deal of time and money, not least attempting to bring together drafting committees from over 130 countries for discussions and negotiation. The UCP rules however are essentially contractual terms rather than legislation⁵ and although one can argue that updating legislation every ten years seems overambitious, updating standard form contracts regularly seems plausible and advisable.

The significance of this article is that updating the UCP with the proposals made will result in the rules providing a better reflection of shipping practices and legal rules and analysis. The rules would be further harmonised and clarified, so that they operate more efficiently allowing increased number of trade transactions to be completed successfully and a decrease in the time needed to complete those transactions. The more clarity the rules provide, the less ambiguous they are, the easier it is for document checkers in banks to complete the credit and thus the trade transaction. The clearer guidance given through updating the rules will result in a quicker turnaround on credit decisions allowing trade to flourish and increasing bank operation efficiency.

The purpose of this investigation

The main objective of this paper is to identify the key articles of the UCP 600 that need clarifications, additions or amendments, to produce a list of recommendations as to what a new version of the rules, tentatively called by this paper 'UCP 700', could and should contain. Many articles of the UCP 600 seem to be working well and the reader should assume that the 'UCP 700' will retain the majority of these. However, there is a need of, on the one hand, amendments to the current rules, and on the other, the eventual addition of new articles to the eUCP⁶ when the trading and banking communities start to utilise electronic documents routinely. This article addresses the main areas of concern, both in relation to letters of credit generally and specific aspects of the transaction. It gives a list of proposals for amendments to the UCP to be incorporated in the new version and is the first time an academic article has stated that it is now time to start discussing a 'UCP 700'. The significance and contribution is not only the individual proposals made, but also that it is the first article to bring together all the key areas of the UCP requiring amendments as a draft version of the 'UCP 700'. It is the starting point for traders, bankers and lawyers to discuss what a complete new version of the UCP could look like.

The structure is simple; each key problematic area of the UCP is identified, analysed and a proposal made at the end – often a redraft of the rules or the addition of a newly drafted provision. We start and end with two general recommendations on standby letters of credit and electronic documents respectively. Then we move through the UCP not in order of articles but rather following the steps that the transaction would follow: setting up the credit (looking at nominated banks and amendments), examination of the presentation (charter-party bills, clean transport documents and non-documentary conditions) and lastly whether the credit should be honoured or refused. The reader will note that not all articles are covered; there are many other minor amendments that need to be made to the UCP but the scope of this article is to focus on the key areas across the entirety of the rules to commence the conversation on 'UCP 700'. We conclude with the entire list of suggested

⁵ Article 1 of the rules states that they “apply to any documentary credit....when the terms of the credit expressly indicates that it is subject to these rules.”

⁶ This is the supplement found at the end of the UCP 600 for Electronic Presentation.

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amendments and that now, is a good time to start thinking about what the 700 version could contain. It is intended that this article is the starting point for legal discussions on the next revision of the UCP.

AMENDMENTS TO THE UCP 600

Removal of references to standby letters of credit

It seems appropriate to start a revision of the UCP 600 with a very simple recommendation for Article 1. This article deals with the application of the rules and states that they apply:

“to any documentary credit (“credit”) (including, to the extent to which they may be applicable, any standby letter of credit [emphasis added]) when the text of the credit expressly indicates that it is subject to these rules.”

Standby letters of credit are mostly used by American banks as a similar instrument to performance bonds in the UK⁷. They are issued as secondary payment mechanisms; that is, to *support* payment. As described by the ICC “[they] are issued to support payment, when due or after default, of obligations based on money loaned or advanced, or upon the occurrence or non-occurrence of another contingency”⁸. For example, if a buyer in an international sale has paid for goods in advance but upon examination of the goods finds that they are faulty, the standby credit allows the buyer to draw ‘damages’ under the credit from the seller’s bank. In a standby letter of credit the bank agrees to pay the beneficiary buyer when the request is accompanied by a ‘default’ certificate – an attestation that there has been a default of performance under the sale contract, for example, short delivery or defective goods. The language used for standby credits is similar to that of commercial letters of credit rather than performance bonds which is unfortunate, but the key feature to remember is that standby credits are secondary payment mechanisms, i.e. something must fail for them to be invoked. Commercial letters of credit on the other hand are primary payment mechanisms, they are the ‘cash’ paid in exchange for goods.

Rules governing standby letters of credit were issued by the ICC in 1998; they are the International Standby Practices ISP98⁹ issued specifically to govern standby letters of credit. By its own admission, the ICC found it necessary to draft detailed rules for standbys because the UCP were intended for commercial credits, were not fully applicable nor appropriate for standbys and even the least complex standbys posed problems not addressed in the UCP¹⁰. It is argued, the correct approach would be to entirely separate standby letter of credit rules and commercial letter of credit rules. The recommendation is that any reference in the UCP to standby letters of credits should be removed. They should be entirely dealt with under the ISP, remain entirely within the scope of the ISP (amended as necessary) and have no place in the UCP. One assumes the reason they were initially associated with the UCP is that, as they had no rules of their own, parts of the UCP could be used ad hoc to help

⁷ See further Ellinger, P. and Neo, D. *The Law and Practice of Documentary Letters of Credit* 2010, Hart Publishing, ISBN: 9781841136738 pages 5 and 6.

⁸ *ICC International Standby Practices*, ICC Publication no. 590E, ISBN: 9789284212477 page 5

⁹ *ICC International Standby Practices*, ICC Publication no. 590E, ISBN: 9789284212477

¹⁰ *ICC International Standby Practices*, ICC Publication no. 590E, ISBN: 9789284212477 page 7

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regulate standby credits. Since 1998 they do have their own rules, and rather than supplement those with the UCP the International Chamber of Commerce should redraft the ISP, if necessary.

Commercial credits and standby credits have similarities, but their primary purpose is different. The former is a method of payment. The latter is a guarantee mechanism for payment – a default provision rather than *the* provision. The intention of the International Chamber of Commerce¹¹ is that the ISP, UCP and indeed the URDG¹² can be used interchangeably as required by the parties for whatever instrument they see fit on the argument that this approach avoids the “impractical and often impossible task of identifying and distinguishing standbys from independent guarantees and, in many cases commercial letters of credit”¹³. Respectfully, it is argued that statements such as these simply serve to blur the line between the different instruments and if the bank issuing the instrument does not know whether it is a standby credit, a guarantee or a commercial credit then there is greater cause for concern than just revising the UCP 600. It is argued that clarity, above all is what serves commercial law best and separation of standbys from commercial credits is an amendment that needs to be made to the UCP. The proposal for this article is that:

Proposal:

Any reference in the UCP to standby letters of credit should be removed.

The reasons for this are that though there are similarities between standby credits and commercial credits, each do have their own set of rules and the differences between them merit treatment of each instrument under their own specific procedure. Removing the reference to standbys will reduce any potential confusion for bankers or traders trying to determine which set of rules applies to which credit and, if necessary the traders can still expressly decide to use the UCP for standby credits by incorporating these instead of the ISP. The default position however should be that the ISP applies to standbys and the UCP to commercial credits.

Nominated Banks

Nominated banks in letters of credit are those with which payment is available but who do not add their confirmation to the credit¹⁴. They may have authorization to honour the credit, but they are under no obligation to do so unless they have expressly agreed and communicated this agreement to the beneficiary. Sub articles 14 (a) and (b) give them the right to determine compliance of documents, and Article 12 the obligation to pay if they have agreed to do so. What is missing from the UCP however is a right for the nominated bank to be informed of any amendments to the credit. Article 10 (a) states that credits cannot be amended or cancelled without the agreement of the issuing bank, the confirming bank and the beneficiary¹⁵. The same right is not given to the nominated bank – this is

¹¹ *ICC International Standby Practices*, ICC Publication no. 590E, ISBN: 9789284212477 page 8

¹² *ICC Uniform Rules for Demand Guarantees*, ICC Publication no. 758E, ISBN: 97889284202270

¹³ *ICC International Standby Practices*, ICC Publication no. 590E, ISBN: 9789284212477 page 8

¹⁴ For further information on the nominated bank see generally, Ellinger, P. and Neo, D. *The Law and Practice of Documentary Letters of Credit*, 2010, Hart Publishing, ISBN: 9781841136738, Chapter 7.

¹⁵ These parties are defined in Article 2 of the UCP 600.

logical. There may be numerous nominated banks as the credit can be available with any bank anywhere in the world, and the nominated bank has no direct liability under the credit¹⁶. However, if a beneficiary presents documents to a nominated bank who agrees to pay, at minimum the nominated bank must be aware of the exact terms of the credit (so that it can correctly fulfil its examination duties under the UCP). If there have been any amendments, it must have been informed of those amendments. It is suggested that Article 10 (a) should include the following:

Proposal:

‘An amendment or cancellation of the credit should be communicated to the nominated bank by the issuing bank’.

If the proposal is adopted, it will reduce disputes between banks because they will all be conducting business on the same credit requirements, with no confusion as to whether the nominated bank should or should not have paid the beneficiary based on amendments to the credit. Clearly communication by the parties involved in the credit mechanism can only serve to decrease the time needed to examine the presentation and increase the acceptance of documents on first presentation.

Charter-party Bills of Lading

Thus far, the suggested amendments have been simple, but crucial. We now turn to issues that are more complicated. Charter-party bills of lading are transport documents evidencing shipment from a port of loading to a specified destination. Unlike ordinary bills of lading, they contain indications that they are subject to a charter party¹⁷. The definition for these documents is provided in UCP sub-article 22 (a).

A charter-party bill of lading will only be acceptable if the credit calls for one. Article 22 starts with the issue of signature; unlike Article 20 which deals with traditional bills of lading, it does not require the carrier to be named, as such bills do not usually do so¹⁸. The persons who can sign are the master, owner, charterer or named agent thereof¹⁹. The “signature...must be identified as master, owner, charterer, agent”²⁰ and “any signature by an agent must indicate whether [he] has signed for or on behalf of the master, owner or charterer”²¹. If an agent does sign “for or on behalf of the owner or charterer [he] must indicate the name of the owner or charterer”²². The goods must be “shipped on

¹⁶ That is vis-à-vis the beneficiary – it is only acting on behalf of the issuing bank via authorisation it has received. Its only liability is limited to its own undertaking with the issuing bank.

¹⁷ For a full explanation on transport documents see generally Eder et al, *Scrutton on Charterparties and Bills of Lading* 23rd Edition, 2015, Sweet and Maxwell, ISBN: 9780414051188

¹⁸ See Malek, A. and Quest, D. *Jack: Documentary Credits*, 4th Edition, 2009, Hart Publishing. ISBN: 9781845923471 at pg. 223 para. 8.109

¹⁹ Sub-article 22 (a) (i)

²⁰ Sub-article 22 (a) (i)

²¹ Sub-article 22 (a) (i)

²² Sub-article 22 (a) (i)

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board a named vessel from port of loading” to port of discharge²³ (which here can be a range of ports or geographical area as per the credit) with the provisions relating to “intended” vessel or port of loading found in Article 20 absent, probably because if the bill of lading is subject to charter party then the vessel and journey will no doubt be specified and as per credit. The document must “be the sole original or if issued in more than one original be the full set”²⁴. Lastly, the bank may not examine the actual charter party²⁵ and sub-articles relating to transshipment are absent (clearly a charter party bill of lading will be for the specific charter of the specific vessel).

What is a necessary clarification in Article 22 is the extent to which a reference in the bill of lading to a charter party will be enough of an indication to make it a charter party bill. Clearly, if a credit calls for a bill of lading and Article 20 tells us that this can only be a document which does *not* contain an indication that it is subject to charter-party, then presentation of a charter party bill will be unacceptable. We must know therefore what constitutes an indication and what does not. The ICC had the opportunity to discuss this issue in a Banking Commission Opinion and seem to have decided²⁶ that *any* indication is sufficient to make that bill of lading a charter party bill. For example:

- a. “Issued pursuant to charter party dated...” the date being blank
- b. “freight payable as per charter party”
- c. “Charter party bill of lading” as the title but is otherwise a traditional bill of lading

are all considered to be indications that the bill of lading is subject to charter party. Unfortunately, this is the opposite opinion to that which exists in the market²⁷. In the shipping market a document showing shipment on a chartered vessel stating it is intended to be used with a charter party is clearly a charter party bill of lading, but one which merely makes a reference to a charter party is not. It can be argued that what Article 22 requires is that the indication must be one that shows that the document is *subject* to a charter party – hence, a mere reference would not under UCP (and simultaneously under shipping market practice) render the bill a charter party bill. The examples stated above however are to be found in Opinion R 647 where the ICC, it is submitted, has essentially decided that *any reference* to a charter party will mean the bill is to be examined under Article 22.

This seems clear from the examples above. Example a) is perhaps the least controversial as the pre-printed words “issued pursuant to charter party dated...” clearly indicate that the bill is subject to a charter party despite the missing date. Notably, case law has held²⁸ that the effect of the blank date

²³ Sub-article 22 (a) (ii)/(ii)

²⁴ Sub-article 22 (a) (iv)

²⁵ Sub-article 22 (b)

²⁶ Opinion R647 available in *ICC Banking Commission Opinions 2005 -2008*, ICC Publication No. 697, ISBN: 9789284200597

²⁷ See Debattista, C. The new UCP – changes to the tender of the seller’s shipping documents under letters of credit J.B.L. 2007, Jun, 329 – 354 at 350

²⁸ *Pacific Molasses Co and United Molasses Trading v Entre Rios Compania Naviera (The San Nicholas)* [1976] 1 Lloyd’s Rep 8 and *Bangladesh Chemical Industries Corp v. Henry Stephens Shipping and Tex-Bilan Shipping (The SLS Everest)* [1981] 2 Lloyd’s Rep 389. See also *Welex AG V. Rosa Maritime Limited* [2003] EWCA Civ 938 which

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is the same as if the document simply read ‘issued pursuant to charter-party’; the omission not intending to negative the incorporation of a charter-party (thus making it a charter-party bill). Example b) however is more problematic. If the words “freight payable as per charter-party” are enough to render a bill a charter-party bill, then an ordinary full form bill of lading (not marked as being intended for use with a charter-party) would be considered a charter-party bill when both in fact and in practice it would not be so. If we are to look at the substance of a document and the substance shows there is no charter party, then mere reference on an otherwise typical bill should not render it a charter-party bill. It is suggested that what the ICC have done via Opinion R647 is taken the definition in Article 22 further to include reference to charter parties. This is also expressed by the ICC in paragraph G2 (a) of the International Standard Banking Practice (ISBP)²⁹: “A transport document, however named, containing any indication that it is subject to, *or any reference to, a charterparty* [emphasis added] is deemed to be a charterparty bill”. This is potentially a very dangerous step because it essentially means that if the word ‘charter-party’ is on a bill, then it will be considered a charter party bill. Ironically with example c), the ICC concluded that the title of the document alone is enough to make it subject to charter party. It seems that the “however named”³⁰ rule in Articles 20 and 22 have been lost. So, a bill of lading titled “charter party bill of lading” can *only* be examined under Article 22 despite having all the characteristics of a traditional bill of lading.

Confusion in article 22 also stems from the interpretation of “subject to” a charter-party. The word “indication” is difficult to define because we need an explanation of how strong that indication must be, but the phrase “subject to” poses its own difficulties. One argument is to say that what the ICC intended Article 22 to cover is a certain collection of bills which were designed for specific trades to be used with specific charter parties³¹. For example, the Cementvoybill 2006³² is to be used with the Cementvoy 2006 charter party. This is stated both on the front of the bill and on the back. Indeed, the first clause on the reverse of the bill is that all terms and conditions of the charter party are incorporated into the bill. It can be argued that bills of lading such as these have only ever intended to be subject to a charter party and can thus only ever be charter party bills. Why use a Cementvoybill if not using the Cementvoy charter-party?

On the other hand, it can be argued that what the ICC wanted to achieve through Article 22 is acceptance of any bills which were subject *to the terms of a charter party*. Clearly, this would include the ‘true’ charter party bills we discussed above, but it would also include a traditional bill of lading which made itself subject to the terms of a charter party. What is being suggested here, is that “subject to” should be read as “subject to the terms” which in turn should be interpreted as requiring the bill to show, on its face, that the terms of a charter party are incorporated into it. The key is, that because

concluded that the omission of the date from the face of bill was not fatal to the incorporation of the charter-party.

²⁹ *International Standard Banking Practice*, ICC Publication No. 745E ISBN: 9789284201884 – the necessary companion of the UCP 600 on how the UCP should be integrated into day-to-day practices.

³⁰ That is, that document checkers are to concern themselves with the format and content of the document, as directed by the UCP, rather than focus on the title/name of the document. The question is not whether a bill of lading is called a bill of lading, but rather if it has the characteristics of a bill of lading.

³¹ See further Debattista, C. *Banks and the Carriage of Goods by Sea: Secure Transport Documents and the UCP 500* (1994) 7 J.I.B.F.L. 329 at Part III

³² For a copy of the bill go to www.bimco.org. See also similar documents such as Ferticon 2007 also available at www.bimco.org.

document checkers are not allowed to look at carriage terms (and thus conclude whether the terms of the charter have in fact been officially incorporated into the bill) they must be able to determine whether the bill is subject to a charter party from the other information on the document. Hence, it is assumed, the use of the word “indication”. The checker is not supposed to determine whether the document is indeed subject to a charter-party; he is merely supposed to determine whether the information presented indicates that it is subject to charter party terms. The use of a Cementvoybill will always indicate this unless the words “to be used with charter party” and “freight payable as per charter party” have been deleted from the bill. Let us not forget that the name “Cementvoybill” alone will not be enough to render the bill subject to charter party³³ although were it to state “Cementvoybill – Charter party bill of lading” this would be enough³⁴.

Combining the issues relating to the word “indication” and the issues relating to the phrase “subject to charter party” it is submitted that the best interpretation of sub-article 22(a) is this: “subject to a charter party” can only mean a bill that incorporates terms from a charter party. Reference to a charter party cannot on its own ever indicate this; something more is required. Any contract may refer to a charter party; it cannot possibly mean that that contract also incorporates the terms of a charter. In a perfect world, the something more would be the words “charter party terms are hereby incorporated into this bill of lading”. Invariably, these of course are words to be found as part of the conditions of carriage. Under article 20(v) a bank is not supposed to look at carriage terms for bills of lading. A similar provision in article 22 for charterparty bills however, does not exist. The only equivalent provision in article 22 is 22(b) which forbids the bank from examining the charter party contract, not the carriage terms. It is therefore suggested that where a bank has suspicions that the bill presented may be subject to a charter party (i.e. it says freight payable as per charter party etc.) it may confirm this indication by checking the terms of carriage. It is very likely that the first term will incorporate the charter party. If it does not, the bill should be considered a traditional bill of lading. Thus, bills which do not actually incorporate a charter party cannot ever be determined as charter party bills. This will follow shipping market practice and simultaneously not affect the UCP wording. How then are we supposed to reconcile bills that do not incorporate charter parties but do refer to a charter party with Opinion R647? The answer is the ‘loophole’ in article 20(v). Traditional bills of lading must contain terms and conditions of carriage *or may make reference to another source containing the terms and conditions of carriage (short form or blank back bills of lading)*. Bills that do not actually incorporate terms of a charter party (and are thus not subject to a charter party) but do *refer* to a charter party may thus be examined under article 20³⁵. The fact that they must simultaneously not contain an indication that they are subject to a charter party under sub-article 20(vi) means that they must not *incorporate* a charter party; reference is fine.

What are we left with? Article 22 covers ‘true’ charter party bills i.e. bills devised for particular trades to be used with particular charter parties, and any bill that incorporates terms from a charter party. References to charter parties should not on their own constitute a strong enough indication that the

³³ Commission Opinion R648 in *ICC Banking Commission Opinions 2005 -2008*, ICC Publication No. 697, ISBN: 9789284200597 - we follow the “however named principle” of Article 20. Now also in paragraph G3 of *International Standard Banking Practice*, ICC Publication No. 745E ISBN: 9789284201884.

³⁴ R647 *ICC Banking Commission Opinions 2005 -2008*, ICC Publication No. 697, ISBN: 9789284200597

³⁵ As suggested by Debattista, C. in The new UCP 600: changes to the tender of the seller’s shipping documents under letters of credit 2007 J.B.L. 329 at 350/351.

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bill is subject to a charter party. These bills will be examined under Article 20 instead. Thus, Opinion R647 may be correct in the sense that the examples given are an indication, but those indications must be coupled with evidence that the bill incorporates charter party terms, hence “subject to”.

It is suggested that Article 22 is not in itself problematic. An indication that the bill is *subject* to charter party is in essence correct. It is the interpretation that causes problems. It should not mean that any reference to charter party is enough to mean the document is examined under Article 22, nor should it mean that a mere reference to a charter party means the document is *subject* to charter party. ‘Subject’ here should mean that the specific document is intended to be used with a charter party and thus incorporates its terms and conditions. In other words, the carriage terms on the bill of lading are dependent upon the charter party terms. If it does not have such intention and looks like a traditional bill of lading save for one reference to a charter party which does not clarify if the document works pursuant to a specific charter party, then it should be considered under Article 20 and not Article 22. Therefore:

Proposal: Sub-article 22 (a) should be amended to read:

“A bill of lading, however named, containing an indication that it is subject to *the terms* of a charter party (charter party bill of lading) must...”

Or

“A bill of lading, however named, containing an indication *that it incorporates the terms and conditions of a charterparty* (charterparty bill of lading) must...”

The proposal requires reinterpretation and redrafting of the UCP, thus amending the Opinion and clarification of what exactly constitutes a charter party bill in the rules. Of the two alternatives, it is suggested that the latter is best for greater certainty. However, the former may be more practical for two reasons. Firstly, it is a smaller change than the latter which, in theory, would cause less anxiety in the banking community. Secondly, it will not tempt document checkers into dealing with the interpretation of “incorporates” or with examining charter party terms which they are instructed not to do. It is simply intended that greater weight it to be put on the phrase “subject to” rather than on the phrase “intention”. The key is that the document is “subject to a charter party”; not that it contains an indication that it is so.

Clean Transport Documents

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It is very likely that during sale contract negotiations, buyers will demand that there is an express clause in the sale contract that stipulates that the seller must tender a clean transport document³⁶. Apart from making sure that they are on the agreed ship and heading for the correct destination, the buyer will most definitely want to know that the goods are in the correct condition, or at least, to be reassured that when they left the loading port, they were as agreed in the sale contract. That way, if they are damaged on discharge, the buyer will know to look to the carrier for damages, not the seller. It is this need of the buyer that Article 27 intends to cover, namely, that the transport document should be 'clean'. If the document does contain a statement indicating that the goods are in any way damaged, then it is said to be 'cloused'.

Article 27 is not divided into sub paragraphs, but it could very easily be sectioned into three parts. The first, very simply states that "banks will only accept a clean transport document". Quite clear and to the point needing no further additions. It begs however, the immediate question: what is the definition of clean? This is answered in the very next line: "A clean transport document is one bearing no clause or notation expressly declaring a defective condition of the goods or their packaging." To make it clear, issues concerning the quantity of goods do not make the bill cloused. For example, if the transport document had a notation stating "99 containers not 100" then the bill will not be cloused. We are dealing only with the quality of the goods.

The last 'section' of Article 27 provides that the word 'clean' need not appear on the transport document for it to be deemed as clean. A necessary verification so that document checkers do not reject documents on the basis that they are not formally stated as "clean". Similarly, paragraphs E20 and E21 of the ISBP³⁷ also focus the essence of Article 27 on the notations/clauses as opposed to the word "clean". It states that even if the word "clean" appears on a bill of lading and has been deleted, this does not render the bill cloused unless it bears a notation declaring the goods/packaging to be defective.

The concept of "clean" and "cloused" transport documents, particularly bills of lading, has been settled in English common law for a while³⁸ and along with the definition of clean the law states that the time at which the documents must be clean is at the time of shipment³⁹. The UCP do not pose any such issue and in their current form, any transport document with a clause or notation declaring a defect in the goods will not be accepted as a complying presentation whether the defect was caused before

³⁶ Indeed, even standard form contracts such as FOSFA 54 (Federation of Oils, Seeds and Fats Association Limited, Contract for vegetable and marine oil CIF delivered weights) Cl. 10, lines 92 – 94: 'Shipping documents shall consist of...Full set of *clean* on board Bill/s of Lading'. As to whether the requirement of 'clean' can be implied into a letter of credit see Salmon J in *British Imex Industries Ltd v. Midland Bank Ltd* [1958] 1 QB 524 at 551 who suggests *obiter* that in the normal circumstances of business i.e. exceptions of war etc. when a credit calls for a bill of lading, this means a clean document without the necessity of stating the requirement of such. See also the view of Bailhache J in *National Bank of Egypt v. Hannevig's Bank* (1919) Ll. L. Rep 69.

³⁷ International Standard Banking Practice, ICC Publication No. 745E ISBN: 9789284201884. See also paragraphs G18 and G19 which state the same for Charter-party bills of lading.

³⁸ See in particular *British Imex Industries v. Midland Bank Ltd* [1958] 1 QB 524 and *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc* [1980] 1 WLR 495; although not exhaustively defined as per Justice Salmon in *British Imex Industries* at pg 551.

³⁹ See *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc* [1980] 1 WLR 495 at paragraph 4.97ff. Case involved a bill cloused with a notation that goods damaged by fire but after shipment. Court of Appeal accepted that a clean bill was one which did not contain any notations qualifying the statement by the carrier that the goods were in apparent good order and condition at the time of shipment.

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or after shipment. This is a serious problem in the UCP 600⁴⁰ because of the existence of foundation rules of law that support the notion that the seller (beneficiary) is responsible for the condition of the goods up until and including loading. At shipment, not only does the risk transfer to the buyer⁴¹, but the duty of the seller to provide goods of a certain condition ends. If they are of satisfactory condition on shipment, then any damage (even loss⁴²) caused must be the responsibility of the carrier and that is the party the buyer must turn to for answers. The seller, has fulfilled his obligation and should be paid, whether this be on a cash against documents basis or through a letter of credit. Where the law is so conclusive, the UCP must be reconciled and it is unacceptable for the rules to reject a document which on the market could not be rejected. It is therefore suggested that the notations which the bank should be concerned with are only those at the time of shipment. Article 27 should read:

Proposal:

“A clean transport document is one bearing no clause or notation expressly declaring a defective condition of the goods or their packaging *at the time of shipment*”.

It is perhaps important to note, that if the underlying transaction concerns the sale of defective goods from the start (e.g. the sale is for dead plants) then any characteristics of the goods which are to be expected by the buyer (despite appearing to anyone else defective) should be included in the credit as defects which are permissible. The ICC Commentary⁴³ states that when it is known that the type of goods may give rise to a clause/notation, the terms of the credit should cater for this.

Non-Documentary Conditions

The issue of non-documentary requirements has caused considerable confusion in the letter of credit arena, most notably evidenced by the fact that the ICC issued Position Paper No. 3⁴⁴ to clarify

⁴⁰ Also identified by several academics including Todd, P. *Bills of Lading and Banker's Documentary Credits* 4th Edition, 2007, Informa, ISBN: 9781843116318 at pg 229; Malek, A. and Quest, D. *Jack: Documentary Credits*, 4th Edition, 2009, Hart Publishing. ISBN: 9781845923471 at pg 233 and Isaacs, M. and Barnett, M. in International Trade Finance: Letters of credit, UCP 600 and the examination of documents JIBLR 2007, 22 (12) 660-664 at pg. 664.

⁴¹ See Debattista, C. *Bills of Lading in Export Trade* 3rd Edition; 2008; Tottel Publishing, 9781845923154 particularly at pgs. 83 – 104.

⁴² McKendrick, E. *Goode on Commercial Law* 4th Edition, 2010, Penguin, ISBN: 9780141030227 at pgs. 941-943

⁴³ ICC Publication No. 680 *Commentary on UCP 600* ISBN: 9789284200153 at pg 127.

⁴⁴ Commission on Banking Technique and Practice, 1 September 1994, available at www.iccwbo.org.

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misinterpretations of the UCP. Today, the Position Paper issued under the UCP 500 rules, does not apply⁴⁵, and our guidance as to how they are to be treated is found the UCP 600 and the ISBP⁴⁶.

If a bank's obligation is to examine a presentation⁴⁷, and a presentation by definition is a presentation of documents⁴⁸, it follows that the instructions of the buyer to the bank for what facts to check for must be facts capable of being found in the documents *called* for⁴⁹. For example, if the buyer requires goods of German origin, then it is logical that he should also require a specific document to confirm that fact, as opposed to simply state the requirement, and leave the document checker to trail through various documents which he has no knowledge of to find if one states German origin. Notably, the bank's undertaking is to "examine a presentation⁵⁰ [of documents]" to see if they comply with the UCP, standard banking practice, and the credit (i.e. the buyer's instructions). If the buyer requires German origin, and the document checker does not find a document confirming such origin, should he reject the presentation as a whole? The answer is no. The absence of a document confirming origin, does not make the presentation inconsistent with the credit. How can it? For something to be inconsistent with something else, two "somethings" must exist. I.e. a condition *and* a document. If there is nothing in the presentation to compare the credit to, then how can it possibly be inconsistent?⁵¹ From a practical viewpoint, a document checker will no doubt be concerned that the credit requires goods of German origin and that if he accepts any others he must answer to the buyer⁵². The reaction to this may be to refuse to honour and to avoid this outcome, the simple solution would be to make it clear that if a credit calls for confirmation of facts, without stipulating the document which will evidence these facts, then such a provision will effectively be ignored. A non-documentary condition, is exactly that: a provision in the credit, which calls for a specific fact to exist, without stipulating a document which will evidence that fact.

Immediately, bells are ringing with concern that a) serious requirements in the transactions will be ignored if not coupled with documentary production and b) that non-documentary conditions which can be obviously evidenced in a presented document but not specifically coupled in the credit itself,

⁴⁵ See Pg. 12 of Publication No. 600 at Introduction to UCP. The same has not been stated about the DOCDEX Decisions or the Banking Commission Opinions, although in the Introduction to the UCP it is stated that when drafting the new rules, account was taken of both the Opinions and the Decisions which were subsequently incorporated into the UCP rules themselves. Presumably, those which have not been incorporated (it is impossible to think that all outcomes of these cases were put into the UCP) will continue to have at least persuasive effect under the UCP 600 where applicable.

⁴⁶ *International Standard Banking Practice*, ICC Publication No. 745E ISBN: 9789284201884.

⁴⁷ Article 14 (a).

⁴⁸ Article 2.

⁴⁹ See also Donaldson MR in *Banque de l'Indochine et de Suez SA v. J. H. Rayner (Mincing Lane) Ltd* [1983] QB 711 at 728 "this was an unfortunate condition to include in a documentary credit, because it breaks the first rule of such a transaction, namely, that the parties are dealing in documents, not facts".

⁵⁰ Article 14 (a).

⁵¹ Although not put in these words, the author suggests that this is also an explanation offered by the ICC itself in the Position Paper 3. It states "such practice [of including non-documentary conditions in the credit] defeats the underlying principle of the documentary credit itself and directly contradicts the wording of Articles 2...4...5(b)...13(a)..., all of which clearly indicate that payment...is to be effected against documents stipulated in the credit".

⁵² See also Downes, P. UCP 600: Not so Strict Compliance B.J.I.B. & F.L. 2007, 22(4) 196 at pg. 198 "In practice it may be difficult to give no regard whatsoever to all non-documentary conditions where they have a very close connection to a required document".

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will be ignored. As the reader can understand, the topic is complicated and any solution will not be without its own problems.

The solution given by the UCP in the current version can be called at least simple, despite any flaws which we shall discover⁵³. Sub-Article 14 (h) provides that “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 disregard it”. In other words, if I [the buyer] instruct you [the bank] to check whether the goods are of German origin, but do not tell you which document you shall check to confirm origin, then you shall ignore the instruction completely. All conditions in the credit must therefore simultaneously state the document which will satisfy them. For example, Condition: German Origin. Document to satisfy Condition: Certificate of Origin.

This solution however still produces the two issues stated above, namely that important conditions fundamental to the transaction will be ignored if not coupled with a document, and secondly that conditions capable of being linked to a presented document but not coupled in the credit itself, will be ignored. Under UCP 500, although the ICC condemned the use of non-documentary conditions by banks⁵⁴ it went on to state that if a condition can be linked to a document presented, then it is not a non-documentary condition and should not be disregarded. For example, if the condition was “German Origin” and no Certificate of Origin was called for, the bank would disregard the condition. If it happened that the particular credit called for a Certificate of Origin but did not couple the document with the condition, it would not be disregarded because the certificate would evidence the origin of the goods⁵⁵. Curiously, the clarification of the UCP 500 by the Position Paper has not been incorporated into the UCP 600 even though the provision in the former rules⁵⁶ has remained the same in the current version⁵⁷. The explanation given by the ICC for this is that the Position Paper itself caused further confusion to practitioners, instead of clarification⁵⁸. The position that remains therefore is that

⁵³ The extent to which the issue of non-documentary conditions continue to cause problems under UCP 600, is debated by academics and practitioners. For example, Ulph, J. in The UCP 600: Documentary Credits in the 21st Century J.B.L. 2007, Jun, 355-377 at 366 states “There is a risk that this issue *may* continue to cause difficulties” [emphasis added] whereas Downes, P. UCP 600: Not so Strict Compliance B.J.I.B. & F.L. 2007, 22(4) 196 at 198, clearly suggests that difficult cases are likely to come before the courts where judges will “*strain*” to qualify sub-article 14(h).

⁵⁴ Position Paper No. 3 available at www.iccwbo.org. The practice of incorporating non-documentary conditions in letters of credit was branded “totally wrong” with the Banking Commission “express[ing] its strong disapproval” of banks issuing such credits. In Malek, A. and Quest, D. *Jack: Documentary Credits*, 4th Edition, 2009, Hart Publishing. ISBN: 9781845923471 it is suggested (pg 179 para 8.23) that “the only satisfactory solution...is that banks [do] not accept instructions to issue or to confirm credits containing non-documentary conditions”. Adodo, E. in Non-documentary requirements in letter of credit transactions: what is the bank’s obligation today? J.B.L. 2008, 2, 103-122 at 103/104 suggests that the practice is mostly due to “poor drafting of the application form together with the inexperience, inefficiency, and unprofessionalism of the issuing bank”.

⁵⁵ Banking Commission Opinion R212 Number 58 available in ICC Publication No. 632E, ISBN: 9789284212972 *Collected Opinions 1995-2001* makes it clear that the addition in the Position Paper about conditions linked to documents is now an essential rule to follow: “As pointed out by ICC Position Paper No.3, a condition is not deemed to be a non-documentary condition if the condition can be clearly linked to a document stipulated in the credit.”

⁵⁶ Article 13(c) UCP 500.

⁵⁷ ICC Publication No. 680 *Commentary on UCP 600* ISBN: 9789284200153 pg 66

⁵⁸ ICC Publication No. 680 *Commentary on UCP 600* ISBN: 9789284200153. See also Bridge, M. *Benjamin’s Sale of Goods*, 9th Edition, 2016, Sweet and Maxwell, ISBN: 9780414051041 para 23-121 which suggests that it

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any non-documentary condition will be deemed not stated, and disregarded⁵⁹. Happily, this follows DOCDEX decision 201⁶⁰ which stated a condition requiring the addressee of the purchase order to sign another document, without requiring presentation of the purchase order, was a non-documentary condition to be disregarded.

How then does the ICC intend to solve the problem of ignoring issues a) and b) mentioned in the paragraphs above? The answer is to be found in Banking Commission Opinion R631⁶¹, the effects of which have somewhat been incorporated in the ISBP⁶². The condition required details of transport to and from specific points and latest date of shipment, but without stipulating the document to indicate compliance with the condition. It is not clarified if this meant that, for example transport documents presented were not coupled with the condition, or whether no transport documents were presented at all (i.e. not called for by the credit at all). We continue our investigation on both fronts. Firstly, assuming a transport document was called for, but not coupled with the condition, the approach taken by the ICC in the opinion⁶³, is to make sub-article 14 (h) qualified by sub-article 14(d). This states that “data in a document...must not conflict with data...in the credit⁶⁴. If the data in the credit is taken to be the condition ‘latest shipment’, and the document is taken to be the bill of lading, then by qualifying sub-article (h) with sub-article (d), the condition must not conflict with the data in the bill of lading. Thus, both our concerns above (ignoring fundamental requirements or conditions clearly capable of being linked to a document presented) are set to rest.

The question arises: If we qualify sub-article 14 (h) with sub-article (d), which must operate first? The importance of this question rests on the fact that if we are to make sure that data in documents are not in conflict with data in the credit (which if we are to follow the Banking Commission above includes non-documentary condition data), then how does sub-article 14(h) come into play? That states that non-documentary conditions (and thus the data in those conditions) must be disregarded. If they are disregarded, how can we compare them to data in a document? As the reader can see, the questions go around in a circle with no end. On the other hand, imposing the rule that documents must not conflict with data in a non-documentary condition can be grossly unfair. It is suggested, the point being made by the commission is this:

‘If a document presented, includes data concerning a non-documentary condition, then that data must not conflict with the data of the condition in the credit.’

suffered from vagueness and served to introduce uncertainty (Contrasts Banking Commission Opinion R212 with R411 found in *Collected Opinions 1995 – 2001*, ICC Publication No. 632E, ISBN: 9789284212972).

⁵⁹ The rule is harsh and it is suggested will very likely to result in unfair conclusion. See Downes, P. UCP 600: Not so Strict Compliance B.J.I.B. & F.L. 2007, 22(4) 196 at 198 “It is not difficult to imagine hard cases coming before the court...and judges straining to qualify the absolute prohibition contained in new art 14(h)”.

⁶⁰ This is the ICC’s internal ADR procedure for trade finance related instruments standing for Documentary Instruments Dispute Resolution Expertise. Decision available in ICC Publication No. 696E, *Collected DOCDEX Decisions 2004 – 2008* ISBN: 9789284200580

⁶¹ ICC Publication No. 697 *ICC Banking Commission Opinions 2005 – 2008* ISBN: 9789284200597

⁶² *International Standard Banking Practice*, ICC Publication No. 745E ISBN: 9789284201884 paragraph A26.

⁶³ The same approach is now written in *International Standard Banking Practice*, ICC Publication No. 745E ISBN: paragraph A26 which states that “data contained in a stipulated document are not to be in conflict with the non-documentary condition”.

⁶⁴ Also, it must not conflict with data in the same document or any other stipulated document.

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The effect is somewhat the same as the Position Paper. For example, if a transport document contains a reference to origin as 'French' and the credit had a condition of 'German origin' without stipulating the document to satisfy the condition, the result would be inconsistency between the credit and the document, leading to rejection under sub-article 14(d).

The conclusion of the Opinion gives no clear indication of what exactly is to happen. On the one hand, it clearly states non-documentary conditions should be disregarded. On the other it states that should a beneficiary (seller) elect to insert data concerning those conditions in any of the documents stipulated in the credit, it must ensure that that data does not conflict with data in the credit. The crucial question is *what* data in the credit? It could be argued that this means the remaining data (i.e., once the non-documentary condition data has been disregarded). But then, how can such data possibly conflict with the rest of the credit if the rest of the credit does not contain any data concerning the non-documentary condition? The only response the author can provide is that the effect of this Opinion is much like that of the Position Paper; confusing and in necessary need of clarification.

From a legal point of view, non-documentary conditions by their nature, create conflict with two principles of law. The first is the autonomy or independence principle stated Articles 4 and 5⁶⁵ of the UCP, namely, the bank's duty is to examine documents and nothing else. Examining anything outside of the documents, means examining something outside of the credit; *ipso facto* the credit loses its independence. The only logical thing that could be examined outside of the credit is the underlying transaction (i.e. the sale contract) which, is not the concern of the banks as the letter of credit undertaking is an independent transaction where banks are unconcerned with the reality of the sale. Non-documentary conditions by their nature refer to facts not found in the documents and are therefore outside of the letter of credit undertaking. Consequently, if the banks examine such conditions, they are not only undermining the autonomy principle of the credit, they are also failing their obligation under Articles 4, 5 and 14(a) of the UCP 600⁶⁶.

The second principle we must deal with, is not about letters of credit, but about contracts. When courts have been faced with letter of credit issues, they have turned to the law of contract for solutions and guidance⁶⁷. One argument concerns the principle of Freedom of Contract. In the context of non-documentary conditions, it can be turned to so that effect *can* be given to the condition⁶⁸. In other words, if parties are free to contract on whatever terms they wish, and one of those terms is the

⁶⁵ They contain the Autonomy Principle stating that the credit is a separate and independent transaction to the underlying sale and that banks deal with documents and not goods.

⁶⁶ During the 1995 Revision of the United States Uniform Commercial Code (UCC) Article 5 of which deals with letters of credit, it was agreed that non-documentary requirements were incompatible with the independence of the issuer's obligations. See Barnes, J. Non-documentary conditions and the L/C independence principle DCInsight Vol 14(4) 2008 pg 11

⁶⁷ See for example Todd, P. *Bills of Lading and Banker's Documentary Credits* 4th Edition 2007, Informa, ISBN: 978-1843116318 at pg 252 who suggests that Lord Diplock in *United City Merchants (Investments) Ltd v. Royal Bank of Canada (The American Accord)* [1982] 2 Lloyd's Rep 1 applied the ordinary law of contract to documentary credits.

⁶⁸ See Hwaidi, M. The story of the English strict compliance principle in letters of credit and its consistency with the UCP J.I.B.L.R. 2014, 29(2), 71-81 at 79 and 80, who argues that if a buyer inserts a non-documentary condition in the credit instructions then this is an express term overriding article 14 (h) of the UCP600. See however footnote 73 below stating the position of the ICC as expressed in Article 26 of *International Standard Banking Practice*, ICC Publication No. 745E ISBN: 9789284201884.

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requirement of a non-documentary condition, then priority should be given to that term despite the inclusion of the UCP. A conflict between an express term and a standard incorporated term will result in the express term prevailing⁶⁹. Indeed, it has already been held⁷⁰ that conditions fundamental to the commercial operation of the credit must prevail over the UCP otherwise the credit would be unworkable.

It is submitted that disregarding all non-documentary conditions, is a rule which is favourable. It produces a clear-cut result, and when the objective is deciding on payment as quickly as possible, clear cut results are essential. How to deal with the harshness of the rule and the possible injustices mentioned above [a) and b)] was the likely purpose of Banking Commission Opinion R631. It is suggested that the clear answer the Commission intended was that:

Proposal

- 1) data in a non- documentary condition of the credit must not conflict with data in the presentation as a whole and;**
- 2) a bank cannot refuse payment on the basis that a document is absent if the credit calls for a specific condition without calling for a specific document to evidence that condition.**

For example, if the credit requires conditions X, Y, Z but only calls for documents X, Y, then the presentation cannot be rejected on the basis that document Z is missing. However, if data in condition Z conflicts with data in documents X or Y, then the presentation will be discrepant⁷¹.

It is suggested that the proposal is either directly added to Article 14 of the UCP 600, or that it is incorporated through the ISBP. The former solution is best, making sure the rule is clear to all parties using the UCP. However, if doubts remain about the position of non-documentary conditions, a clear statement in the UCP that document checkers should use the ISBP guidance when dealing with them is also plausible, allowing the Banking Commission to alter its guidance without redrafting the UCP again.

How do we reconcile this with the provision that non-documentary conditions should be disregarded? It does not seem that it can be reconciled. The two provide opposite results. If we are to disregard, then we cannot compare; and if we are to compare first, then what is the point of disregarding later? It is suggested the problem therefore is not if non-documentary conditions should or should not be disregarded. The problem is what to do with the conditions generally⁷². If instead we approached the

⁶⁹ See *Chitty on Contracts* Volume 1 32nd Edition Chapter 12 and Mustill LJ in *Royal Bank of Scotland v. Cassa Di Risparmio delle Provincie Lombard* [1992] 1 Bank LR 251 at 256: "any contrary provision in the UCP must yield to the parties' expressed intention".

⁷⁰ See Singapore case *Korea Exchange Bank v. Standard Chartered Bank* [2006] 1 SLR 565.

⁷¹ This is similar to the advice given in paragraph A26 of *International Standard Banking Practice*, ICC Publication No. 745E ISBN: 9789284201884.

⁷² The reader will find it interesting to note that paragraph A26 of *International Standard Banking Practice*, ICC Publication No. 745E ISBN: 9789284201884 states "When a credit contains a condition without stipulating a document to indicate compliance therewith ("non-documentary condition"), compliance with such condition need not be evidenced on any stipulated document". This seems a somewhat lighter approach to these

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problem from the perspective of honour/rejection as opposed to examination, we can provide that: A presentation shall not be rejected on the basis that a document is absent, when that document is not called for. So, conditions not calling for a document will not be a basis for rejection⁷³. The inclusion of non-documentary conditions was problematic because the bank would reject when it could not confirm the facts in the conditions. Under this approach the problem would be eliminated. If it is argued that non-documentary conditions also posed the problem of allowing the buyer to make extra demands not agreed with the seller, then again, the absence of the document confirming the demands would not allow rejection.

Refusal to honour

The bank has an obligation to make payment when it has determined that the presentation made is compliant⁷⁴. It follows therefore that when the presentation does not comply⁷⁵, the bank is entitled to refuse payment. The process for refusal under the UCP is contained in Article 16. It is extremely important for a bank to understand this process because the consequence of not following it correctly is the bank being precluded from denying payment.

Article 16 of the UCP 600 named “Discrepant Documents, Waiver and Notice” provides the right of the bank to refuse payment when a presentation does not comply, and sets out the process which it must follow to communicate this refusal. Under UCP 500 the equivalent article (Number 14) was one causing particular problems in the banking community evident by the fact that it prompted many queries to the Banking Commission⁷⁶. This in turn resulted in the publication of the ICC paper entitled “Examination of Documents, Waiver of Discrepancies and notice under UCP 500”⁷⁷ which provides a clear explanation of the procedure (also applicable to UCP 600) and a flow diagram for a bank to follow.

Article 16 is rather long, but essential knowledge for the parties involved, particularly the banks as failure to act in accordance with the provisions of the article will result in the preclusion of claiming that the documents do not constitute a complying presentation: “If a...bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation”⁷⁸. The reader should take note that the preclusion takes effect

conditions than the Article 14 (h) rule of disregarding them. None the less, the ISBP is only the companion to the UCP 600, rather than the rules themselves.

⁷³ After all, paragraph v of the Preliminary considerations in *International Standard Banking Practice*, ICC Publication No. 745E ISBN: 9789284201884 states that “The applicant bears the risk of any ambiguity in its instructions to issue or amend the credit”. It is argued that a buyer instructing a bank to check for facts without stipulating the document is an ambiguous instruction and if the buyer is to bear the risk, then the seller should not be penalised by the presentation being rejected.

⁷⁴ As per Article 15.

⁷⁵ The reader must not forget that the concept “comply” does not only mean that the documents must comply, but that the presentation as a whole must comply i.e. we include issues of timing etc. under Article 6.

⁷⁶ See ICC Publication No. 680 *Commentary on UCP 600* ISBN: 9789284200153 pg. 72. Indeed, the list of Opinions on issues relating to Article 14 is too big to mention; suffice to say that at least 32 Opinions are found Publication 1995-2001; 15 in Publication 1995-2004, 11 in Publication 2005 – 2008 and 21 in Publication 2009 – 2011.

⁷⁷ ICC Commission on Banking Technique and Practice *Discrepant Documents, Waiver and Notice* Published on 9 April 2002; Document 470/952rev2 available at www.iccwbo.org

⁷⁸ Sub-article 16 (f) UCP 600. The potent effect of this sub-article is evidenced in *Fortis Bank SA v Indian Overseas Bank* [2011] EWCA Civ 58.

only in connection to *the documents* not complying; not the presentation as a whole not complying. i.e. if the presentation is made after the expiry date then despite the bank not following the correct procedure to refuse to honour, it can still claim the presentation does not comply. Was this the intended outcome by the ICC? Possibly not. In the Commentary, the ICC states⁷⁹ that the bank will be precluded from claiming that the *presentation* is not compliant if it fails to act in accordance with Article 16. Yet the UCP itself as we have noted say in sub-article (f) that the bank “shall be precluded from claiming that *the documents* [emphasis added] do not constitute a complying presentation”. A complying presentation is one that not only meets the required documentary standards, but also one that meets the presentation requirements (timing/place etc. as per article 6). Failure of the beneficiary in either can result in refusal of payment. However, failure of the documents is a different thing to failure to present in the correct manner. It is therefore submitted that the reading of sub-article (f) suggests that where a bank does not act in accordance with Article 16, it shall be precluded from claiming that the documents do not comply, but it will not be precluded from refusing payment because the presentation was late.

One can argue that because compliance in terms of presentation and compliance in terms of documents are two different strands, it is possible to treat them differently⁸⁰ i.e. precluded from claiming that the documents are non-compliant but not precluded from claiming the presentation is non-compliant. However, although they are distinct components; they are just that; *components*. They make up compliance, and if the presentation is for whatever reason not compliant, then failure to act in accordance with Article 16 should result in preclusion from claiming non-compliance. The issue is that the consequence we are trying to avoid, is the same for both strands. If the purpose of the rule in sub-article (f) is to avoid the bank holding on to documents indefinitely or not communicating its decision quickly enough to a beneficiary so that he has a chance to re-present, then the bank must be precluded from claiming non-compliance both as far as the documents are concerned and as far as the presentation itself is concerned. So, when a beneficiary presents outside of the allowed time-frame and the bank determines that this presentation is non-compliant, it may refuse to honour under sub-article 16 (a). It must then give such notice to the beneficiary stating its refusal, stating the discrepancy (in our supposition failure to present before expiry date) and stating the handling status of the documents. Namely, the process set out in Article 16. One may also argue that a failure to present within the time-frame, is not presentation at all, so that the bank is not obligated to do anything when the presentation itself is non-compliant. Article 2 however defines “Presentation” simply as the delivery of documents to the bank. It does not require that for this action to be termed

⁷⁹ See ICC Publication No. 680 *Commentary on UCP 600* ISBN: 9789284200153 at pg. 74

⁸⁰ See for example Justice Mance in *Bayerische Vereinsbank Aktiengesellschaft v National Bank of Pakistan* [1997] 1 Lloyd’s Rep 59 at 67 who stated that a failure to present within the allotted time, is not a discrepancy that must be stated in the refusal notice. This was based on the reasoning that this is not a discrepancy found upon examination of the documents on their face; it is a discrepancy dealt with separately under now Article 29. This serves our point that compliance has two strands but Article 29 does not deal with the consequences of not presenting in time; the consequences are still contained in Article 16 dealing with refusal/waiver. Yes, it is not a discrepancy found on the face of the documents, but it is grounds for refusal, and surely when the bank gives notice to the beneficiary that it refuses payment, it must state its reason. If the sole reason is late presentation, then it is a discrepancy to be listed in the notice.

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as a “Presentation” under the UCP it must also be within the time-frame; that definition concerns a “Complying Presentation”.

With the intention of the ICC being to preclude a bank from claiming a non-compliant presentation in general, as evidenced in the Commentary and based on the arguments made above, it is submitted that the wording of sub-article 16 (f) be changed to:

Proposal:

“If an issuing bank or confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that *the presentation does not comply*”.

A note on Electronic Procedures

At the end of the UCP 600 articles one finds a supplement for electronic presentation called the eUCP. It is named “Version 1.1” and it is the first time that articles concerning electronic presentation have had a formal home in the UCP⁸¹. Previous revisions did not contain articles specifically for electronic presentation, though a supplement to UCP 500 was issued in 2002⁸². As one can imagine, even version 1.1 is in its infancy.

We are of course in an age where technology advances quickly and millions of transactions in and outside commercial law, take place electronically. International Trade however tends to move rather slowly in this regard; it’s practices are deeply rooted in customs dating back hundreds of years and the comfort of familiar old rules means that shippers and traders are sometimes resistant to change. This is particularly true of developing countries, as can be seen by the work of UNCTAD⁸³, whose purpose is to support developing nations access the globalised economy with technical assistance and equip them with tools to do so successfully. Electronic transactions in bulk international trade have not therefore taken off as in other commercial fields.

The issue that causes the most reluctance by far, is how to transfer from paper to electronic, the document of title⁸⁴ function of transport documents. Documents that have this function are commonly bearer or order bills of lading⁸⁵. They carry with them title to the goods; the right to demand delivery, the right to sue the carrier and crucially, the right to transfer these rights to a new buyer⁸⁶. In simple terms, transfer of the document operates as transfer of the goods themselves, no matter their location. This feature, is deeply rooted in the physical possession of the document. Once the

⁸¹ There has been a previous edition of the eUCP called Version 1.0 (ICC Publication No. 500/2, ISBN: 9789284213061) released as a supplement to UCP500 but this came into force in 2002, whereas the UCP 500 came into force in 1994. The UCP 600 however gives the eUCP a permanent home.

⁸² *ICC Uniform Customs and Practice for Documentary Credits and Supplement for Electronic Presentation* ICC Publication No. 500/2, ISBN: 9789284213061

⁸³ United Nations Conference on Trade and Development – www.unctad.org

⁸⁴ For an explanation of this function see Eder et al *Scrutton on Charterparties and Bills of Lading* 23rd Edition 2015, Sweet and Maxwell, ISBN: 9780414051188, Chapter 10.

⁸⁵ See Aikens et al, *Bills of Lading* 2nd Edition, 2015, Routledge, ISBN: 9781843114383, Chapter 2 for an explanation of the different types of bill.

⁸⁶ See Debattista, C. *Bills of Lading in Export Trade* 3rd Edition, 2009, ISBN: 9781845923150, Chapters 2, 3 and 4.

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goods arrive at the destination port, delivery will be made to the person with possession of the bill⁸⁷ – the carrier is in breach of contract if he delivers to anyone else⁸⁸. Even if the goods are discharged and warehoused, they legally belong to whoever holds the bill. The Carriage of Goods by Sea Act 1992 talks about the “lawful holder of a bill of lading”⁸⁹ being the “person to whom delivery is to be made...[and]... have transferred and vested in him all rights of suit under the contract of carriage”⁹⁰. It defines holder as persons with “possession of the bill”⁹¹. The troublesome question is how can we transfer the document of title feature to an electronic version of the bill? It is possession and presentation of the physical document – of the original document - that allows a person to take delivery. How to evidence that an electronic version is the one and only original copy of a transport document (and thus the one acting as a document of title) carrying with it delivery rights is a very difficult question to answer.

Attempts have been made to deal with this issue; electronic trading systems such as Bolero International⁹² and essDOCS Exchange⁹³ have been created where electronic bills can be traded. They attempt to replicate the document of title feature by requiring traders to sign user agreements agreeing that between the trading parties electronic bills replicate the paper bill features. This includes transfer of the bill where the platform restricts access and indorsement to the lawful holder via an access code and fob. Whilst there are many advantages to e-bills, such as cost and time (paper versions must be couriered around the world) there is a serious question about how different jurisdictions will react to the legal nature of these bills. They have not yet been the subject of any legal proceedings – a sign that they are seldom used or at least used only between trusted parties.

The eUCP make no real attempt to deal with electronic bills of lading; in fact, they do not address any specific document whatsoever. This is unsurprising given that even the UCP itself sidesteps the issue of documents of title⁹⁴, though of course they do deal with bills of lading, seawaybills, charterparty bills and multimodals. Reading the eUCP the feeling one gets is that they are mostly there to accommodate minor documents that have been produced in electronic format - unless the underlying sale transaction is incredibly simple, the eUCP are unlikely to be used for a presentation of electronic documents alone. No doubt the legal advisors of any buyer will make clear that to be sure a true document of title is received, the credit should call for paper documents or at least paper transport documents.

Until the shipping industry starts to make significant use of e-bills, there is no reason for the UCP to be altered but in terms of the rules mirroring technological advances it is a worthwhile point to note that as the use of e-documents starts to increase and the mechanisms for their creation and transfer become apparent, the eUCP will also have to be amended to reflect current practice.

⁸⁷ *London Joint Stock Bank v. British Amsterdam Maritime Agency* (1910) 11 Asp MLC 571

⁸⁸ *Sucre Export SA v. Northern Shipping (The Sormovskiy 3068)* [1994] 2 Lloyd’s Rep 266

⁸⁹ Section 2 Carriage of Goods by Sea Act 1992

⁹⁰ Section 2 Carriage of Goods by Sea Act 1992

⁹¹ Section 5 (2) Carriage of Goods by Sea Act 1992

⁹² See www.bolero.net

⁹³ See www.essdocs.com

⁹⁴ Paragraphs E12 and E13 of *International Standard Banking Practice*, ICC Publication No. 745E ISBN: 9789284201884 do refer to ‘order’ bills of lading and ‘straight’ bills though this is just to say that if a credit calls for a bill made out to a named entity then the words ‘to order’ must be absent and vice versa. It does not discuss documents of title.

CONCLUSION – THE NEW ‘UCP 700’

The position of this paper is that any one of the proposals above, on its own, will not merit a complete revision of the UCP. There have not been very dramatic changes in the way traders, carriers and bankers conduct international trade transactions. However, combining the proposals above means that there are a multitude of articles in the UCP that need redrafting or additions. As a total, there are several places that traders and bankers themselves agree are not working.

The UCP continue to be a model of soft international regulation that is immensely successful. The use of SWIFT⁹⁵ is almost universal between banks and the incorporation of the UCP in a high percentage of letter of credit contracts is inevitable. Updating these rules, is just like updating contractual terms and it is argued that once several of these terms are problematic, they must be revised. Ten years is a good point to think about amendments – it has given ample time to the trading community to consider what works and what does not. It is therefore recommended that the new ‘UCP 700’ should at a minimum contain the following amendments:

1. Removal of references to standby letters of credit (article 1);
2. Addition of a provision requiring the issuing bank to inform all nominated banks that there has been an amendment to or cancellation of, the credit (article 10);
3. Clarification and redrafting of what constitutes an “indication” that a bill of lading is subject to charter-party (article 22);
4. Addition of a time element to the definition of clean transport documents (article 27);
5. Additions and alterations concerning non-documentary conditions; either that they are to be disregarded, without any effect on the credit whatsoever or that they must not conflict with data in the other documents (article 14);
6. Amendment precluding a bank from claiming a presentation does not comply (as opposed to the documents do not comply) where it has not followed correct refusal procedures (article 16);
7. Consideration of developments in electronic documents (eUCP).

The article is the first to mention and address the idea of the ‘UCP 700’. We all anticipate a revision, but it is the first to anticipate what the key provisions requiring amendment shall be in their totality and the first to argue that it is time we start to discuss in detail what the new revision could look like. Taking the lead from the banking community, this paper puts into the legal perspective areas which are of concern and which will need to be addressed by the ICC in the next version of the UCP.

As mentioned, the incorporation of the UCP in letters of credit is almost universal via SWIFT. These are the rules that determine whether a seller in an international trade transaction gets paid, any seller in any country. They have been described as “the lifeblood of international commerce”⁹⁶ because

⁹⁵ Society for Worldwide Interbank Financial Telecommunication (www.swift.com) used by more than 11,000 financial institutions in more than 200 countries and territories around the world.

⁹⁶ See Kerr L.J. in *R.D. Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] 1 QB 146, Griffiths L.J. in *Power Curber International Ltd v National Bank of Kuwait S.A.K.* [1981] 2 Lloyd’s Rep. 394 at 400, Donaldson L.J. in *Intranco Ltd v Notis Shipping Corporation of Liberia* [1981] 2 Lloyd’s Rep. 256 at 257, and Stephenson L.J. in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1981] 3 W.L.R. 242 at 253.

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without first securing the payment method, no sellers would be willing to trade internationally. When international trade falls, this impacts everyone on a personal level (such as increase in prices for commodities and other goods) national (such as tax related) and international level (co-operation and harmonisation of shipping related matters). The ability to run the credit correctly, based on up to date and harmonised rules is what pumps the blood of international commerce. The significance of updating lies at the very core of commercial transactions and maintaining the significance by updating regularly secures the position of the credit as the trusted mechanism for providing payment in international sales.