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Complying Shipping Documents under UCP 600

by

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ABSTRACT

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This thesis analyses the Uniform Customs and Practice for Documentary Credits (UCP) against the backdrop of the question: 'what documents must a beneficiary, acting as seller under an international sale of goods carried by sea, present to a bank, and how must he present them, in order for the presentation to be considered compliant?'. It interprets the rules through the answer to this question by looking at national law but also the range of supporting material published by the International Chamber of Commerce. This includes the International Standard Banking Practice, Banking Commission Opinions and Recommendations and DOCDEX decisions. It is unique, because it is one of the few pieces of academic research to place emphasis on these documents and argue that they provide clarification and addition to the UCP.

The result of the analysis is a list of proposals for amendments and additions, specifically to UCP but also in some cases to letter of credit law generally. It is these proposals and the arguments for them that are the original contribution to research. Perhaps the most daring submission, never made before in another piece of legal writing, is the proposal that the location of the Fraud Exception to the Autonomy Principle of letters of credit, and indeed all exceptions to the principle, are to be found in the UCP themselves. Where past research has adamantly held that the UCP do not deal with fraud, I submit that they do, and the analysis of the corresponding articles evidence this.

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CONTENTS

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COMPLYING SHIPPING DOCUMENTS UNDER UCP 600

CHAPTER 1

Introduction

A. The question

It has been approximately four years since the new Uniform Customs and Practice on Documentary Credits (UCP) have been in force and we are now beginning to see the effect that they are having on the trade finance market. In this thesis, I am asking the question: what documents must the seller present to the bank under a letter of credit, and how must he present them, in order for the presentation to be determined as compliant, and thereby receive payment for goods he has sent by sea? The purpose is threefold. Firstly, to indeed answer the question of what the seller must do. Secondly, in the process of answering the question, to identify provisions or areas of the UCP that are problematic. Lastly, to evidence that these objectives can only be fulfilled when all sources of information connected to the UCP and published by the International Chamber of Commerce are utilised.

The reader will note that my question concerns an international sale of goods carried by sea. The thesis is therefore limited to carriage by vessel and does not cover air, road or rail. The primary reason for this is that carriage by sea is by far the most frequent method of trading. A reported 90% of trade is still carried by sea[1] and thus the investigation of the UCP takes place against this backdrop. This is not to say that other modes of transportation do not merit investigation; indeed in recognition of such modes I do deal with combined transport (involving sea). But in order to take this thesis to greater depths of research, I have confined the scope to carriage by sea, which also incidentally is the most frequent international trade scenario

[1] See IMO Maritime Knowledge Centre International Shipping and World Trade Facts and Figures October 2009 at pg 7 para 2.1 available at www.imo.org/KnowledgeCentre/ShippingFactsAndNews/TheRoleandImportanceofInternationalShipping/Documents/International%20Shipping%20and%20World%20Trade%20-%20facts%20and%20figures%20oct%202009%20rev1__tmp65768b41.pdf

B. The UCP

In 1933 the International Chamber of Commerce (ICC) first promulgated the Uniform Customs and Practice for Documentary Credits which are today in their sixth revision (UCP 600[2]). The primary objective of the ICC was to facilitate the flow of international trade and to alleviate the confusion caused by individual countries promoting their own national law. The aim therefore was to create a set of contractual rules that would allow uniformity in the letter of credit arena. It is stressed that the UCP are created by experts in the private sector and are the work of a private international organisation[3]. The current version was intended to address developments in the banking, transport and insurance industries as well as to clarify language and structure issues[4]. They are accompanied by several documents. The first is the International Standard Banking Practice (ISBP)[5] which is characterised as "a necessary companion"[6]. The second set of sources is Banking Commission Opinions[7], which are exactly what they say. The ICC Banking Commission offers its opinion on queries concerning the UCP or the ISBP. The third set of sources is DOCDEX decisions[8] which stand for Documentary Credit Dispute Resolution Expertise. The decisions are reached by a panel of three experts and can be binding on the parties if they so agree[9]. It is a cost effective way to finding a solution to a letter of credit dispute without going to court.

It is worthwhile commenting here on the relationship between the UCP and these accompanying sources of letter of credit practice. The ICC has stated in the Foreward

[2] 2007 Revision ICC Publication No. 600 Paris 2007, ISBN: 978-9284212576. The previous revision was in 1993and published as ICC Publication No. 500, Paris 1993, ISBN: 978-9284211555 (hereinafter UCP 500).
[3] UCP 600 pg 3
[4] UCP 600 pg 11
[5] International Standard Banking Practice for the Examination of Documents under Documentary Credits 2007 revision for UCP 600, Published by ICC No. 681, Paris 2007, ISBN: 978-9284200191
[6] UCP 600 pg 12
[7] See for example: ICC Banking Commission Collected Opinions 1995-2001 Published by ICC No. 632, Paris, 2002, ISBN: 9284212979 (hereinafter Opinions 1995 – 2001); ICC Banking Commission Unpublished Opinions 1995-2004 Published by ICC No. 660, Paris, 2005, ISBN: 978-928413412 (hereinafter Opinions 1995 – 2004) and ICC Banking Commission Opinions 2005 – 2008 Published by ICC No. 697, Paris, 2008, ISBN: 978-9284200597 (hereinafter Opinions 2005 – 2008)
[8] See for example: Collected DOCDEX decisions 1997-2003 Published by ICC No. 665, Paris, 2004, ISBN: 9284213347 (hereinafter DOCDEX 1997 - 2003)
[9] http://www.iccwbo.org/court/docdex/id4493/index.html

of the ISBP[10] that the specific publication provides "an intelligent checklist of items document checkers could refer to in determining how…[the] rules on documentary credits…appl[y] in daily practice"[11]. In other words, it is much like a UCP handbook: "it fill[s] the gap in the market between the general principles in the UCP and the daily job of the practitioner"[12]. The Introduction to the ISBP however goes further still to describe it as a "necessary companion"[13] to the UCP 600 and an "invaluable aid"[14] to letter of credit participants. Throughout this thesis, the reader will find many examples where the ISBP (and indeed the Commission Opinions and DOCDEX decisions) is proved to contain the answer to a particular letter of credit problem, even where the answer is absent in the UCP. Clearly the ICC is right; it is a *necessary* companion. One feels such necessity however, is best emphasised, or more appropriately declared, in the rules themselves. Merely implying that the ISBP is important in the Foreward or Introduction is surely not enough when the publication plays such an essential role; not least because not all practitioners will read anything other than the rules themselves.

It is therefore suggested that ISBP and indeed the Commission Opinions and DOCDEX decisions are given some sort of formal standing, at least within the ICC arena (to give them legal standing would be absurd when the UCP have no such standing). An effective way of doing this would be to directly state this standing within the rules themselves e.g. for Article 1 (Application of UCP) or Article 3 (Interpretations) to state that when parties interpret the UCP they should supplement the rules with the accompanying material and give as much weight to these materials as required by the specific case. This is not a novel idea; it is similar to the quasi-authoritative standing given[15] to the Schlosser and Jenard reports in relation to the EU

[10] Page 3 of ICC Publication number 681
[11] *Ibid*
[12] *Ibid*
[13] Page 11 of ICC Publication number 681
[14] *Ibid*
[15] The Civil Jurisdiction and Judgments Act 1982 made the Brussels Convention 1968 law in the UK. Under sub-section 3(3) (Interpretation of the Brussels Conventions) the reports of P. Jenard and P. Schlosser (as well as several others) "may be considered in ascertaining the meaning or effect of any provisions of the Brussels Convention and shall be given such weight as is appropriate in the circumstances". They are not therefore formally law, but they are clearly recognised as essential tools for the interpretation of the law and will thus be given due consideration in court. In similar light, the ISBP, Opinions and DOCDEX decisions could be given equal recognition in the UCP articles.

Brussels Convention[16]. By doing this, the position of the ISBP, Opinions and DOCDEX decisions in relation to the UCP will be made clear and also alert the parties to the wealth of information to be found in these publications. If we follow the argument that these materials are like cases to a statute, the conclusion of the argument should be that like case law, Opinions, Decisions and the ISBP should be recognised by the statute (i.e. the UCP) as the filling muscle to the legislative backbone.

Now that the reader has a brief background of the UCP we can continue with the relationship between the UCP and law.

I refer to the UCP as 'rules' throughout the thesis and this is both intentionally but also misleading. It must be clear that the UCP have no legislative force, they are not law and they have not been issued by a governmental body. They are called 'rules' in this thesis because they are characterised as such by the ICC[17] and are binding on all parties to the letter of credit when they have been expressly incorporated. They are in effect contract terms to which the parties are bound unless a certain provision is expressly modified or excluded[18]. We shall not go into the issue of incorporation here, but it is important to note that the SWIFT form[19] used by the majority of countries[20] as the application for a letter of credit (which then forms the basis of the credit conditions) includes a field entitled "40E Applicable rules" which must be completed[21]. Communication through SWIFT therefore will require either the current version of the UCP or previous versions to apply. In the unusual case that field 40 E is not filled in, it is generally considered that the mere fact that SWIFT is being used is

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[16] Brussels Convention on Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters 1968
[17] See Article 1 of UCP 600
[18] *Ibid*
[19] Society for Worldwide Interbank Financial Telecommunications (The global provider of secure financial messaging services) See: www.swift.com for more information.
[20] http://www.swift.com/about_swift/company_information/index.page?lang=en SWIFT is used in more than 208 countries in the world and over 8,300 banking institutions. Note: the definition of "country" may vary; the United Nations consists of 192 recognised sovereign states and the 193rd is Vatican City. SWIFT may therefore include in its calculation states which are not universally recognised e.g. Northern Cyprus. For an example of a SWIFT form see Malek, A. and Quest, D Jack: Documentary Credits 4th Edition 2009, Tottel Publishing, ISBN: 978845923471 (hereinafter *Jack*) Appendix 5 at pg. 541
[21] See Debattista, C. The new UCP 600: Changes to the tender of the seller's documents under letters of credit JBL 2007, Jun, 329 at footnote 8.

enough to apply the UCP to the letter of credit[22]. The result is that the vast majority of letters of credit issued by banks will be regulated by the UCP as the market standard. They are therefore at the centre of credit operations and thus the most important element of the letter of credit process.

A last point to note in connection with this general introduction into the UCP is that apart from keeping in mind the relationship of the rules to the accompanying documents and their relationship to the law, the reader must also keep in mind the relationship between banking practice and shipping practice. The UCP necessarily envisage that they will be used by traders, shippers and bankers alike. They thus try to cater for all three. However, even where these three parties are essentially working on the same underlying transaction, they are approaching it from very different perspectives. What one party may consider a usual custom or practice in their business, will not necessarily be a usual custom or practice in another's. Thus there will be times in the thesis when shipping practice conflicts with banking practice. How to rectify such divergence depends on the particular issue at hand but the best possible general suggestion is this: The UCP may be there to harmonise the law of letters of credit which is a banking tool, but that letter of credit owes its existence to a sale contract and invariably connected to that, a carriage contract. We are trying to facilitate trade, not banking, and thus banking practice must yield to shipping practice when the two conflict. If it does not, the UCP will simply be disregarded. Shippers and traders want to know that the customs they have been used to for hundreds of years are reflected in the UCP and if banking practice vastly competes with shipping practice, effect should be given to the trader's expectations, not the banker's. There is of course a balance required, after all, bankers will not take on risks that do not agree with their usual business methods; but in situations of true conflict, perhaps it is best that banking practice steers towards the shipping custom, as opposed to the opposite.

[22] See Opinions 1995 – 2001 R305

C. The Purpose

The main objectives of this research are to analyse the UCP and:

1) determine the requirements a presentation of documents (issued under a CIF[23] sale) must meet in order for it to constitute a complying presentation[24];
2) determine the process the bank will follow to examine such presentation both as a whole and as specific documents[25];
3) determine the obligations and process by which a bank will honour or refuse the presentation[26];
4) determine whether the bank can protect itself from loss either through possession of specific documents or by rejecting presentations which are not favourable despite being compliant[27];
5) through the above determinations interpret the UCP and provide proposals for the clarification and modification of the rules, along with the addition of new provisions that are submitted as necessary incorporations[28].

Throughout the paper the reader will find the proposals clearly marked, my own contributions being in italic, as well as a combined list at the end of each Chapter. The reason this research is necessary is that despite the revision of the UCP taking place only three years ago, there are many areas of the document that are vague, problematic or non-existent in some cases. I do not mean to make it sound that the rules are a disappointment. They by no means are and they are a vast improvement on the previous edition. This research however is not concerned with comparing the two, although this has been done in order to illustrate certain points. My objective is to carve a route through the rules based on the background question, and provide suggestions (now that we have the first cases emerging on the new rules) on where

[23] Cost Insurance Freight. For more information see ICC Incoterms 2010: rules for the use of domestic and international trade terms. Publication No. 715, Paris 2010, ISBN: 978-9284200801. The reason for using this specific sale arrangement is that we will analyse the UCP articles on transport documents and insurance policies also. For the seller to obtain such documents he must have contracted to procure both the carriage and insurance contracts, thus CIF is necessary. For more details on CIF sales see generally Sassoon, D. M. CIF and FOB contracts 4th Edition, Sweet and Maxwell, 1995, ISBN: 978-0421513204.
[24] This will be done in Chapter 2
[25] See Chapters 2, 3, 4 and 6
[26] See Chapter 7
[27] See Chapters 5 and 8
[28] This is accomplished throughout all chapters with Chapter 9 giving a combined list of proposals.

they are lacking certainty. The research is unique because of the emphasis on the use of Opinions and DOCDEX decisions which have thus far been put aside by many writers on the subject in academia[29]. I suggest these Opinions and decisions are just like cases to a statute[30]. They clarify, explain and in some cases add to the rules. This is my own analysis, my own proposals and it is these proposals, and the arguments for these proposals that make my thesis an original contribution to research.

I must make a note here that the UCP are accompanied by a supplement for electronic presentation (Version 1.1 located at the back of the same document) which is called eUCP. It is not the objective of this paper to analyse these rules in any way for the following reasons. Firstly, they are seldom used[31]. Secondly, they have only been updated to reflect the changes of the UCP as to terminology as opposed to their own independent revision. Thirdly, they must be read together with the UCP to operate successfully. Lastly, that any investigation into the electronic presentation of documents would require entirely separate research and issues relating to electronic commerce systems that simply could not fit into the special constraints of this thesis. Moreover, such an investigation would merit its own independent platform as an entirely separate paper as opposed to a chapter in this thesis. The eUCP are therefore entirely out of the scope of the present investigation.

[29] With the exception of *Jack* and Bridge, M. Benjamin's Sale of Goods 8th Edition, 2010, Sweet and Maxwell ISBN: 978-1847038623 (particularly Part 7) who use the Opinions quite frequently.

[30] Note that the difference between cases and opinions is that cases are binding whereas the opinions can only be persuasive evidence. They interpret the UCP. If we were to rank the sources in preceding order clearly UK statutes and case-law would take precedence. The UCP would follow, then the ISBP followed by an equal footing of DOCDEX decisions and Opinions, although there are many more Opinions than there are decisions.

[31] See page 55 of UCP 600 on Introduction to eUCP.

D. The Process

Our background question ("What documents must the seller present and how must he present them?") allows me to analyse the Articles of the UCP not in ascending order, as if we were simply describing them, but to begin at the Article the bank would begin, and work through the rules on the basis of the process that the bank would follow. This allows us to analyse the practical mechanism of the rules, and to enter into not only the legal thinking behind the UCP, but also 'banking thinking' behind the UCP i.e. how will the document checker approach the presentation? The UCP are above all uniform *customs and practices for documentary credits.* Our legal purpose is to put into words, the standard method banks follow to examine a presentation made under a letter of credit. Chapter 2 therefore looks at what I call the 'Practicalities of Presentation' i.e. when and where the seller must present the documents. If the bank receives them after the deadline, there is no point examining anything, the presentation has failed. The Chapter continues with examination of the documents generally and Chapters 3, 4 and 6 look at the standards that specific documents must meet. Chapter 3 deals with the bill of lading, 4 with the seaway bill, charter-party bill and multimodal document and 6 with the insurance document and commercial invoice. Chapter 5 deals with bank security found in the transport documents (as these are analysed in Chapters 3 and 4 the security of these documents is analysed in Chapter 5 before we proceed to the insurance policy and invoice). Chapter 7 with the honour or refusal of the presentation and Chapter 8 discusses the possibilities of denying payment even where the documents generally comply. Chapter 9 is my conclusion which broadly consists of with three things. Firstly, a discussion on the importance of the UCP in the letter of credit arena as evidenced by the thesis. Secondly, a discussion on whether the thesis has met its objective along with a summary of the proposals made in each chapter and the effect I suggest they will have. Lastly, with a comment on the possible areas of research that remain and the next step for the UCP in the future.

E. The Outcome

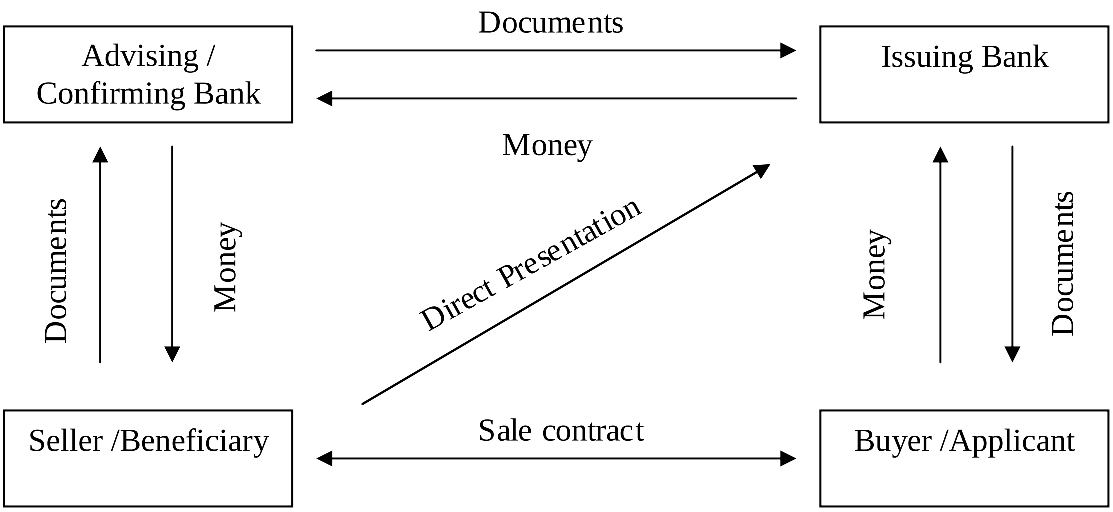
The general result of the paper is, as I have said, to provide a list of proposals that I make for the redrafting of the UCP and the ISBP. In places where I cannot provide a solution, or the issue is particularly complicated, I call for necessary clarification from the ICC directly. The easiest way is of course through a Commission Opinion but as it is not possible that all traders/banks can be continuously aware of the decisions, clarifications may better be published in official documents such as Policy Statements[32].

[32] For example the ICC has released its recommendation paper Recommendations of the Banking Commission in respect of the requirements for an On Board Notation ICC Commission on Banking Technique and Practice, Document number 470/1138 dated 22 April 2010

F. The Letter of Credit

Before we begin our investigation, I find it necessary, for reasons of completeness, to provide the reader with the fundamental elements of a letter of credit transaction. A letter of credit is a payment mechanism where a buyer's financial institution guarantees payment of a specified sum to the seller provided he meets the required conditions for presentation of a set of documents. The buyer wants to make sure that goods which are in transit are up to scratch as evidenced in the documents, before he pays, and the seller wants reassurance that he is guaranteed payment for goods which have left his control if he has fulfilled the agreed obligations. The process is best illustrated in a diagram:

Figure 1



The line between seller and buyer represents the underlying sale contract which in our case will be a CIF sale of goods. Payment for those goods (the freight and insurance also) will be through letter of credit. The buyer approaches the issuing bank and requests a credit to be opened in the name of the beneficiary before the goods are shipped. The issuing bank may then in turn appoint a confirming bank in the seller's country to which the seller may also present. The seller ships the goods and obtains the documents needed for presentation. Upon presentation, the seller hands over the documents and receives payment. The documents move down the chain, eventually ending with the buyer who can claim delivery. Each party in turn gets reimbursed until the applicant's account is debited. A last note to make is that the lines in the diagram represent separate contracts. I.e. the seller's rights under his contract with the issuing bank are separate to his rights with the confirming bank[33]. This will not however be the case if the secondary bank is merely advising. This is not an independent contract, it is merely acting as agent of the issuing bank.

[33] For a general introduction into letters of credit see Murray, C. Schmitthoff's Export Trade: The Law and Practice of International Trade 11th Edition, 2007, Sweet and Maxwell, ISBN: 0421892803 at Part Two: Finance of Exports. For a more detailed introduction into documentary credits, the UCP and the contractual relationships between the parties see *Jack* Chapters 1, 2, 3, 4 and 5.

CHAPTER 2

The Presentation and Standard of Examination

A. Introduction

Article 14 is the essence of the UCP and deals with the standard of examination that the bank will apply to determine whether a presentation[1] complies with the letter of credit conditions and the UCP rules. Like the whole of the thesis we analyse the rules against the backdrop of our main question: 'What documents must the seller present under a letter of credit to receive payment and how must he present them?' By answering this question I endeavour to provide sellers with clear indications of what they must do so that they get paid and through this process identify areas of the UCP that need modification or addition. We must note that even if the seller fulfils his obligations under the letter of credit, it does not necessarily mean that he has also fulfilled his obligations under the sale agreement. Although the contracts are necessarily interconnected, they are also independent of one another[2] and consequently the seller's actions may not satisfy both contracts simultaneously. In analysing Article 14, our investigation will also take us to other articles dealing with presentation, and for reasons of fully understanding the standard of examination, we shall also deal with practicalities of presentation[3]. The common law in this area is extensive and complicated in parts, and although in some circumstances it does not bear any significant relevance in determining the UCP rules, it is nonetheless essential to mention in specific situations for reasons of completeness. On the other hand, the reader will find that there is considerable mention of DOCDEX decisions[4], Banking

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[1] Note: the bank examines the *presentation* to determine if the documents comply and does not examine the *documents* as per UCP 500 Art. 13 'Banks must examine all documents…' Presentation has now been defined by UCP 600 Art 2 entitled 'Definitions' to mean: the delivery of documents. It is suggested that one reason for the change is to indicate the bank's obligation to examine the whole bundle (and later disregard if necessary any document not required) rather than to examine only the documents called by the credit. Another reason would be so that the UCP is easier to read and clearer on what is required. i.e. definitions now have an Article of their own.

[2] See discussion in Section C. below which deals with Articles 4, 5 and 14 that provide for the autonomy of the letter of credit transaction. For leading case in English law see *United City Merchants (Investments) Ltd. V. Royal Bank of Canada (The American Accord)* [1983] 1 A.C. 168 [HL]

[3] For example, where to present (Art. 6) and when to present (Art. 29, 33, 36)

[4] Collected DOCDEX decisions 1997-2003 Published by ICC No. 665, Paris, 2004, ISBN: 9284213347 (hereinafter DOCDEX)

Commission Opinions[5] and the ICC International Standard Banking Practice[6] (ISBP) both in the text and in the footnotes. Similarly, the ICC Commentary[7] on the current rules has been used where appropriate. It is argued that at least the first three documents mentioned are *essential* in determining the possibility of a presentation being rejected or accepted because they too provide clarification, and in some cases, additional rules to the UCP. Understanding the rules therefore is dependant on incorporating elements from other ICC publications.

How to reconcile the two sources of law (ICC publications and Common law) is an issue outside the scope of this thesis, although where there may be conflict in the specific situations discussed throughout this chapter, I have pointed out which may prevail or which should prevail. Generally, it must be noted by the reader that the UCP is not law. It is a set of guidelines and standard terms that many letters of credit incorporate. Even if incorporated however, they do not take precedence over established legal rules[8].

Our investigation follows these stages: Firstly, we look to the practicalities of presenting the documents. This includes the place a presentation must be made, and the time in which the seller must make it. Without meeting these requirements, the seller falls at the first hurdle, and there is no point discussing conditions the documents must meet if they have not first been presented correctly. We then move on to determining a complying presentation, which we shall see depends on conditions in the credit, conditions in the UCP and conditions in international standard banking practice[9]. The investigation follows these three components of 'Complying presentation'. Within the UCP conditions, we also look at the responsibility of the bank to make its determination within a specific time limit. The

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[5] ICC Banking Commission Collected Opinions 1995-2001 Published by ICC No. 632, Paris, 2002, ISBN: 9284212979 (hereinafter Opinions 1995 – 2001); ICC Banking Commission Unpublished Opinions 1995-2004 Published by ICC No. 660, Paris, 2005, ISBN: 928421341X (hereinafter Opinions 1995 – 2004) and ICC Banking Commission Opinions 2005 – 2008 Published by ICC No. 697, Paris, 2008, ISBN: 978928420059 (hereinafter Opinions 2005 – 2008)

[6] International Standard Banking Practice for the Examination of Documents under Documentary Credits 2007 revision for UCP 600, Published by ICC No. 681, Paris 2007, ISBN: 9789284200191 (hereinafter ISBP)

[7] Commentary on UCP 600 Published by ICC No. 680, Paris, 2007, ISBN: 9789284200153 (hereinafter Commentary)

[8] See further Chapter 1 pg 2/3 concerning the incorporation and application of UCP.

[9] Intentionally without capitals as this denotes the general international practice as opposed to the ICC document. See further Section F below.

further responsibilities of the bank concerning actual payment, or in the case of a non-complying presentation, a refusal to pay, are the subject of Chapter 7.

Within this investigation the reader will find that different proposals are made based on the discussion of each section. These will form the basis of my recommendation for change or clarification in the conclusion. The purpose is threefold. First to understand the rules of the UCP and accompanying documents, secondly to discuss the possible issues arising from unsolved problems and thirdly to propose alterations to the rules based on the issues discussed. The reader will find that there are many areas of the UCP which still cause difficulty and the underlying conclusion, is that it remains to each particular presentation to determine if a discrepancy in the documents is material enough to deny payment.

B. Presentation

1. Place of Presentation; is there also a Place of *Expiry*?

Sub-article 6 (a) establishes the rule that the letter of credit "must state the bank with which it is available or if it is available with any bank". No doubt it is obvious that before the seller can start thinking about what and when he must present, he must know *where* to present. The sub-article continues to state that "a credit available with a nominated bank, [will] also, [always], be available with the issuing bank"[10]. This means that the seller will always have the right to make the presentation to the issuing bank directly, as well as to the nominated bank[11]. The availability of payment for the credit (Sub-articles 6 (b) and (c)) is discussed alongside Articles 15 and 16, 'Complying Presentation' and 'Discrepant Documents' respectively, in Chapter 7. Moving on therefore to sub-Article (d) (ii), it is made clear that the place of presentation is "the place of the bank with which the credit is available" as required in sub-Article (a). Again, the place of availability in the credit is in addition to the place of the issuing bank. The Commentary to the UCP makes a note[12] that the beneficiary (in our case the seller) should be aware that if he decides to present the documents to the issuing bank, the period allowed for presentation shall still remain the same. Although a reason for stressing this is not given, we can assume that it is because the issuing bank is likely to be in a different country (letter of credit covering an *international* sale) whereas the nominated bank would be in the seller's country. Therefore, despite the fact that the documents would take longer to reach the issuing bank, for example they would have to be sent by post as opposed to the seller physically taking them to the bank, the time period in which the seller must present the documents remains the same. Hence, "any loss due to delay in the issuing bank's receiving the documents or the documents being lost in transit, would be the responsibility of the [seller]"[13].

[10] For the definition of the different types of bank see UCP 600 Art. 2: Issuing bank is the bank that issues the credit and Nominated bank is the bank with which the credit is available.
[11] See ICC Commentary on UCP 600 pg. 34.
[12] *Ibid* pg. 35
[13] *Ibid*

This refers to issues of timing; i.e. when must the seller present the documents? What is the deadline? This we discuss in the next section but to continue with place of presentation, it is convenient for the reader to know now that all credits have a certain expiry date. The question that arises in the current circumstances is: if the seller does not want to present directly to the issuing bank, but presents to the confirming bank for example, must the documents reach the *issuing* bank before the expiry date of the credit? The commentary makes it clear that if the seller chooses to present to the issuing bank directly, he must do so before the expiry date. This is logical, for the presentation to be acceptable, it must be within the time period allowed. But we have no answer if the seller presents to a confirming bank first. In theory, this bank then becomes a presenter (as per Article 2[14]) in which case it must also present within the time limits if it wants to get paid. Questions arise when for example the seller has presented to the confirming bank before the expiry date, but that bank will not be able to both examine the presentation and make its own presentation to the issuing bank within the period allowed. Should it take the documents? *Can* it take the documents? If we replace the confirming bank with a nominated bank, does the circumstance change as the status of the bank is different?

These questions all arise in practice through the SWIFT[15] standards which provide definitions of fields 31D and 41a, "Date and Place of Expiry" and "Available with/by" respectively, both of which are mandatory[16]. The Place of expiry is the place where the documents may be presented. The "Available with" identifies the bank with which it is available "(the place of presentation)". Notably, if the credit is freely available, the field may contain the phrase 'any bank'. 31D indicates the place (for example the country) where the credit expires and 41a, with which bank it is available (which bank the seller may present to). If the two fields match i.e. the place of expiry is the UK and the credit is available with any bank in the UK, then there is no problem. The seller can present in the UK and the issuing bank will have to honour if the documents are complying even if not received by it before the expiry date *and* despite its location. This is because the credit expires *in* the UK so if the seller

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[14] Presenter means "a beneficiary, bank or other party that makes a presentation".
[15] Society for Worldwide Interbank Financial Telecommunication: global provider of secure financial messaging service. It is the method used by almost all financial institutions which also incorporates UCP 600. See www.swift.com for information on standards and trade services.
[16] See Wang, S Does a credit need a "place of expiry? " in DCInsight Vol. 15 (3) 2009 pg. 15

presents at a permitted bank at the place of expiry, he has fulfilled the requirements. Problems occur when the two fields do not match. For example, if field 41a says issuing bank (located in India this time) and 31D still says UK as place of expiry, what is the result? One view is that if 41a indicates issuing bank, then the seller must present there and no where else within the time period. The other view is: if it is field 31D that indicates the place of expiry, then the seller can present to any bank in that place and as long as the presentation is complying and initially presented before the expiry date, the issuing bank will be obliged to honour even if it receives the documents after the expiry date. Again, what plays the important role is the *place* of expiry. What if the situation is reversed? If field 41a indicates any bank in UK, and 31D indicates India (i.e. place of issuing bank) and this is therefore the place of expiry; what is the result? On the basis of the logic used in the examples above, again if the credit expires in India, then the issuing bank must receive the documents before the expiry date. The seller may present at any bank in the UK, but then that bank must present within the time allowed to the issuing bank in India. However, it can also be argued that the risk of issuing a badly drafted credit (which bears such ambiguity) should fall with the bank that issued it, and hence the issuing bank should be obliged to accept despite expiry. This point is however a point needed to be debated in court[17]. In practice, it is suggested presently that if the credit expires in the country of the issuing bank, then it must receive the presentation before expiry to be complying.

1.1. Conclusions and Proposals

The result of the scenarios above I believe is clear. If you remove the "place of expiry" from the SWIFT form, then we remove the confusion[18]. The seller can then

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[17] See for example *Credit Agricole Indosuez V. Banque Nationale de Paris* [2001] 2 SLR 1 (Singapore) discussed by King-tak Fung in How to avoid conflict between the expiry date and availability of the L/C DCInsight Vol. 15 (3) 2009 pg 16-17 who concludes relying in this sort of analysis is not favourable.

[18] The view also held by both Wang and Fung in *supra* nt. 16 and 17 respectively. There is of course the argument that the reason that field 31D states both date and place of expiry is to make clear the time of expiry. For example, credit expires on 30 June in France means it expires close of business French time. No matter where the seller presents, he must do so before close of business on 30 June GMT+1hr. If close of business in France is 5pm but the seller is permitted by 41a to present in UK, he must present before 4pm UK time because the credit expires in France. I find great difficulty in this argument not least because it seems impractical that a seller would have to sit and calculate correct time zones for presentation. Moreover, if the credit states place of expiry US, which has six different time zones, which is to prevail as the time of expiry? It is submitted that it would be a much better result to remove the phrase completely and let the seller present to any available bank according to its

present to any bank with which the credit is available, unconcerned if this is also the place of expiry. Notably, the UCP do not make reference to this requirement, and the interpretation of Article 6 leads to the belief that presentation must be made before expiry, and presentation is one made to any available bank stipulated in the credit. This obligation also continues to the presenting banks, so that if a confirming bank wants to present within the time allowed, it has to be careful when it confirms the credit that it gives itself enough time to examine, and to present to the next bank.

If the place of expiry is a term that bankers will feel uneasy about removing (because it is a part of SWIFT and the form is so widely used[19]) then we must find another solution. It is therefore submitted (in light also of the fact that this thesis does not directly deal with SWIFT) that if the phrase is not removed, then it must be dealt with by the ICC in the letter of credit provisions. I do not believe the best place for this would be in the UCP rules themselves. This is for two reasons. Firstly, introducing a new phrase into the UCP after more than 70 years of their first publication can only lead to confusion and concern. Secondly, there is absolutely no logic in introducing this term only to state that it should be ignored. My suggestion is to deal with it in the ISBP. It is of course arguable that this will have no particular effect because where SWIFT does contain the phrase, then any provision in the ISBP will be disregarded by the courts if the form is considered to contain the express provisions of the parties. If express provisions by the parties take precedence over the provisions in the ISBP then what is the point? Even dealing with the phrase in the UCP however would not change this; express provisions would still have priority. Nonetheless, the ISBP may strongly suggest to parties that "Place of Expiry" must be dealt with in the credit provisions. This thesis highlights to sellers and presenting banks the possible restriction to presentation this field in SWIFT may have. Therefore:

Proposal 1: ***"Place of Expiry" must be removed from the SWIFT form***

Proposal 2: ***If "Place of Expiry" is not removed from SWIFT, then the ISBP should include a provision stating the practice of banks is to ignore the requirement.***

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own local banking hours. See also section 2 below and prose relating to footnote 26 making the same point.

[19] http://www.swift.com/about_swift/company_information/index.page?lang=en See Chapter 1 nt. 20

We also conclude that 1) Sellers must present to any bank allowed by the credit before expiry; 2) Confirming banks must present before expiry to Issuing banks and 3) Nominated banks must present according to the terms of their agreements with the Issuing banks.

2. Time of Presentation

In the previous section we dealt with the first practicality of presentation, namely, the place of presentation. Now we turn to the second practicality which is *when* the presentation must be made. No doubt the buyer will want the documentation as quickly as possible so that he can check that the seller has fulfilled his obligations (under the sale contract) and so that he can either sell the goods on, or so that he can claim delivery (if it is necessary for him to present the documents to the carrier to physically take control of the goods). The bank will also have its reasons for imposing a deadline, both so that it can schedule its own business obligations properly, and also to minimise the risk of it taking on documents which have been tampered with (the longer the seller holds on to the documents, the longer he has to make sure by any means that they comply). It is logical therefore that a credit has a time limit in which presentation must be made.

The issue of time is not in essence complicated but in order for the seller to understand exactly when he must make the presentation, we must draw from several Articles of the UCP.

The first step is to check the expiry date of the credit itself. Article 6 (d) (i) states that a credit must provide an expiry date for presentation and thus that the presentation must be made on or before that date[20]. A note must be made that the presentation need not be made by the beneficiary himself but instead 'by or on behalf of [the beneficiary]'[21] by another bank or representative for example. This time period is likely to be reduced by the fact that if we are talking about an international sale, then

[20] Sub-article 6 (e). With the exception of Article 29 (a) that provides for the extension of the expiry date due to the bank being closed for reasons other than *force majeure.*
[21] Sub-article 6 (e).

the seller will be presenting to the bank, as part of the bundle of documents, a transport document which will incur the effect of Article 14 (c). This provides that in such a case[22], the presentation must be made "no later than 21 calendar days[23] after the date of shipment"[24] and in no event after the expiry date of the credit. If the expiry date or the last date of presentation under sub-article 14 (c) falls on a day that the bank is closed, then the expiry date or date of last presentation will be transferred to the following banking day[25]. This extension will only apply however, if the bank is closed for reasons other than those stated in Article 36 '*Force majeure'* which include acts of God, riots, civil commotions, insurrections, wars, strikes, lockouts and the newly added acts of terrorism.

The seller must also consider that under Article 33, he must present the bundle of documents within the banking hours of the bank, otherwise the "bank has no obligation to accept [the] presentation". 'Banking hours' means the hours applicable locally to the bank[26]. According to Banking Commission Opinion R265 No. 64 it seems that if a bank accepts a presentation outside of its normal banking hours, that day will none the less count as the day of receipt of the documents. The case indicated that this was the result for the purpose of sub-Article 13 (b) now sub-Article 14 (b) but it is submitted this will also be the case for the purpose of Article 6. The result will be that if the bank accepts documents outside of its normal hours on the exact date of expiry, this will be deemed as a presentation made within the time allowed. This will be the case unless the credit specifically requires that presentation is made to the documentary credit department of the bank, in which case the date of receipt will be the date the documents were received by that department.

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[22] Where an *original* transport document is presented. If therefore a copy is presented, 14 (c) does not apply: see further ICC Commentary pg. 63, and presentation will not be subject to 21 calendar days. In fact, according to ISBP paragraph 20, copies of transport documents are not considered transport documents at all for the purpose of 14 (c) (and Articles 19-25).

[23] It is wished simply to emphasise that this sub-article deals with calendar days and not banking days which shall be discussed later on in this chapter at section E.8.1.

[24] The date of shipment is determined according to the individual rules relating to the type of transport document covered by Articles 19-25. For example, under Article 20 it means "shipped on board a named vessel". See Chapter 3 Section C.4.

[25] Article 29 (a).

[26] ICC Commentary pg. 143

2.1 What is an original today?[27]

The restriction of presenting no later than 21 calendar days after the date of shipment in sub-article 14 (c) only comes into play when the transport document presented is original[28]. This is why we now briefly turn to Article 17 which deals with "Original Documents and Copies" to find the definition of 'original'[29]. It must also be mentioned that the ISBP has a section on 'original' found at paragraphs 28-33 which (at paragraph 33) clearly indicates that the ICC Banking Commission Policy Statement[30] titled "The determination of an 'Original' document in the context of UCP 500 sub-Article 20(b)" remains valid under UCP 600[31]. Both the ISBP and the Policy Statement are therefore necessary documents to determine compliance with the UCP.

The general principle is to be found in sub-article 17(a) which states that (irrespective of sub-article 14 (c)) "at least one original of each document stipulated in the credit must be presented". Moreover, the number of originals that must be presented will also be determined by the credit itself, or, where the documents state how many originals have been printed, the number stated in the documents. So, if the credit calls for two original bills of lading, then the beneficiary must present at least two originals. Also, if the bill of lading shows '1/3 originals' then the beneficiary must present all three originals. These provisions are found in ISBP paragraph 29.

Issues can arise when the credit does not expressly provide if a document required must be an original or a copy. ISBP paragraph 30 covers some examples. The first, is where the credit requires simply "Invoice" or "One Invoice" or "Invoice in 1 copy". All are taken to mean requiring an original invoice. It is thought this sub-paragraph is

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[27] As banking practice changes, what is considered original today may not be considered original tomorrow, or vice versa.

[28] In law, the importance of obtaining an original document can be strongly supported by commercial, legal and evidential value placed on them when a holder obtains rights against the issuer. See *Jack* pg 210 para. 8.65. See also *supra* nt. 22 explaining that for the purpose of 14 (c) transport documents can only be originals. If they are copies, then they are not transport documents at all.

[29] In the common law the position is the same. See: *Glencore International AG v. Bank of China* [1996] 1 Lloyd's Rep 135

[30] Document number 470/871 (Rev) approved on 12 July 1999

[31] See also Commentary pg 76 which also states the continuing validity of the Policy Statement. The statement was issued to clarify problems that arose because of modern methods of reproducing documents.

a little redundant as Article 17 (a) clearly states that at least one original of each document is required; in which case the ISBP sub-paragraph is superfluous. However, evidently these provisions were not enough as one of the first queries to the Banking Commission[32] concerned whether "Courier receipt" meant an original, and of course it was held to be so. Sub-paragraph (b) of ISBP paragraph 30 explains that where the credit calls for "Invoice in 4 copies" this means at least one original and the remainder can be copies. This reflects the position in sub-Article 17 (e) of the UCP 600 which includes phrases such as "in duplicate", "in two fold" and "in two copies". Lastly, "One copy of Invoice" will be satisfied by presentation of either a copy or an original. This is also stated in the UCP itself in sub-Article 17(d). The only time an original will not be accepted in lieu of a copy is where the credit expressly prohibits an original as per paragraph 31 ISBP.

Moving on, we turn to what original actually entails in the context of the UCP. The first point to make is that both Article 17 and the Policy Statement seem to provide a presumption. So, documents are presumed to be originals unless they are obvious copies[33]. This is shown through the provision in 17 (b) that states "an original [is one] bearing an *apparently*[34] original signature[35], mark, stamp or label"; and through the Policy Statement that draws attention to the intention of the issuing party to treat the document as original. In the former, the obligation is to determine if the document appears original on its face[36] but does not require or permit examination beyond this to determine if the document is *in fact* original[37]. Furthermore, a person sending a telefax or making a photocopy is presumably intending to produce a copy, whereas a person printing from an electronic source created by him/her is producing an original.

Sub-Article 17 (c) states that a bank will *also*[38] accept as original a document if 1) "it appears to be written, typed or perforated or stamped by the issuer's hand or [2)] it

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[32] Query TA 668rev currently published in DCInsight Vol. 15 (2) 2009 pg 11.
[33] Ulph, J. The UCP 600: documentary credits in the 21st Century J.B.L. 2007, Jun, 355-377
[34] As to apparent conformity and definitions of 'on its face' see section C.2. below.
[35] As defined by Article 3 of the UCP 600 : "signed by handwriting, facsimile signature, perforated signature, stamp, symbol or other mechanical or electronic method of authentication".
[36] *Supra* nt. 34
[37] The bank is not concerned with the genuineness of the document as per Article 34 discussed in Chapter 8.
[38] This indicates, as per Policy Statement section 2, that the list is neither comprehensive nor exclusive and this must necessarily be as true for sub-Article 17 (a) as it was for the old sub-Article 20 (b).

appears to be on the issuer's original stationery or [3)] states it is original unless [that] statement appears not to apply to the document presented".

2.2 Conclusions and Proposals

Although the Article seems detailed enough to alleviate some of the problems caused by the old Article 20 (b) of UCP 500[39], the reality remains that with the level of technology today so high, it is very hard to determine the originality of a document. I have the following comments to make: Firstly, I find the provision concerning the issuer's original stationery confusing. What does "original stationery" mean? Does it mean paper with the letterhead of the company? Surely in today's business world all this really means is a blank A4 piece of white paper which has the letterhead of the company printed on it. This is something which can possibly be created by any computer. If they can print it, I can print it. Anything can be copied. Secondly, I do not see how telling the bank that a "person photocopying is obviously intending to produce a copy whereas a person printing from their own electronic source is intending to produce an original"[40] is of any use. If the bank knows it was photocopy, then it also must know it is a copy. And if it knows the person was printing from their own source, then it would not question the originality. Lastly, what is missing from Article 17, is clarification in situations where the document "indicates that it is not an original"[41]. The rule is that any document with an apparently original signature (etc) is accepted as original, unless it indicates it is not. My question is: How can it indicate it is not? Does this mean unless it expressly states is it not original? Because if it has an original signature, then what indications should the document checker be looking for apart from express statements that show it is not original? After all, the point of Article 17 (b) is to make original any document with an original signature. How then can any other indication of non originality (other than an express statement) take priority over signature? Moreover, the 'exception' provided by 17 (b) is only available to documents with signatures (etc). It is not provided in sub-article (c) which deals with hand written documents, documents on the issuer's stationery and documents which state they are original. Admittedly if we have the third type of

[39] See further Debattista, C. The new UCP 600: changes to the tender of the seller's shipping documents under letters of credit 2007 J.B.L. 329 at 341-342
[40] See Policy Statement *Supra* nt. 30 above.
[41] As per sub-article 17(b)

document (which states it is original) then we have no need for the exception because we already have an express statement of originality[42]. What if we have documents hand written or on the issuer's stationery? If sub-article (c) does not provide for the exception here then must the document checker accept as an original such documents despite express statements to the contrary? According to the rules, yes. One may argue that both these type of document may fall under 17 (b) anyway i.e. a hand written document is one bearing an "original mark" or a document on the issuer's stationery is one bearing an original "label of the issuer"[43]. If this is so, why should the ICC make a separate rule in 17 (c)? If these documents were to be covered by 17 (b), then there would be no need for 17 (c). Notably, 17 (c) states that a bank will "*also*" accept as original the hand written/stationery documents. Clearly, they are an addition to 17 (b). If so, our question remains: are they covered by the exception[44]?

Proposal 3: Article 17 (b): Documents covered by sub-article 17 (b) (with original signatures etc) *are accepted as original unless they contain express statements that they are not original.*

Proposal 4: Article 17 (c): Documents covered by sub-article 17 (c) (hand written documents etc. or documents on the issuer's original stationery) *are accepted as originals unless they contain express statements that they are not original.*

[42] It is unlikely, although not impossible, that a bank will be presented with a document which contains both a statement of originality and one that denies it. It is suggested that if such a document is presented, it should be rejected on the basis of Sub-article 14 (d) (discussed below in section E.3. "Consistency") because the two statements would conflict. I.e. the data on originality would conflict with the data denying originality.

[43] Both provisions in sub-article 17 (b)

[44] The reader may be thinking: how can a document hand written *not* be an original? Do not forget 17 (c) also includes perforated documents. This means that a photocopy that is perforated can be an original, but what if that copy also stated "Copy" despite the perforation? And thus indicated it always intended to be a copy? Surely this could not be accepted as original as the original would be the document from which the photocopy was made.

C. Standard of examination

Article 14 (a) provides the duty and standard at which the bank is to examine the presentation. This standard follows the principle of autonomy of the letter of credit agreement. The duty is to examine the presentation and determine, on the basis of the documents alone, if they appear on their face to constitute a complying presentation. Complying Presentation is defined in Article 2 as one being "in accordance with the terms and conditions of [1.] the credit, [2.] the applicable provisions of [the UCP] and [3.] the international standard banking practice." We shall proceed by first turning to the principle of autonomy, then to the duty itself to examine "on the face", and lastly to the three components that make up a complying presentation: the credit, the UCP and international standard banking practice.

1. Autonomy

It is suggested that the reference in sub-article 14 (a) to determine compliance "on the basis of the documents alone" refers to the established principle in common law of the autonomy of the contracts[45]. Taken literally, document checkers are supposed to look at the documents presented only, and not at any other sources of information (for example the sale contract) to determine whether or not the entire presentation is compliant. This could of course mean that the seller's obligations concerning the documents under the sale contract could be different under the letter of credit agreement. This is however of no consequence to the document checker and although it should not happen (i.e. the credit should be a reflection of the terms agreed in the sale) if it is not, the seller's only remedy is to sue the buyer[46].

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[45] Autonomy of sale contract, letter of credit and individual letter of credit agreements between banks. See *Hamzeh Malas & Sons v. British Imex Industries Ltd* [1958] 2 Q.B. 127; approved by Lord Denning M.R. in *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* [1978] Q.B. 159 approved by the House of Lords in *United City Merchants (Investments Ltd v. Royal Bank of Canada* [1982] 2 Lloyd's Rep 1. See also *Jack* Pg 21-23 and section 8.11 and King, R. Gutteridge and Megrah's Law of Bankers' Commercial Credits 8th Edition, 2001, Europa, ISBN: 978-1857431124 (hereinafter *Gutteridge)* at pg 13-14.

[46] See for example *Soproma SpA v. Marine & Animal By-Products Corp* [1966] 1 Lloyd's Rep 367 where the bank rejected documents under the credit which the buyer would have been required to accept under the sale contract and the buyer sued (unsuccessfully) under the sale. See also Banking Commission Opinion R509 No. 314 in Opinions 1995-2004.

The reflection of the autonomy principle in sub-article 14 (a) finds its permanent home in Article 4 of the UCP, which provides that the credit is a "separate transaction from the sale or other contract…[and] banks are in no way concerned or bound by such contract". Therefore, the decision of whether the presentation is compliant is not subject to any claims or defences by the buyer resulting from his relationship with the issuing bank or seller. After all, the whole purpose of using the letter of credit is so that the seller will have security of payment irrespective of the possible negative final outcome of the sale contract[47]. Hence, one must be independent of the other.

2. On the face: why is it still here?

In the past there was much confusion[48] with the notion of 'on the face'. A document checker is not in the business of scrutinising what 'on the face' means and indeed is not there to interpret the UCP as a lawyer. Sub-article 14(a) however retains the phrase stating that "a…bank…must examine a presentation to determine…whether or not the documents appear on their face to constitute a complying presentation". Some document checkers therefore understood the phrase to mean checking only the front page of a document[49]. Whilst I do not intend to suggest that the document checkers should have instead read carefully into all terms on the reverse of a document such as the bill of lading, it was inappropriate to think that 'on the face' meant literally on the front of the paper. It is suggested instead that this phrase relates again to the autonomy principle discussed above. Namely, that the banks' obligation is to look at the presentation as a whole, not to investigate whether the goods, services or performance of the sale contract are fulfilled. It is a visual inspection[50] of the documents, not a thorough search of terms and conditions. Like Article 4 discussed above, this is

[47] See for example Lord Diplock's dicta in *United City Merchants supra* nt. 2 at 183 : "The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give the seller an assured right to be paid before he parts with control of the goods".

[48] The ICC now explains that 'the phrase [is] a well established concept understood by those in the legal profession and experienced documentary credit practitioners.' Commentary pg. 62

[49] See 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) 660-664 pg 661 and Ulph, J. The UCP 600: documentary credits in the 21st Century J.B.L. 2007, Jun, 355-377 at 362 referring to Debattista, C. Legislative Techniques in International Trade: Madness or Method [2002] J.B.L. 626 at 634/635. It is now quite clear from the ICC itself that the phrase "does not refer to a simple front versus the back of a document but extends to the review of data within a document" Commentary pg 62

[50] 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. 2009, 24(11), 566-579 at pg 567

reiterated in Article 5 UCP 600 which states that the "banks deal with the documents and not with [the] goods". The reader may be thinking that if the phrase does indeed reflect the provisions in Articles 4 and 5 and sub-article 14 (a) (compliance determined "on the basis of the documents alone") then why is the phrase included at all? No doubt it serves no purpose if its effect has been provided not once, not twice but three times in the UCP already. It could only possibly lead to confusion and it is therefore suggested that the phrase is better removed completely. If the intention was to emphasise that document checkers are to look only to the documents and not the underlying transaction[51], this has been done through the other articles[52]. If on the other hand the intention was something else, such as restricting the banks from spending hours checking documents to make sure they have fulfilled their obligation, perhaps a better provision is needed to indicate exactly the intention of the phrase[53]. It is an area of the UCP which respectfully, would either have to be eliminated, or explained properly (as opposed to minimising the length of the rules as intended by UCP 600).

It is also suggested that the phrase was intended to highlight the fact that the documents must only *appear*[54] to comply on their face. This is intended to reflect the concept of apparent conformity found in Article 34 (which we discuss in Chapter 8). The bank will have discharged its obligation to examine the documents if they appear to comply and does not have to look into the authenticity of the documents[55]. It is not therefore liable or responsible for, amongst other things, the genuineness or falsification of the document[56]. This is supported by DOCDEX decision 232 which states that banks are "not required or permitted to conduct full scale forensic investigations before they accept documents as authentic"[57].

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[51] See ISBP ICC Publication No. 681 pg 15 section 1.
[52] And indeed by the use of the word 'appear' in sub-article 14 (a) itself i.e. 'whether or not the documents *appear*…to constitute a complying presentation'. See further Debattista, C The new UCP 600 – changes to the tender of the sellers' shipping documents under letters of credit J.B.L. 2007 Jun 329-354 at pg. 338
[53] The banks are already restricted as to time to examine which we discuss in Section E. 8.
[54] Article 14 (a) UCP 600
[55] See Doise, D. The 2007 revision of the Uniform Customs and Practice for Documentary Credits (UCP 600) I.B.L.J. 2007, 1, 106-124 at 111/112
[56] Article 34 UCP 600, Disclaimer on Effectiveness of Documents. We shall discuss the fraud exception found in Chapter 8.
[57] See also Banking Commission Opinions R470 Ref. 371 and R472 Ref. 373

2.1. Conclusions and Proposals

If we consider the arguments above, namely, that the phrase “on the face” is a support for the autonomy principle and that it highlights the fact that the documents must only *appear* to comply, the natural conclusion would be to eliminate the phrase altogether[58]. It is submitted that including such a phrase in the UCP only to support the autonomy principle is not a justification for its use. If the phrase has another intention, then the ICC should provide its meaning in the rules, preferably in the ISBP[59]. For example, if the phrase also intends to provide some security for the bank, in the sense that it is not obligated to thoroughly search the document (and thus the seller or buyer will not sue it for wrongful refusal/acceptance respectively) then the ISBP should state that a bank is to check the data in a document but is not to read into any lengthy terms or conditions thereof. Details of how banks examine documents should be confined to banking practice. The UCP are the standard rules, not the be all and end all. I make the following proposals therefore:

Proposal 5: Sub-article 14 (a) should read “A…bank…must examine a presentation to determine, on the basis of the documents alone, whether or not they appear to constitute a complying presentation”. *The phrase “on their face” is eliminated,* thus eliminating the possible confusion without losing the autonomy of the credit.

Proposal 6: ISBP: If the ICC decides the phrase “on the face” is a necessary determination used by banks, *then it should provide its meaning and intention in the ISBP.*

3. A note on Reasonable care

An issue that remains is the actual standard of the duty of care that the bank must provide when examining documents. In the UCP 500, sub-article 13 (a) stated that the

[58] See Debattista, C. *Supra* nt. 52 above at pg. 338 who states that during the revision process there was agreement that the phrase does not add anything to the word “appear” but there was no agreement to delete the phrase.
[59] This should not be too hard in light of the ICC comment made *supra* nt. 48 (that the concept is well established and understood in banking circles)

banks should exercise "reasonable care" when completing their duty; a phrase that has now been deleted from the current UCP version. The purpose was to impose upon the bank the requirement to "adopt a professional and diligent approach"[60] when determining compliance. The ICC states that this requirement has now been "superseded" by the "more comprehensive and precise"[61] provisions of Article 14 (a) and Article 2 by defining "Complying Presentation" so that by requiring the presentation to comply with international standard banking practice, it also means that the banks will exercise the due care suggested by the practice. Although this is a little confusing, it is believed that what is best understood is that despite the removal of the phrase, if the banks are to determine whether or not the documents *appear* to conform, then their duty must be to exercise reasonable care instead of any higher duty to thoroughly scrutinise the documents[62]. It is also argued that if indeed the standard is now provided by the fact that the bank must act according to standard banking practice, then this should be included in the ISBP document. For example:

Proposal 7: ISBP: *Banks are to make a due diligent assessment of the presentation to determine its compliance.*

[60] Bridge, M. Benjamin's Sale of Goods (hereinafter Benjamin) First Supplement to 7th Edition, 2008, London, Sweet and Maxwell, ISBN: 9780421945500 pg. 120 para. 23-236P. The writer is aware of the 2010 of Benjamin but wishes to make specific reference to this supplement as it included the immediate reaction to the 2007 UCP revision.
[61] ICC Commentary pg 62
[62] See Debattista, C. *Supra* nt.39 at pg. 337. For a detailed discussion on imposing a possible tortuous duty of care on banks see Adodo, E. *Supra* nt. 50 above at 569-573.

D. Conditions in the Credit

Out of the three components that make up a complying presentation, it is perhaps[63] compliance with the conditions in the credit that is most important. After all, the parties are able to exclude any part of the UCP[64] that does not reflect their requirements and even if not excluded it can be strongly argued that where a condition of the Credit is in conflict with that of the UCP, the credit will prevail[65]. Indeed the ICC itself has decided[66] that where the UCP or local law are in conflict "Local law will always rule in a dispute situation"[67] and that the UCP are the basis level of requirements "*unless* the credit states otherwise"[68].

It is the bank's duty therefore, to examine the documents and determine if they comply with the requirements in the credit. The extent to which these documents must comply, is a matter which has resulted in a considerable number of cases and in the UK, is governed by the principle of strict compliance. As we shall see however, the UCP itself *does not* expressly provide for such a notion[69] and it has been suggested by

[63] It is suggested in the following sentence that conditions in the credit overrule conditions in the UCP or standard banking practice in cases of conflict. This is not an ICC rule at the moment, it is only a submission by this paper. See also Uniform Rules for Demand Guarantees Paris 2010 Revision, Publication (URDG 758) Publication No. 758, ISBN: 978-9284200368 which in Article 2 "Definitions" state "**complying presentation** under a guarantee means a presentation that is in accordance with, first, the terms and conditions of the guarantee, second, these rules so far as consistent with those terms and conditions, and third, in the absence of a relevant provision in the guarantee of these rules, international standard demand guarantee practice". So, the hierarchy is 1) guarantee 2) URDG 3) demand guarantee practice. (By analogy to the letter of credit the rank would be 1) credit 2) UCP 3) banking practice). The determination of compliance with the URDG is only where there is consistency between the rules and the conditions of the guarantee. If they are not consistent, then the presentation must be compliant with the guarantee conditions and need not be complaint with the URDG. This supports the submission in this paper for letters of credit.

[64] Article 1 UCP 600: Application of UCP

[65] See Beale, H. Chitty on Contracts 30th Edition, 2009, London, Sweet and Maxwell, ISBN: 9781847038654 para. 12-079 and Musthill LJ in *Royal Bank of Scotland v. Cassa Di Risparmio delle Privincie Lombard* [1992] 1 Bank LR 251 at 256: "any contrary provision in the UCP must yield to the parties' expressed intention".

[66] Banking Commission Opinion R515 No. 321 in Opinions 1995-2004

[67] *Ibid* at pg 37

[68] *Ibid* The phrase is very similar to "unless otherwise stipulated in the credit"; a recurring notion in the UCP 500 found in many articles which fortunately in the current version, thanks to the intention of the ICC to "remove wording that could lead to inconsistent application and interpretation" (see Introduction to UCP 600 pg.11) has been removed.

[69] See DOCDEX decision 221 which clearly states that there is no reference to the strict compliance standard in the UCP 500. See also Jack at pg. 184 para. 8.31 who makes the same observation.

practitioners and academics[70] (and supported in this paper) that the notion is losing ground where the UCP is concerned.

The principle can be summed up by Viscount Sumner's iconic phrase in *Equitable Trust v. Dawson Partners*[71]: "There is no room for documents which are almost the same, or which will do just as well"[72]. The documents must strictly comply, or if the bank "does [not do] as it is told…[and] departs from the conditions laid down, it acts at its own risk" and its reimbursement may be jeopardised.

There is no doubt, that where a credit calls for documents X, Y, Z, then the bank can only accept as complying a presentation that includes X, Y, Z. The UCP and common law agree on this. This is whether or not X, Y, Z were agreed in the sale contract[73] or whether X, Y, Z are actually capable of being obtained by the beneficiary[74]. As with all legal matters, the devil lies in the detail. So it is the extent to which the detail (data) in the document must strictly comply with the detail (data) in the credit. If we follow the common law discussed thus far, the documents cannot be 'almost the same', they therefore have to be *exactly* the same. How practical can this be? It would be very difficult to imagine documents presented that follow the details of the credit so closely that they are identical. Strict compliance cannot therefore "extend to the dotting of i's and crossing of t's"[75] "some margin must and can be allowed, but it is slight"[76]. The question of course then turns to 'how slight'? What is a trivial error? It is suggested this can only be answered according to the particular facts of each case. For example, if a document refers to the place of delivery as 'SloveniO' it may be decided that this is a trivial and obvious typographical error[77] (one letter being wrong; O instead of A) and the documents should be accepted. On the other hand, if the

[70] See for example Downes, P. UCP 600: not so strict compliance (2007) 4 J.I.B.F.L. 196 and Dolan, J.F. The strict compliance rule in a recession in DCInsight Vol 15(4) 2009 pg 8.
[71] *Equitable Trust Co of New York v. Dawson Partners Ltd.* (1926) 27 Ll L Rep 49
[72] *Ibid* at 52
[73] As the two are independent; ref. section C.1. on autonomy above. If the buyer (applicant) requires documents under the letter of credit which were not agreed to in the sale contract, then the seller's (beneficiary's) remedy is under breach of the sale agreement, not breach of the credit or by the bank.
[74] See for example *Oliver v. Dubai Bank Kenya Ltd* [2007] EWHC 2165 (Comm) where a telex from the issuing bank was one of the documents required but the beneficiary could not have any control on whether this could be obtained.
[75] *Gutteridge* pg. 186 para. 7-13
[76] *Banque de l'Indochine v. J. H. Rayner Ltd* [1982] 2 Lloyd's Rep 476
[77] See for example *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.

document referred to 'SlovANia', is the error obvious? Is the mistake with the letter A and should have been 'SlovEnia'? Or is the mistake with the letter N and should have been 'SlovaKia'? Two entirely different places. Again, only one letter is wrong, but surely the documents would have to be rejected[78] as there is a possibility that the goods are being delivered to Slovakia instead of Slovenia.

The ICC follows a similar line when it comes to typographical errors. In Banking Commission Opinion R209[79] the surname of the 'Attention Party' in an Airwaybill spelt as 'Chai' instead of 'Chan' was discrepant as it could have meant someone else. On the other hand, 'Industrial Parl' instead of 'Industrial Park' was not discrepant. The ISBP helps on this point to make it clear that the issue turns on whether or not the error affects the meaning of the word or the sentence[80]. The problem is, if a document checker is unaware of a particular place or phrase, then how can he know if it affects the meaning? It is suggested that the test would better be whether or not the error is capable of causing any confusion[81]. It is not about literal compliance[82] nor is it about the documents reproducing a 'mirror image'[83] of the credit.

1. Conclusions and Proposals

Typographical errors are an issue difficult to decide in letter of credit law. We cannot say with certainty that such an error shall not make the document discrepant; we cannot even say that a specific typographical error (i.e. error of one letter) shall not make the document discrepant, because it all depends on the specific word in question. It is submitted moreover, that it also depends on the specific document checker in question. It is very difficult to determine how hundreds of checkers in

[78] See for example the US Court of Appeal case *Beyene v. Irving Trust Co* 762 F. 2d. 4 [1985] where the misspelling of the name 'Sofan' as 'Soran' was considered a material discrepancy.
[79] No. 55 in 1995-2000 published. See also DOCDEX decision 205 which, when quoting Banking Commission Opinion R209 accepted that address St. Blass instead of St. Glass was not discrepant.
[80] See paragraph 25 entitled: Misspellings or Typing errors.
[81] "There appears to be a degree of discretion" at pg 663 of 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) 660-664 so that the document checker/bank can determine if the error brings doubt over whether the documents match the credit.
[82] See Lord Justice Evans in Court of Appeal judgement *Kredietbank Antwerp v. Midland Bank Plc* [1999] Lloyd's Rep 219: "The requirement of strict compliance is not equivalent to the test of exact literal compliance in all circumstances and as regards all documents" at para 12.
[83] This is not even the case with the description of the goods in Commercial Invoice. It must correspond with the credit, but need not be a mirror image. See ISBN para 58.

different countries may react to a specific typo. I therefore suggest that the rule should turn on whether a prudent checker, would be capable of unequivocally establishing the error as a typo not affecting the meaning of the word. The test would be objective. Again, it would be best if this rule found its home in the ISBP so:

Proposal 8: ISBP paragraph 25 should read *"A misspelling or typing error that does not affect the meaning of the word or the sentence in which it occurs, determined objectively, does not make a document discrepant".*

E. Conditions in the UCP

We have so far discussed the compliance of the presentation with the conditions of the credit. As mentioned in that section, it may be argued that the conditions in the credit are the most important component when determining a complying presentation. The reader may therefore be thinking: 'Then why was our examination of credit terms so short?'. The answer is that we do not presently have an actual credit or credit terms in front of us to analyse. Where appropriate however, we discuss possible conditions in the credit within the present section[84], 'Conditions in the UCP'. The UCP itself, lays down certain requirements which the presentation must meet in order for it to be considered compliant[85]. Requirements as to specific documents will be discussed in Chapters 3, 4 and 6. Here we are concerned with the presentation as a whole. We therefore consider the UCP position on non-documentary conditions, consistency, description of the goods, linkage, superfluous documents and documents issued by freight forwarders. We also consider the UCP provisions relating to the bank's examination regarding time for the activity but firstly turn to the place of the Strict Compliance Principle within the UCP arena.

1. Not so strict compliance?

It is argued that there are indications that the UCP is trying to offer a more relaxed rule to that of Strict Compliance. I do not intend to suggest that the principle has been completely done away with; this would be inconceivable as the whole point of the letter of credit arrangement is so that a bank checks whether or not the presentation reaches the required standard of the credit instructions and the UCP. I do intend to show however that there is a degree of discretion in the determination[86].

Firstly, despite the common law forbidding the application of the *de minimis* rule of insignificance under *Moralice (London) Ltd v. E D and F Man*[87]where a shipment of

[84] See for example Section E.2. on Non documentary Conditions.
[85] The reader must not forget that the requirements of the UCP can always be altered or excluded under Article 1 dealing with Application.
[86] See also arguments of 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 - 557
[87] [1954] 2 Lloyd's Rep 526

sugar was three bags short, the UCP provides[88] a 5% tolerance for the quantity of the goods[89]. It is suggested that in a credit where the UCP applies, the court would decide that the tolerance is allowed. We are faced here however, with the dilemma of which rule shall prevail. If in cases of conflict between the UCP rules and national law, national law should prevail[90], then surely the 5% tolerance will not be allowed. This is an impractical result for two reasons. Firstly, in the world of commodity trading at least it may be near impossible to be sure of the *exact* amount that will be shipped at the time the letter of credit is issued, due to the fact that we are talking about bulk cargo. Secondly, due to the first proposition traders and indeed bankers will be used to such a tolerance and may have a lot to say about it being denied. It can be strongly argued therefore that the court will seek to give effect to the general practice of the trade. After all, it can be argued that if the parties incorporated the UCP, and the UCP includes such tolerance, it was their intention for the credit to be governed by the rule and should thus, not be denied. Despite these arguments, one thing is for sure. The example serves to show a departure from Strict Compliance.

Secondly, the 2007 Revision also introduces sub-articles 14 (j) dealing with the address and contact details of the parties and 14 (i) dealing with dates on documents. Both also serve to show departure from Strict Compliance.

1.1 Addresses

Sub-article 14 (j) states that where a document provides the address of the beneficiary (seller) or applicant (buyer), "[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". It is logical that both the seller and the buyer, if large companies, may have more than one office in a country and so it is not uncommon to find that addresses may differ. This is a significant change in document checking as such an exception (to strict compliance)

[88] Sub-article 30(b) UCP 600
[89] Note: the credit called evidence of shipment of 500 metric tonnes of sugar in bags of 100kgs net weight. The 5 % tolerance is on the weight, not on the number of bags. Had it been on the number of bags, even under the UCP the document would be discrepant because the tolerance is not applicable if the credit stipulates the quantity in terms of number of packing units/items as per sub-article 30(b) UCP 600 Tolerance in Credit Amount, Quantity and Unit Prices.
[90] See further Section D above and footnotes accompanying section.

was not previously provided by the UCP. The question then however falls, where parties in the letter of credit are not large corporations but mere individuals, and the address is the only item that legally differentiates them from another private individual[91], will the result from the UCP still be welcome? It is suggested probably not. Also, additional contact details will be disregarded. The exception to both the address and the additional details rule is when these appear as part of the consignee or notify party on a transport document. In that case they must be the same as those stated in the credit[92]. This is all very well when the credit does state the address/contact details, but what if it does not? Is the document checker to accept the document giving no regard to the address/contact details? Would the exception apply here? Moreover, does the exception mean that the address/details must be exactly the same? For example, say the telephone number under the address in the credit included the country code, but the telephone of the notify party given in a transport document did not, would the document be rejected? It is suggested that on the interpretation of Article 14(j) as it stands, and taking into consideration the exception provided, the document would be rightly rejected. This seems a harsh conclusion for such an obvious conformity but nonetheless, the result would be such. As with many things, the introduction of a new rule will ultimately lead to several questions until the interpretation is clarified. This is perhaps also the result of the new sub-article 14 (j). We continue our investigation with sub-article 14(i) which deals with dates on the documents.

1.2. Dates

Sub-article 14 (i) provides that a document presented "may be dated prior to the issuance date of the credit, but must not be dated later than its date of presentation". It is important to note, that the ISBP requires in paragraph 13 that transport and insurance documents must be dated even if this is not required by the credit and that whether or not other documents must be dated depends on the nature and content of such. For example, it was decided in DOCDEX number 213 that weight and measure certificates need not show an issue date. It was sufficient that they showed the name

[91] See Dobάš, R. Issues and question marks in DCInsight Vol 14(1) 2008 pg. 3
[92] See however DOCDEX decision 205 where the address in an Airwaybill as 'St. Blass instead on St. Glass' was found not discrepant.

of the vessel and the date of the bill of lading to unequivocally establish relation to the shipment[93]. The key in this Article is that any document must not have a date later than the date of presentation. The reasons for this of course are obvious. Also, as pointed out by the ICC[94], the article seeks to avoid the situation where banks used to reject the documents because they contained a date later than the date of shipment

1.3 Conclusion

It is submitted that the above examples show the intention of the UCP to provide a more relaxed rule to Strict Compliance. Moreover, in the current economic climate[95] with markets particularly volatile and companies having severe financial constraints, it can be strongly argued that banks (indeed in some cases persuaded by the applicants themselves or through the acceptance of waiver[96]) will be more open to accepting documents which are not strictly compliant, so that the underlying transaction can go ahead[97].

Going back to the particulars of the UCP, a change in the consistency test between documents (which we shall come to later) and the clear cut disregard of non-documentary conditions also serve to show a stretch of the principle, and it is to this that we now turn.

2. 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

[93] See Section E. 5. below relating to issues of linkage.
[94] Commentary pg 66
[95] Two consecutive quarters of negative growth is defined as a recession in the UK. i.e. Gross Domestic Product falling below 0%. This occurred in Q3 of 2008 with growth at -0.6% and did not rise to above 0% until Q1 of 2010. Q1 of 2011 is currently at +0.5% growth. See http://www.statistics.gov.uk/cci/nugget.asp?id=192. Although better, obviously the economic climate is volatile.
[96] See Chapter 7 concerning Sub-article 16 (b) UCP 600 where the issuing bank may approach the applicant for waiver of the discrepancies at section D.1.2.
[97] See also Dolan, J. F. The strict compliance rule in a recession in DCInsight Vol. 15(4) pg 8 who suggests the same.

Paper No. 3[98] to clarify misinterpretations of the UCP. Today, the Position Paper issued under the UCP 500 rules, does not apply[99], and our only guidance is the UCP 600 itself.

If a bank's obligation is to examine a presentation[100], and a presentation by definition is a presentation of documents[101], 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* for[102]. 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 presentation [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? It is argued, without reference to law but with reference to simple logic, 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?[103] 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

[98] Commission on Banking Technique and Practice, 1 September 1994
[99] 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 we 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 provide at least persuasive effect under the UCP 600 where applicable.
[100] Article 14 (a)
[101] Article 2 UCP 600
[102] 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".
[103] Although not put in these words, the author believes 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".

others he will have to answer to the buyer[104]. 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, 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 discover[105]. 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,

[104] 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".
[105] The extent to which the issue of non-documentary credits will continue to cause problems, is at the moment debatable 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 by author) whereas Downes, P. *supra* nt 104, clearly suggests that difficult cases are likely to come before the courts where judges will "*strain*" to qualify sub-article 14(h).

although the ICC condemned the use of non-documentary conditions by banks[106] 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 goods[107]. Curiously, the clarification of the UCP 500 by the Position Paper has not been incorporated into the UCP 600 despite the fact that the provision in the former rules[108] has remained the same in the current version[109]. The explanation given by the ICC for this is that the Position Paper itself caused further confusion to practitioners, instead of clarification[110]. The position that remains therefore is that *any* non-documentary condition will be deemed not stated, and disregarded[111]. Happily, this follows DOCDEX decision 201 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 a new Banking Commission Opinion (TA 644rev), at the moment only published in DCInsight Volume 14(3). This is a perfect example where without having regard to the

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[106] Position Paper No. 3 *Supra* nt. 98. 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. *Jack* suggests (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".

[107] Banking Commission Opinion R212 Number 58 in 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." See also Banking Commission Opinion R326 Number 72 in 1995-2001.

[108] Article 13(c) UCP 500

[109] Commentary Pg 66.

[110] *Ibid.* See also *Benjamin First Supplement to seventh Edition* pg 127 para 23-236Z which suggests that it suffered from vagueness and served to introduce uncertainty (Contrasts Banking Commission Opinion R212 with R411 in 1995-2000).

[111] The rule is harsh and it is suggested will very likely to result in unfair conclusion. See Downes, P. *supra* nt.104 at pg. 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)".

accompanying material to the UCP a bank could come to a very different conclusion about the presentation made by the seller. Crucially, the query involved conditions relating to shipment, a very important area in the UCP. 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 opinion, 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 credit[112]. 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 round in a circle with no end point. On the other hand, imposing the rule that documents must not be in 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.

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

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

‘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 effect of this decision remains to be seen but clarification is absolutely necessary. The conclusion of the query 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 be in 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 in section C. 1. of this chapter. As mentioned above, 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, as we have stated 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 600[113].

[113] 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

One of the last few cases decided before the availability of the UCP 600 was the case commonly referred to as the *Oliver*[114] case. The problem the case highlighted is when a non documentary condition refers directly to the underlying contract but simultaneously calls for a document. The reader may be wondering: if the condition calls for document, then it cannot be non-documentary. This is exactly the argument followed by the commercial court.

The facts were as follows: the defendant bank issued a standby letter of credit which incorporated the UCP 500 in respect of a deferred portion of the purchase price of Oliver's company. Oliver was required to give warranties as to employees and accounts etc. and the letter of credit was conditional against "telex addressed to beneficiary's [Oliver's] bank…issued by [defendant bank] confirming the beneficiary's fulfilment of [his] commitments towards [the purchasers]". The purchasers gave no instruction to the defendant bank to issue the telex because of a dispute concerning the breach of a warranty. Oliver contended the condition was non-documentary and should be disregarded. The High Court held that the UCP 500 Article then dealing with non-documentary credits (Sub-article 13(c)) had no application because the credit did state a document to present, the telex. Notably, Mr Justice Andrew Smith also disagreed with the argument that the condition should be disregarded because it requires the bank to be concerned with the sale agreement *and* consider on this basis whether or not to issue the telex. His reasoning is that the bank is not seeking to rely upon any claims/defences that the purchasers may have and therefore the condition cannot offend sub-article 3(a) of UCP 500 which then dealt with credits v. contracts.

Two observations can be made. Firstly, the seller had put himself in a very difficult position when he agreed to the condition of the telex issued by the bank. Although the condition does not state when or if the bank is obliged to issue the telex, including in the credit any condition for presenting a document which must be provided by either

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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

[114] *Oliver v. Dubai Bank Kenya Ltd* [2007] EWHC 2165 (Comm)

the buyer (applicant) or the issuing bank, is extremely dangerous and a 'trap'[115] for the beneficiary. Secondly, although the outcome of the case is unfair, and that the bank is offending Article 3, Oliver had agreed to these conditions and it seems he should face the consequences of the agreement. If the condition was simply 'confirmation of fulfilment of commitments' without stipulating the document, then it is submitted the condition would have been considered non-documentary and disregarded.

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 guidance[116]. 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 condition. In other words, if parties are free to contract on whatever terms they wish, and one of those terms is the 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 prevailing[117]. Indeed it has already been held[118] that conditions fundamental to the commercial operation of the credit must prevail over the UCP otherwise the credit would be unworkable.

2.1 Conclusion and Proposals

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 making a decision 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

[115] See *Jack* at pg. 182 para. 8.27 and Barnes, J. *Supra* nt. 113 at pg 11. The practice is discouraged by ICC The International Standby Practices 1998 at Rule 4.10 Publication No. 590 ISBN: 9284212472
[116] See for example Todd, P. Bills of Lading and Banker's Documentary Credits 4th Edition 2007, Informa, ISBN: 978-1843116318 (hereinafter Todd) 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.
[117] See *Chitty on Contracts* 30th Edition para 12-079 and Mustill LJ in *Royal Bank of Scotland v. Cassa Di Risparmio delle Privincie Lombard* [1992] 1 Bank LR 251 at 256: "any contrary provision in the UCP must yield to the parties' expressed intention".
[118] See Singapore case *Korea Exchange Bank v. Standard Chartered Bank* [2006] 1 SLR 565.

likely purpose of Banking Commission Opinion TA 644rev. It is suggested that the clear answer the Commission intended was that:

1) data in a non- documentary condition of the credit must not conflict with data in the presentation as a whole and;
2) if a credit calls for specific conditions evidenced in specific documents, then a presentation cannot be refused on the basis that a document evidencing a specific condition is absent, when the specific document is not called for.

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. If however data in condition Z is in conflict with data in documents X or Y, then the presentation will be discrepant.

How do we reconcile this with the provision that non-documentary conditions should be disregarded? I do not believe 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 generally. If instead we approached the 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 rejection. The inclusion of non-documentary conditions were problematic because the bank would reject when it could not confirm the facts in the conditions. This problem under my approach 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.

3. Consistency

So far we have discussed comparing the documents to the requirements in the UCP and the requirements in the credit. Consistency refers to the link between the documents themselves. In other words, is the bank required to compare information in one document against another? Sub-Article 14 (d) provides that "data in [one] document…need not be identical to, but must not conflict with,…data in any other document"[119]. If for example the invoice states '21,000kgs' and the packing list shows '300 cartons' the data is not in conflict. It is not identical because the method of measurement is different, but it is not conflicting. The problem is, how is the document checker supposed to know if the 300 cartons do indeed correspond to 21,000kgs? They could correspond to 18,500kgs if the weight of each carton is not known. It has also been suggested[120] that the task to making the document checker appraise whether or not all the documents presented are not in conflict, can be extremely time consuming. Consider a presentation of 100 documents, some of which could be very complicated and detailed. If they are to be checked against the credit, the UCP and against themselves, it could take someone double the time and no doubt increase the risk of finding a discrepancy. None the less, this is the provision of the UCP as it stands.

A further example would be the use of commas instead of full stops to show decimal places. The figures will not look identical, but they will not be in conflict if the meaning of each figure can be easily established[121]. Figures on drafts[122] are a little more complicated because as a matter of principle, a difference between the amount in figures and the amount in words would be a discrepancy[123] but where there is an obvious[124] typographical error such as 'Four hundred and forty sevenTY' instead of 447, the document does not conflict[125].

The check for data must be done in the context of the credit, the document and the international standard banking practice. What this seeks to avoid is situations where

[119] "When read in context with the credit, the document itself and international standard banking practice" Sub-article 14 (d)
[120] Ulph, J. The UCP 600: documentary credits in the 21st Century J.B.L. 2007, Jun, 355-377 at 366
[121] DOCEDEX decision 221
[122] An order for the payment of money: see Oxford Dictionary of Law; Oxford University Press, 7th Edition, 2009, ISBN: 0199551243. See further Chapter 7 generally on the consequences of a complying and non-complying presentation.
[123] DOCDEX decision 226. See also ISBP para. 50 and 51 which states that "the amount in words must reflect the amount in figures".
[124] In the example given, the number 'four hundred and forty seventy' does not exist. The error is thereby obvious.
[125] See also DOCDEX decisions 215, 221, 228, 229 which all show similar examples of differences in documents which may or may not be discrepancies.

data is clearly different but is not inconsistent when read in context. For example, where a certificate of origin indicates as consignee a party different to that indicated on the bill of lading (and therefore data relating to the consignee clearly differ) it is not an inconsistency because in the normal process of international sales, it is possible that the consignee on a certificate of origin (e.g. the buyer) is not the consignee on the bill of lading (e.g. a bank to which the bill of lading has been consigned.)

Sub-Article 14 (d) also states that data in a document must also be consistent with data in the credit. At first glance, this may seem unproblematic. However, it has been pointed out[126], that if the data has to be consistent with data in 1) the document itself 2) any other stipulated document and 3) the credit, then the only data in the credit not in categories 1) and 2), must relate to a non-documentary requirement. These requirements are conditions not attached to any particular document, which Article 14 (h) states should be disregarded. If so, then how can the data in one document be inconsistent with the credit? There is nothing in the credit other than non-documentary requirements which should be disregarded. Or is it intended that before the non-documentary requirements are disregarded, it must be checked if data in a document is in conflict with such requirements? My immediate answer would be 'surely not'. But in light of the discussion we had above and Banking Commission Opinion TA 644rev, there is now a case that can be argued that all data in the credit, must not conflict with data in the documents. The conclusion is therefore the same as in the Section above.

4. Description

The issue of description of the goods in the Commercial Invoice[127] will be dealt with in Chapter 6 of this thesis. Here, we are concerned with the description of the goods in documents other than the Commercial Invoice. Sub-article 14 (e) states 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". It should be noted, that this is not a requirement that each document *must* contain a description; it is only

[126] Debattista, C. *supra* nt. 39 pg. 340-341

[127] See Art 18 for the requirement that the description in the invoice must correspond with the description in the credit.

if it does[128]. A recent Banking Commission Opinion[129] makes it clear that the UCP does not require a goods description on any document other than the invoice but it is usual and transport industry practice for documents such as the bill of lading, to contain a form of description (not least so that they be linked to the goods) and in such cases the description must not conflict with that of the credit. This has been a long established rule in common law[130] but it is also the common law which imposes a small restriction. Whereas the description of the goods may be slightly different as between the documents and the credit (apart from the invoice), the identification of the goods must be exactly the same[131]. It would be unacceptable to allow doubt about the exact goods in the transaction and so all the documents and the credit must refer to the same goods. This leads us onto the very important issue of linkage.

5. Linkage

Linkage refers to the ability of the documents presented to be linked to the goods in the underlying transaction. It is necessary for the bank to be able to identify that the documents with which it has been presented, do actually relate to the goods in the specific credit[132], otherwise, the seller could present any document to satisfy the conditions without it concerning the goods in question[133]. Perhaps because of the principle of autonomy and the absence of liability or responsibility of the bank through Article 34 concerning the genuineness of documents (discussed in Chapter 8), there is no express provision in the UCP requiring linkage[134]. It is suggested that because there is an absence for the issue of identification and linkage in the UCP, it is

[128] See ICC Commentary pg. 65. See also Banking Commission Opinion R260 No. 59 where insufficient description of the goods in the packing and weight lists were regarded as not discrepant.
[129] TA 681rev currently in DCInsight Vol 15(3) 2009 pg 22. See also DOCDEX decision 204 which makes the same point: a weight list does not have to contain a description of the goods and therefore the absence of such is not considered a discrepancy. See also previous Opinion R364 no. 228 which states the same.
[130] See for example *Midland Bank Ltd v. Seymour* [1955] 2 Lloyd's Rep. 147
[131] *Banque de l'Indochine v. J.H. Rayner Ltd* [1983] 1 Lloyd's Rep. 228; if the documents are to have any value the identification must be unequivocal.
[132] See *Banque de l'Indochine et de Suez SA v. J. H. Rayner (Mincing Lane)* [1983] Q.B. 711
[133] See for example Ulph, J The UCP 600: documentary credits in the 21st Century J.B.L. 2007, Jun, 355-377 who at 365 states: "This requirement can easily be defended because a document is of little value if the goods to which it refers cannot be readily identified and it would create a fertile ground for fraud".
[134] See *Jack* pg 195 para. 8.50. See however DOCDEX decision 213 that reasoned that weight and moisture certificates where not discrepant (contained no issuance date) *because* they contained the name of vessel and bill of lading date to link them to the relevant shipment.

the local law that will currently come into effect, which in the UK will result in the necessity of linkage. In view of this absence however, the opportunity arises to make the following suggestion as a provision to be included in the next revision of the UCP:

Proposal 9: *'Each document presented must refer either to a) the specific letter of credit b) the specific transport document or c) the specific goods.'*

What I mean by specific is the letter of credit number or bill of lading number for example. Under section c), a description of the goods is not required, but a link to those goods is. Notably, section b) was added because in the circumstances of our current paper, a transport document will always be provided as we are dealing with an international sale of goods carried by sea.

Despite no provision on linkage, the UCP do provide that where a credit requires presentation of a document other than the invoice, transport or insurance document, and does not state the issuer of the document or the contents required, then the banks will accept the document as presented if the content fulfils the function intended[135]. For example, where a credit calls for a packing list without further stipulation about specific content, then the bank will accept a packing list in any form as long as it fulfils the function of a packing list[136]. It is of course necessary, that data in this packing list does not conflict with any data in another document or in the credit as per sub-Article 14 (d). As far as the issuer of the document is concerned, this provision is also supported by DOCDEX decision number 202 where the letter of credit did list the content of the documents required (e.g. packing list to indicate weight and certificate specifying nation/year/brand of products) but did not stipulate by whom the documents must be issued. The case held that the documents presented must be accepted despite the identity of the issuing party.

[135] Sub-Article 14 (f)

[136] See DOCDEX decision 203 which held that the packing list's purpose is to show how the goods are packed, and if detailed listing of the number and content of each carton was required by the applicant (buyer) then the letter of credit should have asked for it. See also DOCDEX decision 205 where the packing list which made no reference to weight was held to be compliant and accepted as presented; and also Banking Commission Opinion R218.

6. Documents not required

Documents presented to the bank which are "not required by the credit will be disregarded and may be returned to the presenter"[137]. For example, if the seller presents a packing list, and this is not required by the credit, then it should be ignored and returned. Most importantly because if the bank continues to scrutinise it and finds any discrepancies, then it will wrongly reject the presentation due to a document which need not have been in the bundle to begin with. The seller (beneficiary) should however be aware of the decision in DOCDEX number 224. The case concerned a log list attached to the certificate of inspection which indicated that some logs were not according to the letter of credit (too short or too thin). Although the log list was not called by the credit, it was presented as an attachment to the certificate of inspection and held to be discrepant. Part of the reasoning in the specific case was because the certificate of inspection actually made reference to the log list and was thus considered to be an integral part thereof. The writer cannot help but wonder however, if the log list was not attached, and the certificate still referred to it, would the presentation be non-compliant because of the absence of the log list? It is suggested probably not; it was not called for. Therefore, the seller should be aware that presenting documents that are not required may *or may not* result in them being disregarded.

6.1 Combined documents

The UCP itself does not make any reference to whether or not combined documents are acceptable as a presentation. It falls to the ISBP to clarify that "documents listed in a credit should be presented as separate documents" at paragraph 42. There are two exceptions however. The first is within paragraph 42 itself that allows for a combination of weight and packing list to be presented, but will only be accepted if there are two original combined documents and both state weight and packing details. The second, is found in paragraph 8 of the ISBP. This allows for certifications/declarations to be contained within another document without the necessity of them being signed or dated as long as the document in which they are

[137] Sub-Article 14 (g)

contained is signed and dated by the same entity making the declaration. The panel in DOCDEX decision 211 stated that the UCP 500 neither forbade nor allowed combined documents and thus held that the place to turn to would be the credit itself and if documents were expressly called for separately, the beneficiary must present them so, otherwise combinations were allowed. It is interesting to note however that the case involved declarations and certifications. Would the decision be the same if the documents involved were different? It is suggested yes. This may seem as a surprise because the panel concluded the UCP 500 neither forbids nor allows combined documents and on this basis decided that combined documents are allowed unless expressly refused by the credit. The panel failed to note however that the two exceptions mentioned above under UCP 600, were also exceptions under the previous ISBP[138] (paragraphs 44 and 8 respectively). They were, *exceptions*; because paragraph 44 states in its opening line that "documents in a credit should be presented as separate documents". It is therefore suggested, that even under UCP 500, combined documents were not allowed. The UCP 600 also neither expressly forbids such documents but the ISBP makes it clear they are unacceptable apart from the exceptions above. The position is therefore the same but the DOCDEX panel confused its reasoning. Dangerously the decision could be used to support the use of combined documents when the position under the ISBP is clear. In this case, it is suggested that a clear statement in the UCP would be required as follows:

Proposal 10: '*Documents must be presented separately, with the exception of weight and packing lists, and certifications and declarations'.*

7. Freight Forwarders

Article 30 of the UCP 500 dealt with transport documents issued by freight forwarders. This Article has been completely deleted, and if such a document is issued, then it will fall under sub-article 14 (l) and the corresponding transport document article. Sub-Article 14 (l) states that "a transport document may be issued by any party other than [the] carrier, owner, master or charterer provided that the…document meets the requirements of articles [19-24]". In the initial drafts of

[138] ICC Publication No. 645; Paris 2003; ISBN: 9284213142

UCP 600, sub-article (l) had not been included at all, with the thinking that since the transport articles do not refer to who the issuer of the document is, then there should be no problems with freight forwarder documents, making the article redundant. However, after concerns by the transport industry that the removal of Article 30 with no replacement[139], could lead to banks simply rejecting documents issued by freight forwarders, the sub-article was added, which broadens the concept to any party issuing a transport document. It is suggested that what was intended by the ICC in removing Article 30, was that freight forwarders were, for the purposes of the UCP considered simply as carriers and not freight forwarders. What the writer means is that transport documents issued by freight forwarders in their capacity as carriers, does not make the documents freight forwarder documents, they are carrier documents. Therefore, even the exclusion of article 14 (l) would leave the same position, namely, that transport documents issued by freight forwarders would be examined under articles 19-24.[140] It has been common that this sub-article is excluded[141] presumably so that the bank does not accept documents by freight forwarders but again, as stated above, it is unlikely that the exclusion will have that effect unless it is coupled with an express provision in the letter of credit that they will not be accepted.

On the other hand, when a transport document is issued by a freight forwarder in the capacity as such, the issue becomes confusing. Here the requirements change slightly. If the credit states ‘freight forwarder’s bill of lading acceptable’ then under ISBP paragraphs 72/95/138 the bank will accept a transport document signed by the freight forwarder in the capacity of freight forwarder without the need of either identifying itself as carrier or showing the name of the carrier if signing as agent thereof. Banking Commission Opinion 470/TA 651rev[142] states that this is also the position if the letter of credit *requires* (as opposed to allows) a freight forwarder transport document.

7.1 Conclusion

Transport documents issued by freight forwarders as carriers are acceptable even where sub-article 14 (l) has been excluded. They will be determined as compliant

[139] See Commentary pg 67
[140] See Andrle, P Excluding articles: a troublesome trend DCInsight Vol 1491) 2008 pg 4 at pg 5.
[141] See DCInsight vol. 14 (2) 2008 pg 4, 7
[142] Published currently in DCInsight Vol 14(3) 2008

according to the corresponding transport article. When a transport document is issued by a freight forwarder in their capacity of forwarders and not carriers, the document will be acceptable even if it does not meet all the requirements of the transport articles (e.g. identifying the carrier) as long as the credit states ‘freight forwarders transport document acceptable’.

8. Time for Examination

Now that we have determined compliance of the presentation with the UCP, we must let the seller know how long it will take the bank to assess the presentation. Issues of payment (or refusal) are dealt with in Chapter 7, but it is convenient for the reader to know now, that the time allowed to the bank to examine the documents, is also the time within which the payment process is to begin. Sub-article 14 (b) that deals with time is therefore important both for the seller (so that he knows when the result of the determination of the presentation is available) and for the bank (so it does not breach an obligation).

Sub-article 14 (b) provides that each bank[143] “shall have a *maximum* of five banking days following the day of presentation” to determine compliance irrespective of whether or not the expiry date or last day of presentation falls within these five days. What is intended by the last part of the previous sentence is that if discrepancies are found which can be corrected and the documents returned to the seller for re-presentation, then the seller must make sure that he has left sufficient time to do this before the expiry date. The bank should not be expected to expedite examination just because the credit is about to expire and the seller would not have time to re-present[144].

The first point to make is that this period is a maximum [emphasis added]. The UCP 500 had a maximum of seven days which was reduced after the ICC national

[143] I.e. the nominated, confirming and issuing bank.
[144] See ICC Commentary pg 63. See however Wunnicke, B Sub-article 14 (b): can there be unreasonable conduct? DCInsight Vol. 15 (3) 2009 pg. 8-9 who argues that if the five day rule is applied unfairly then equity should right the wrong. For example, where a bank waits to examine on the fifth day which is past the expiry date of the credit, hoping that it will find a discrepancy and reject the documents without the possibility of re-presentation by the beneficiary.

Committees voted for the applicable number of days during the drafting of the UCP 600[145]. Agreement had also been reached to remove the phrase 'reasonable time' from the article which previously stated that the banks should examine the documents in 'reasonable time not to exceed seven days'[146]. The ICC explains[147] that this was removed due to the lack of a standard application of the concept globally. Indeed, it is suggested that even within one jurisdiction what is a reasonable time for one bank, may not be reasonable for another. Much depends on the number[148] and type of documents, the professional abilities of the bank[149], the language the documents are in[150] and the complexity of the presentation[151].

The question that arises is, with the removal of 'reasonable time' and the number of days fixed at five, where do the obligations of the bank fall when it has determined whether or not a presentation is compliant during the second banking day? In other words, does the bank have an obligation to pay the seller before the maximum fifth day if the presentation is compliant? On the one hand, sub-article 14 (b) gives the bank five days to determine the outcome of the presentation and it is argued that implying a different provision where an express provision as to time already exists, is dangerous. However, if the bank's duty is also to either pay the seller when it has decided compliance[152] or refuse to pay and give notice of such by expeditious means no later than the close of the fifth banking day[153], then it has been suggested[154] a bank which waits until the fifth day to inform the seller of its decision, despite having determined compliance earlier, could be in breach of its obligations not under Article 14, but under Articles 15 and 16 (Complying Presentation and Discrepant Documents,

[145] *Ibid* Commentary
[146] See sub-article 13 (b) UCP 500
[147] Commentary pg 63
[148] See *Seaconsar Far East Ltd. V. Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 at 41.
[149] For example, in *Bankers Trust Co. v. State Bank of India* [1991] 2 Lloyd's Rep. 443, the Court of Appeal thought that reasonable time also depended on the level of sophistication of the bank in dealing with documents and that in London, seven days (as per UCP 400 at the time) were too many. See also Todd, P Bills of Lading and Bankers' Documentary Credits Fourth Edition, 2007, Informa, London, ISBN: 9781843116318 at pg. 238 para. 9.15.
[150] See Ellinger, P Reasonable time for examination of documents [1985] J.B.L. 406 at 407-408
[151] *Jack* para. 5.42-5.43
[152] As per Article 15 (a)
[153] As per Article 16 (d)
[154] See Debattista, C. *supra* nt. 39 at 339 and Murray, C. Holloway, D. and Timson-Hunt, D. Schmitthoff's Export Trade: The law and practice of International Trade Eleventh Edition, 2007, Sweet & Maxwell, London, ISBN: 9780421893207 at pg 197. See however Todd, P. at pg 240 footnote 28 who argues that the obligation to communicate and the obligation to decide are separate and one should not be reasoned from the other.

Waiver and Notice respectively). It has also been suggested[155] that the courts would continue to impose the 'reasonable time' requirement as it seems unacceptable for a bank to "sit on its hands"[156] until the maximum time has expired. The author suggests that as the UCP stands at the moment, and without any decision from the courts directly, it is difficult to imply a 'reasonable time' for examination when the specific phrase (and hence effect) has been deleted. This does not of course mean that the result is positive, indeed the reason given by the ICC for its removal (lack of standard interpretation globally) is enough to argue that a provision is necessary otherwise we are left with a void. If we are trying to provide certainty, then the best option is to stick with five days and nothing else. However, in a commercial world where time is money, and documents move between sellers in string sales, and markets rise and fall daily, a few days, indeed a few hours, could make a very big difference to both the seller and buyer. It is therefore suggested that a reasonable test is required, but should be clearly and carefully catered for (as far as possible) either in the UCP or the national law. Notably, Banking Commission Opinion R264 Ref 63[157] which was in response to the UCP 500, stated that 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'. In the same light, we can argue that the five banking day maximum is an outer guideline, and the local law will dictate if it was unacceptable for a bank to wait until the fifth day if had already reached a decision on the second[158].

8.1. Banking Day

This is defined in Article 2 of the UCP as "a day on which a bank is regularly open at the place at which an act subject to these rules is to be performed". Without this definition, it could have been assumed that this meant Monday – Friday. Instead, it depends on the practices of the specific bank. The latter part of the definition requires that the day must not only be one on which the bank is regularly open, but that it is also a day on which the department or personnel dealing with documentary credits is

[155] See Todd, P. at 239-240
[156] *Ibid* at para. 9.21
[157] ICC Banking Commission Collected Opinions 1995 – 2001 pg. 134
[158] See also Banking Commission Opinion R534 No. 339 in Opinions 1995-2004 which supports the same.

open. For example, if a bank is regularly open on a Saturday, but does not on that day deal with documentary credits, then it is not a banking day for the purposes of the UCP. Another issue with Saturdays, is that many banks which are open will remain so for only half the day. If they do in that half day conduct documentary credit business, then Banking Commission Opinion R325 Ref 71 states that that half day will count as a whole from the seven (under UCP 600 five) banking day maximum[159].

8.2. Day of Presentation

The trigger to start the five banking day period is the day of presentation. For a seller (and of course the bank) to know exactly which is the fifth banking day, he must first know the day of presentation, and this may not be as simple as it may seem, especially when considering by what means the presentation has been made[160]. This is the day on which the documents are in fact received by the bank[161]. If this is on a day on which the documentary credit department was open in the morning, but closed when the documents were received, then this will still count as the day of presentation, unless the credit specifically requested that presentation must be made to the documentary credit department[162].

8.3. Conclusion

It is clear that a bank has a maximum of 5 days in which to determine whether or not the presentation is complying. The fact that this is a maximum, means that if it determines on the second day that the presentation is compliant, it must communicate such decision immediately. My proposal is therefore that the rule in the UCP should remain the same, but that the ISBP should provide for the precise obligations of the bank within the 5 days. For example, the ISBP may read:

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[159] See also Banking Commission Opinion R536 No. 341 in Opinions 1995-2004 which provides the same conclusion.
[160] For example, by hand or by mail.
[161] See Bridge, M. Benjamin's Sale of Goods, First Supplement to Seventh Edition, 2008, Sweet & Maxwell, London, ISBN: 978-0-421-94550-0 pg 122 para 23-236R.
[162] See ICC Banking Commission Opinion R265 Ref 64

Proposal 11: '*Where a bank has completed its assessment of the presentation and concluded whether or not it is compliant before the end of the fifth banking day, it must act on its assessment expeditiously*".

F. International standard banking practice

The third 'concept'[163] in a complying presentation refers to banking practice in general, not the ICC document ISBP No. 681. This would therefore include procedures used by banks on a day to day basis to determine compliance that have not been codified in the rules. It may seem that this could give the bank a lot of room to manoeuvre[164] and most importantly, with the seller unaware of such procedures, be particularly vague for him to determine the likelihood of his presentation being accepted. However, the concept was also part of the UCP 500 sub-article 13 (a) in the manner that whether or not the documents are compliant with the credit would be determined by international banking practice. Looking through Banking Commission Opinions and DOCDEX decisions, there seems to be no queries on this particular issue and it is argued that although vague, not only has this previously not caused any problems, document checkers are so engrossed with checking the conditions of the credit and the provisions of the UCP, that the banking practice will not be the second thing they turn to but the third. Although document checkers will most likely be familiar with banking practice, we are still faced with the problem that non-bankers will be unaware of the standards. Notably, it has been questioned how this group of people will keep up with this "moving target"[165]. Unfortunately, there is no official answer from the ICC. However, when Gary Collyer (Technical Adviser to ICC Banking Commission and Chair of the Drafting Group on the UCP 600) was interviewed by DCInsight[166] in 2008 one of the questions[167] concerned the intent of the reference to "international standard banking practice" and how to determine this without reference to something specific. The answer relates four points. Firstly, yes indeed, the ICC ISBP Publication no. 681 is not exhaustive; there are many processes that could be classified as standard banking practice which have not been included. Secondly, the DOCDEX decisions and the Banking Commission Opinions are "equally international standard banking practice". For the purpose of this thesis, nothing can make it clearer how important it is therefore, to have knowledge of these cases. Thirdly, the publication of the new ISBP is only an update to reflect the results

[163] As per Commentary pg 16.
[164] "A wild card that banks can play at their convenience"; DCInsight Vol 14(1) 2008, Reynolds, F. and Smith, D. Reports from the UCP seminars (part 2) pg. 6
[165] *Ibid*
[166] Exclusions, interpretations and the future of the UCP DCInsight Vol. 14(2) 2008 pg 3-5
[167] *Ibid* pg. 4

of UCP 600. The writer understands this to mean that at the moment, the ISBP provisions have only been deleted or added to in order to consider UCP 600. Material change has therefore not occurred. And that is why the fourth point made by Collyer, is that there is an intention to actually revise the ISBP itself which in his opinion will be "a full blown revision with agreement globally on what all of these practices are"[168]. No doubt the banking community, traders and anyone involved with the use of letters of credit will be waiting with bated breath for such a document. In a Utopia such a document with *all* the practices would be considered the banking bible. In reality, it is submitted such a document would be tremendously difficult to form and after all, a practice between India and Bangladesh, does not make it a practice between India and Russia. The document would have to be enormous to encompass such a wide range of possible practices, and of course it would have to be continuously evolving along with the economy and technology. Still, what we are to understand, is that right now[169], international standard banking practice is a fluid concept which includes the ISBP, Commission Opinions and DOCDEX decisions.

[168] *Ibid* pg. 5
[169] And it is suggested likely that in the future also.

G. Conclusion

When the revision of the UCP process began, a global survey indicated that approximately 70% of documents presented under letters of credit were being rejected on first presentation[170]. It is noteworthy, that these rejections were because of discrepancies in the documents. They were not therefore because of late presentation or wrong place of presentation. This figure is staggering and no doubt one of the very important reasons that led to the revision of the UCP. Whether or not that figure will decrease, remains to be seen with the passing of time. It is not the purpose of this thesis to determine if the situation was better under UCP 500 or not. What it has strived to do is, according to the current state of the rules, investigate and determine what the seller must do to meet the requirements, and also arm him with the knowledge of how the bank will determine if the presentation is complying. In this process, regard has to be given to documents outside of the UCP that act as case law does to statute. These include DOCDEX decisions and Commission Opinions as well as the ISBP which is a secondary, but none the less essential document to determine compliance.

In this investigation we have found that the beneficiary (seller) must present before expiry at the appropriate bank where the credit is available. He must present all the original documents called for in the credit, and these must not materially conflict with one another, or with the conditions of the credit. It is strange to think that such a lengthy investigation may be summarised in the above few lines, but after all, the key point is that if a document contains a discrepancy, presentation will be rejected. It remains to each particular case, to determine if the specific discrepancy is material enough to support rejection. The seller is therefore best advised, that despite the effort of the revision, the documents he presents must still meet a very high standard, in order to guarantee payment. It is only when slight conflicts or unacceptable conditions (such as non-documentary) are in the documents or credit, that a bank will overlook such discrepancies. Notably, the definite way he can protect himself, is by making the list and quality of documents to be presented, detailed in his sale agreement. This will be his fall back.

[170] See Introduction to UCP pg 11 of booklet, Publication No. 600

Moreover, the reader will remember the Proposals to alterations of the UCP or ISBP which were made throughout the investigation and it is therefore submitted that the following should be considered:

Proposal 1: *"Place of Expiry" must be removed from the SWIFT form*

Proposal 2: *If "Place of Expiry" is not removed from SWIFT, then the ISBP should include a provision stating the practice of banks is to ignore the requirement.*

Proposal 3: Article 17 (b): Documents covered by sub-article 17 (b) (with original signatures etc) *are accepted as originals unless they contain express statements that they are not original.*

Proposal 4: Article 17 (c): Documents covered by sub-article 17 (c) (hand written documents etc. or documents on the issuer's original stationary) *are accepted as originals unless they contain express statements that they are not original*.

Proposal 5: Sub-article 14 (a) should read 'A…bank…must examine a presentation to determine, on the basis of the documents alone, whether or not they appear to constitute a complying presentation'. *The phrase "on their face" is eliminated*, thus eliminating the possible confusion without losing the autonomy of the credit.

Proposal 6: ISBP: *If the ICC decides the phrase "on the face" is a necessary determination used by banks, then it should provide its meaning and intention in the ISBP*.

Proposal 7: ISBP: *Banks are to make a due diligent assessment of the presentation to determine its compliance.*

Proposal 8: ISBP paragraph 25 should read *'A misspelling or typing error that does not affect the meaning of the word or the sentence in which it occurs, determined objectively, does not make a document discrepant'.*

Proposal 9: Linkage: '*Each document presented must refer either to a) the specific letter of credit b) the specific transport document or c) the specific goods.'*

Proposal 10: Combined Documents: '*Documents must be presented separately, with the exception of weight and packing lists, and certifications and declarations'.*

Proposal 11: ISBP: *'Where a bank has completed its assessment of the presentation and concluded whether or not it is compliant before the end of the fifth banking day, it must act on its assessment expeditiously'.*

The issues of non-documentary conditions and consistency are particularly complicated and cannot be summarised better than saying that data in the documents must not conflict with data in the credit, and where there is a non documentary condition, the absence of the document to satisfy the condition is not a discrepancy denying payment. It is suggested that these issues would require a complete investigation of their own, and should be the subject of another individual paper.

CHAPTER 3

Documentary compliance 1 – The Bill of Lading

PART I

A. Introduction

We started this paper by looking at the general provisions in Article 14 concerning the standard of examination of documents and the accompanying provisions concerning a complying presentation. In the next four chapters we look at the requirements of the UCP as to specific documents and included in this is the possible security the transport documents can offer to the bank. We shall not examine each and every document mentioned in the UCP (that would require a book and not a paper) but instead we shall focus our investigation on the main documents that form part of 'the bundle' in a sale of goods carried by sea. These include: a bill of lading, an insurance document and a commercial invoice. The UCP 600 covers several transport documents in Articles 19 – 24 (ranging from multimodal transport documents to inland waterway documents) and although having a shipment that covers solely sea travel today is rare, we focus first on the bill of lading as an example to highlight the issue of how a bank will be able to distinguish between whether the document is a bill of lading, or is either a multimodal/charter-party bill. This is further analysed in depth in Chapter 4 which concerns Articles 19, 21 and 22. In fact, the rules covering most of the transport Articles are very much identical save for issues relating to each document's precise purpose. We shall therefore focus in this chapter on the bill of lading, in Chapter 4 the remaining transport Articles and in Chapter 6 on the insurance document and the commercial invoice. At the end of the present chapter we also take note of Article 27 which covers "Clean Transport Documents" (hence applicable to Articles 19 – 24) and Article 26 which also relates to all transport documents. Chapter 5, which is situated after the transport chapters concerns bank security offered by the transport documents. It is best thought of as part of Chapters 3 and 4, but due to the size of the analysis I believed it merited a Chapter on its own. We therefore look at this before the Insurance document and Commercial Invoice.

B. Structure of this Chapter

Unlike Chapter 2 this chapter has a slightly different structure. Instead of detailing each provision in Article 20 and highlighting problem areas as we go along, an outline of the provisions are given (which are very much workable) and issues for discussion are posed at the end. The reason being that Article 20 has already caused a great deal of questions in the trading and banking community which has led to numerous Commission Opinions being sought. They tend however to relate to the same problem areas of Article 20 and so I have grouped them into several categories and decided to highlight these directly, rather than repeating provisions of Article 20 which would only describe the requirements (thereby adding nothing to academia that one cannot read directly from the rules). I do, for reasons of completeness, and of course to provide our footing for the problem areas, provide an outline of Article 20 along with some extra information originating in the accompanying material to the UCP (DOCDEX / ISBP/ Opinions) but the core of this chapter is the discussion points. Analysing these particular problem areas will allow me to provide proposals for redrafting the UCP without the necessity of taking the reader through elements required in a bill of lading which he is likely to know already.

1. A brief reminder of the characteristics of the bill of lading

The bill of lading is a document which acknowledges that goods have been shipped on a specific vessel on route to a specific destination which includes terms concerning the carriage[1]. It is in effect evidence of the contract of carriage between the bill of lading holder, and the carrier who has signed the document. Based on this definition, the characteristics of the bill of lading[2] can be itemised as being: 1) a receipt for the goods 2) evidence of the contract of carriage and 3) a document of title[3]. Although the

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[1] See Sassoon, D. CIF and FOB contracts 4th Edition 1995, Sweet and Maxwell, ISBN: 0421513209 para. 132.

[2] At least a shipped to order bill of lading.

[3] See Boyd, S. Eder, B. Burrows, A. Foxton, D. Berry, S. and Smith, C. Scrutton on Charter-parties and Bills of Lading 21st Edition, 2008, Sweet and Maxwell, ISBN: 9780421915107 at pg 2. It should be noted that not all bills of lading will be documents of title; straight bills (i.e. non order bills) are not currently recognised as documents of title although the case of *J I MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11 has gone some way in dispelling this. Discussion of straight bills takes place in Chapter 4 at sections C and D. See also Carr, India. International Trade Law

third characteristic is not provided for in the UCP at all, it is important to mention that the bill of lading by endorsement is capable of transferring the property in the goods and upon transfer may also give the holder rights of suit and liabilities under the carriage contract as if he had been a party to it[4]. The issue of the bill of lading as a document of title and 'Delivery clauses' is however one of the points of discussion that I have mentioned in the section above on structure, that we will encounter[5].

4th Edition 2009, Routledge, ISBN: 978-0415458436 at pg. 181; *Goode* at 980-982 and *Debattista* at para. 2.2 – 2.4 who discusses the concept of document of title.

[4] Carriage of Goods by Sea Act 1992

[5] See Discussion Point D.2 below.

PART II

C. Article 20

1. What's in a name?

It is Article 20 which provides the standards that a bill of a lading must reach in order to be compliant with the UCP 600 (and thereby accepted by the bank against payment). Sub-article (a) makes it clear that what banks are to look at is not merely the title of the document, but the actual function and intent. According to ISBP paragraph 92, the key is that the bill covers port-to-port shipment, not the name in the bill. Sub-article (a) starts with "A bill of lading *however named…*" This does not only cover bills entitled "marine / ocean / port to port"[6] but will also allow for example a Congenbill to be presented as a bill of lading and not a charter-party bill of lading (which are covered by Article 22). The Congenbill has been designed by BIMCO[7] to be used with charter-parties and indeed says so on the front of the document[8]. Where however this statement has been deleted[9] then the name alone "Congenbill" will not mean that the bill is not a bill of lading[10]. Hence, document checkers and banks are to look at function, not to the name.

2. The carrier

Under sub-article 20 (a) (i) the bill of lading must "indicate the name of the carrier". It is not enough that the bill of lading has the name of the carrier in the document; the name must be identified as that *of* the carrier and in the Hong Kong case *Southland Rubber Co v Bank of China*[11] it was decided that the word 'carrier' must also be used. The Drafting Group in the Commentary[12] spend a considerable part of the analysis of Article 20 on this issue and make it clear that "indicate the name of the carrier"

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6 See ISBP Publication No. 681 para. 91.
7 The Baltic and International Maritime Council; an independent international shipping association. For more information see: www.bimco.org.
8 For a copy see: https://www.bimco.org/~/media/Documents/Document%20Samples/Bill%20of%20Ladings/CONGENBILL2007.ashx
9 If it had not been deleted then this would be an indication that the bill is subject to charter-party and thus analysed under Article 22 (if the credit allowed a charter-party bill to be presented).
10 See Banking Commission Opinion R648 in Opinions 2005 – 2008 on UCP 600 Publication No. 697.
11 [1997] 2 HKC 569
12 ICC Publication No. 680 pg 90.

essentially means identify the carrier on the document. For example, a document issued by A is not enough to identify that A is the carrier. What is needed is either "Issued by A as Carrier" or the document signed "A as carrier". It is likely therefore that the Hong Kong case above rings true of all cases dealing with the UCP 600. Indeed the Drafting Group state while a document issued by A is a document indicating the name of the carrier, unless the word "carrier" actually appears on the bill *and* is linked to A, then the document will not be accepted. As I mentioned in Section B above on structure, our discussion points will come after the outline of Article 20 but a small redraft must be made here. I suggest that if the ICC requires that the carrier is identified clearly, then the UCP should simply state this. For example, instead of requiring that a bill of lading "indicates" the name of the carrier why not state that the bill of lading must "identify the name of the carrier as carrier, and be signed by…" Surely this would relieve the Drafting Group from the necessary clarifications and presumably also the Commission from answering questions on the naming of the carrier. So my proposal for redrafting the first line of 20 (a) (i):

Proposal 1

'a. A bill of lading, however named, must appear to:

i. ***identify the name of the carrier as "carrier"*** **and be signed by:…'**

It should be noted that the ISBN at paragraph 94 does in fact clearly state that the bill of lading should be signed and indicate the name of the carrier, identified as the carrier. I do not see why this is not included directly in the UCP 600 as it seems the ISBP is not enough to emphasise the requirement when Gary Collyer (Technical Adviser to ICC Banking Commission and Chair of the Drafting Group on UCP 600) is continuously asked to clarify the position[13].

3. <u>The signature</u>

The second issue in sub-article 20 (a) (i) is the signature on the bill of lading and the identity and capacity of the person signing. It should be noted that according to

[13] See for example DCInsight, The Trade Finance Quarterly of the International Chamber of Commerce, Vol 14 No 2 April – June 2008 at pg 5.

Article 3 (Interpretations) a document may be signed by "handwriting, facsimile…[or]…perforated signature, stamp, symbol or any other means of mechanical or electronic method of authentication". The bill of lading may "be signed by the carrier…or the master or a named agent" of either. The signature must be identified as either "carrier, master [or] agent" and in the case of the agent must also indicate the capacity in which he is signing i.e. for carrier or for master.

4. <u>Shipment</u>

Sub-article 20 (a) (ii) concerns the characteristic of the bill of lading acting as a receipt. First of all it must "indicate that the goods have been shipped", not received for shipment i.e. that they are actually on board[14] and that they are "on a…named vessel at the port of loading stated in the credit". Again the word "indicate" is a little vague here. Any doubt will mean the bill is discrepant[15]. These three elements (shipped; vessel; port) may be indicated by pre-printed wording[16] or by an on board notation indicating the date on which the goods were shipped on board. If the bill of lading contains phrases such as "intended vessel" then an on board notation is required to clarify the name of the actual vessel utilised along with the date of shipment. We shall not analyse the issue of dates at the moment as it is one of our discussion points in Section D of this chapter, but it is important to note now that according to ISBP paragraph 13 all transport document must be dated, and in the case of the bill of lading, the issuance date will be deemed as the date of shipment unless there is an on board notation stating the date of shipment. To make it clear, on board notations are anything not pre-printed on the bill.

5. <u>The route</u>

Under sub-article 20 (a) (iii) the bill must "indicate shipment from the port of loading to the port of discharge stated in the credit". The lack of the UCP to clarify the

[14] Similarly received-for-shipment bills of lading are considered bad tender under a CIF contract: see *Diamond Alkali Export Corpn v Bourgeois* [1921] 3 KB 443 and *Yelo v SM Machado & Co Ltd* [1952] 1 Lloyd's Rep 183. See however Carriage of Goods by Sea Act 1992 Section 2 (b) that includes in the definition of bills of lading received for shipment bills.
[15] See Opinion R645 in 2005 – 2008 Publication No. 697
[16] As per ISBP para 97 this includes: "Shipped on board", "Shipped in apparent good order", "Laden on board", "Clean on board" or other phrases using the words "Shipped" or "On board".

requirement of "indicate" is our first Discussion point in Section D but we must mention here that any doubt as to whether the "shipment" relates to any pre-shipment recorded on the bill or to the specific port of loading to port of discharge route, will render the bill unacceptable. Again, a dated on board notation will be needed to clarify that the goods are on the specific vessel at the specific port required if the port is stated as "intended". This applies even where shipment on the named vessel is indicated by pre-printed wording.

6. The full set

Sub-article 20 (a) (iv) requires the beneficiary to present the full set of original bills of lading. If there is only one original he must present one, if there is more, he must present them all. Bills usually contain a statement as to the number of originals issued[17] and this will tell the bank how many they should expect. Paragraph 93 of the ISBP requires all bills to indicate the number of originals issued (as the reader might remember from Chapter 2[18], if the document is not an original then it is not a transport document at all) but bills need not state that they are original in order to be accepted. The purpose of this requirement I suggest is to combat fraud. As we have seen the bill is a document of title capable of giving rights to the holder and banks want to make sure that if in any event they are stuck with the goods, they at least have all the necessary documentation to make sure that they indeed have control[19].

7. Evidence of the contract of carriage

Sub-article 20 (a) (v) requires the bill to either "contain terms and conditions of the contract of carriage or make reference to another source [that does]" (i.e. short form bills). The contents of the terms shall not be examined by the banks however. It is simply to clarify that the carriage terms exist.

[17] See for example Goode, R. Commercial Law 4th Edition, 2010; Penguin, ISBN: 978-0141030227at pg 887 Fig 32.5. (hereinafter *Goode*)
[18] Section B.2.1.
[19] For further discussion see further Chapter 5 generally.

8. Charter-party bills

The last sub-article of 20 (a) clarifies the distinguishing factor between a bill of lading and a charter-party bill. That is, the bill of lading does not contain an indication that it is subject to a charter-party. The extent of the indication is crucial. As we mentioned in sub-section C.1 above, the name “Congenbill” is not enough to imply an indication that the bill is subject to charter-party. A clear statement is required such as “pursuant to charter-party dated…” (even when such statement is not qualified by the date) or “freight payable as per charter-party” (even when no charter-party actually exists) or “Charter-party bill of lading”. These all indicate that the bill is subject to charter party and would be analysed under Article 22. The reader must not forget however that, although Article 22 is similar to Article 20 and thus the end result may be the same, the credit might specifically require a bill of lading to be presented and where that bill turns out to be a charter-party bill, the presentation will be rejected and the beneficiary not paid.

9. Transhipment

The last three sub-articles of Article 20 (sub-articles (b) (c) (d)) all deal with transhipment. Sub-article (b) states the definition of transhipment (for the purpose of Article 20) as being the “unloading from one vessel and reloading to another vessel during carriage from the port of loading to the port of discharge”. Transhipment is also one of the discussion points in this Chapter and as such, I shall not go into particular detail here. However, it is convenient to know now, that the UCP allow acceptance of bills of lading which contain clauses reserving the carrier’s right to tranship[20]; allow acceptance of bills that indicate goods will or may be transhipped (as long as they are covered by one and the same bill of lading)[21]; and also allow acceptance of bills that indicate transhipment will or may occur even if this is prohibited by the credit, in cases of goods shipped in a container, trailer or LASH barge[22].

[20] UCP 600 sub-article 20 (d)
[21] UCP 600 sub-article 20 (c) (i)
[22] UCP 600 sub-article 20 (c) (ii)

D. Discussion Points

1. The Place of Receipt/Delivery v. the Port of Loading/Discharge

In our description of Article 20, we did not encounter the terms "Place of Receipt" or "Final Destination". The UCP states[23] that the bill must "indicate" shipment from the port of loading and if it does not or uses phrases such as "intended port" then an on board notation is required. I do not believe the UCP is strict enough in this respect. Not only must the bill indicate shipment but it must be unambiguous as to the port of loading. If not, it will be rejected. One of our questions is: what makes the bill ambiguous? As we mentioned several times in Section C above, the word "indicate" used in Article 20, is not appropriate to clarify the fact that "indication" is not sufficient; certainty is what is required. This is true of the identity of the carrier as it is true of the recognition of the port of loading. Imagine a bill like this:

Place of Receipt: A
Port of Loading: B

Imagine that the LC states: Port of Loading B. One may assume that since the two match, this is indication enough under Article 20 that the goods are "shipped" at Port B, and indeed a document checker may accept the document on those grounds. However, the mere existence of a place of receipt different to the port of loading causes the ambiguity which will result in a rejection[24].

A notation is necessary not only to clarify whether the port of loading is the same as that in the credit, but also whether the document is a bill of lading or a multimodal transport document. Where a credit calls for a bill of lading (i.e. only sea shipment) and the bill presented shows a place of receipt different to the port of loading, then the bill will fail on two counts. First of all it does not indicate the port of loading

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[23] Sub-article 20(a)(ii) and (a)(iii) respectively.
[24] If on the other hand the place of receipt also indicated B then there is no ambiguity and the document would be accepted (as long as there was no other indication that pre carriage has occurred). See Recommendations of the Banking Commission in respect of the requirements for an On Board Notation. Recommendation paper prepared by the ICC Commission on Banking Technique and Practice, Document number 470/1138 dated 22 April 2010 at pg 7

sufficiently or clearly enough, and secondly, cannot be examined under Article 19 (multimodal) because the LC called for a bill of lading.

The source of this confusion I suggest is the word "indicate". If what the ICC require is an unambiguous statement that the goods are shipped at the specific port[25], then why not require just that? It is common for a bill to include references to pre-shipment or even include a place of final destination; even more so when the LC application itself provides spaces to fill in terms "Place of receipt" and "Place of Delivery". It is therefore necessary to clarify the requirements of the UCP. In their current form, it is evident that they have been causing numerous problems[26] and as I suggested with the name of the carrier sub-article 20 (a) (iii) should read:

Proposal 2

'a. A bill of lading, however named, must appear to:

> **ii.** ***unambiguously identify*** **shipment from the port of loading to the port of discharge…'**

If the port is not identified as that of loading where shipment took place and linked to the vessel, then an on board notation is required. This is what the ICC intended the article to mean[27]; it is just that the meaning does not come across by the words that are currently used; hence the vast number of questions to the Commission[28].

Two important Commission Opinions must be mentioned. R644[29] involved a bill pre-printed "shipped on board in apparent good order and condition for carriage to the

[25] As stated in the Commentary at pg 91 "Unless it is evident from the bill of lading that the shipped on board statement applies to the vessel and the port of loading, the bill of lading will require…an on board notation showing the port of loading and the name of the vessel, even if the goods are loaded on the vessel named in the bill of lading."

[26] See for example Shaffer, S. Misusing the SWIFT L/C formats in DCInsight Vol. 15 No 1 January – March 2009 pg 10 and Erdemol, H. Is UCP language re on board notations sufficient? DCInsight Vol. 15 No. 4 October – December 2009 pg 10.

[27] The Drafting Group in the Commentary at pg 92 does not state the same ambiguity in the case of place of final destination v. port of discharge. They state that where the bill evidences a place of final destination different to the place of discharge in the credit, then the bill is acceptable. I assume however that if the port of discharge in the bill was not the same as in the credit, then the bill is not acceptable.

[28] The Commission has itself recognised the number of questions in its paper Recommendations of the Banking Commission in respect of the requirements for an On Board Notation. ICC Commission on Banking Technique and Practice, Document number 470/1138 dated 22 April 2010 at pg 2 para. 1.1.

[29] Opinions 2005 – 2008 Publication No. 607

port of discharge…" with the vessel and port of loading as per credit, with no pre-carriage details but *with* a place of receipt not mentioned in the credit. The party making the query also noted that different document checkers interpreted the bill in two different ways. The first accepted the bill as there is no reference to pre-carriage (despite the place of receipt reference) and thus the "shipped" must relate to the port of loading i.e. no on board notation required. The second rejected the bill as there is no evidence that the "shipped" did indeed relate to the specific port of loading on the specific vessel despite no pre-carriage details, unless an on board notation clarified the point. The Commission decided in favour of the second approach. I.e. the bill will be rejected unless there is an on board notation linking the port and vessel to the shipment[30]. If the place of receipt and port of loading were the same however, no notation is required[31].

The reasoning of the case is based not on Article 20 (how can it be, after all I have argued that the word "indicates" is not sufficient to denote the requirement of identification, and it seems the Commission agrees, although it does not admit it) but on the previous Article 23 of UCP 500 which covered bills of lading. Sub-article 23 (a) (ii) included the provision that where a bill indicated a place of receipt different to the port of loading, an on board notation is required to clarify the port and vessel. The Commission state that this requirement remains unchanged in UCP 600. My immediate response is: but it is *not* in UCP 600. How can you base the reasoning of the case on the previous rules that today are superseded by the current version? I suggest the irrationality of the reasoning need not be questioned further.

The Commission recognised that a shipping company may include in a bill of lading reference to a place of receipt different to the port of loading and to make that bill acceptable under Article 20 the document checker must be able to determine that the

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[30] In Recommendations of the Banking Commission in respect of the requirements for an On Board Notation *supra* nt 28 at pg 7-8 the Commission has stated that the position in Opinion R644 would, in light of the recommendations made, now be different. Although a document with a different port of loading and place of receipt is ambiguous, it will only be rejected if it also contained indications of pre-carriage. If, like the document in R644, it has a different place of receipt to port of loading but did not contain any other indications of pre carriage, then the document should be accepted. Our Proposal 2 works in both outcomes however as essentially checkers must feel comfortable about the place to which the phrase "shipped on board" relates.

[31] This is true if there is no reference to pre-carriage. For example, if the bill had place of receipt Hong Kong CY and place of loading "Hong Kong" the bill is acceptable as the places are deemed one and the same unless it also evidences pre-carriage.

'shipped on board statement' relates to loading on a vessel at the port of loading and not to any pre-carriage between the place of receipt and the port of loading.

The second Opinion is TA 679rev[32] which supports the Opinion above. Both are based on previous decision R648[33] but none highlights the issue of place of receipt v. port of loading better than R644 which we have already discussed. I suggest the Opinions are even more evidence of the necessity of redrafting the UCP 600 in line with my Proposal 2 above. It is clear from the Opinion that leaving the UCP as it is results in document checkers coming to different conclusions about the same presentation. Clearly if the purpose of the 'new' UCP was to reduce the number of discrepancies and thereby the number of rejections, then the redrafting is necessary. This is also another example of how important the Opinions are to interpreting the UCP. Better yet, to include in the UCP the decision directly.

2. Delivery Clauses

The reader may be thinking that surely, any clauses as per delivery, are considered terms and conditions of carriage, which, under sub-article 20 (a) (v) are not to be examined by the bank. Opinion TA 675rev[34] however questions whether they can be considered a discrepancy under UCP 600. In that case the issuing bank rejected the bill on the basis that wording just above the signature of the carrier stated: "Shipped…in apparent good order and condition…subject to all terms conditions hereof…from port of loading to port of discharge. *Where the bill of lading is non-negotiable, the carrier may give delivery of the goods to the named consignee upon reasonable proof of identity and without requiring surrender of an original bill. Where the bill of lading is negotiable, the merchant is obliged to surrender one original in exchange for the goods*". In the particular case the letter of credit contained a condition that bills which on their face indicated that goods may be

[32] Currently published in DCInsight Vol. 15 No. 3 July – September 2009 pg 22. The bill in this case not only contained a different place of receipt to port of loading but also a clause stating that where the place of receipt is inland, the "on board" wording is deemed to relate to the inland loading not the port loading. In such a case, this clause alone will render the requirement of an on board notation even if there is no other indication of pre-carriage. See Recommendations of the Banking Commission in respect of the requirements for an On Board Notation *supra* nt 28 at pg 4 and 8.
[33] *Ibid* DCInsight Vol. 15 (3)
[34] Currently only published in DCInsight Vol. 15. No. 4 October – December 2009 pg 4

released without presentation of an original bill were unacceptable. The Commission decided that despite the condition in the credit, the bank could not determine whether there was a discrepancy because the term on the bill was indeed a carriage term and thereby not examined by the bank. The bill was therefore acceptable.

I have maintained throughout this paper many times that what we are concerned with is the UCP and the UCP alone, not the common law. In this particular topic however, there is a vast difference in the UCP perspective of delivery clauses and the situation in the trade market. I agree that the term is one concerning carriage and should not be examined by the bank; but at the same time the clause brings to the forefront the issue that the UCP does not deal with documents of title and negotiability. Indeed this may be a difficult point to raise within the UCP as it is so directly related to the contract of carriage. What I find unusual however is that the impact of the clause on the bank itself can be tremendous. Let me clarify something first. In the context of the UCP, a document which is non-negotiable and which will allow delivery of the goods to the consignee without its production, is a seawaybill and examined under Article 21. So, under Article 20, we can theoretically only deal with negotiable documents (not that the UCP specifically states this[35]). If the document is negotiable, and the credit contains a condition denying delivery without production of an original, then a term which allows such delivery is in conflict with the form of the document, the credit and with common law: "a shipowner is not entitled to deliver goods to the consignee without the production of a bill of lading"[36]. If the document is negotiable and therefore likely to be sold several times back to back, firstly the consignee may not be known for certain and secondly the whole purpose of requiring the bill to get delivery is to protect that delivery is not made to the wrong party. More importantly, made to a fraudster. Where a bank, for whatever reason is stuck with the bill of lading, it wants to know that it will be the only one capable of taking delivery of the goods; hence the requirement of all originals to be presented. If it accepts a negotiable bill that allows delivery without presentation of an original bill, it is putting itself at considerable risk. I do not see how this option is better for the bank than not breaking sub-article 20 (a) (v) (not examining the carriage terms).

[35] See further on this point Chapter 4 Section D.3.
[36] Per Justice Butt in *The Stettin* (1889) L.R. 14 P.D. 142 at 147

From the point of view of the buyer; he has taken the step to expressly state that bills of lading allowing delivery without production of an original bill, are not permissible, but is still faced with accepting a document that is just that. The bank does not follow the buyer's (applicant's) instructions and follows Article 20 by not examining the terms, effectively therefore ignoring the buyer's instructions. How is the buyer then to protect himself from such a document? He must exclude completely article 20 (a) (v).

Our issue here, is what solution the UCP can offer. Excluding the sub-article is one approach, but then the bank is to look into all the carriage terms and apart from taking hours to do, it may also lead to other discrepancies which the buyer did not intend to affect the determination. Perhaps the best approach is to return to the issue of negotiable v. non negotiable documents. What I suggest, is incorporating in the UCP the notion of a negotiable document. If it is non-negotiable it is a seawaybill and delivery without the document is permissible. If it is negotiable (and required by the UCP to be so) then it *must* be presented in order to obtain the goods. In the same way that the bill of lading is required by the UCP to show that the goods are shipped, it may also require that the bill indicates that it is negotiable. If it is negotiable, it must be presented to get delivery, if it is not, then it is a seaway-bill and depending on the credit either rejected for being so (where the credit does not stipulate presentation of a seawaybill - thereby the buyer is protected) or accepted (where the credit does stipulate and the buyer gets an alternative he intended).

I understand that incorporating the ability of a bill of lading to be transferred in the UCP is difficult, but at the same time I believe the trading community will face huge problems with bills that have a delivery clause. Such a document would not be accepted by the buyer in a cash against documents situation and it should not be accepted under a letter of credit. After all, there are very few sales carried by sea that do not involve a letter of credit. Its existence is required to support exactly such a sale, an international sale.

I can imagine that alarm bells are ringing in the readers' ears with my arguments above because of one type of document which we have yet to mention. That is, the straight bill of lading. This type of bill is much like a seaway bill in the sense that it is made out to a named party and delivery will only be to that specific party. The status of such bills in English law is debatable[37] but it is possible to argue that case law confirms[38] that they are documents of title and required to be presented for delivery to take place despite not being capable of transfer (hence non – negotiable).

The arguments I was making above on negotiable documents being exclusive to Article 20 and non-negotiable being exclusive to Article 21, must therefore be slightly altered. Yes, seaway bills can only be non-negotiable[39] but bills of lading can be both negotiable and non – negotiable. Indeed, it is implied by the ISBP that the UCP also reaches the same conclusion as common law i.e. straight bills of lading are considered under Article 20 and not Article 21. Paragraphs 101-103 state that where a credit calls for a "to order" bill then a bill with a named party as consignee cannot be accepted and vice versa. The "to order" document is the negotiable bill and the named party as consignee bill is the non-negotiable straight bill. Indeed, the paragraph states directly in brackets that such a bill is a "straight bill of lading". Clearly therefore the intention is that straight bills of lading, despite not being negotiable are bills of lading and not seaway bills. How then can we protect the status of the bill of lading as the negotiable document of title necessary of presentation to take delivery? How can we excuse a bank accepting a document as a bill of lading which includes a clause permitting delivery without presentation of the bill? I submit that we cannot. Especially when one considers that English law seems to stretch as far as requiring a straight bill to be presented for delivery[40]. Similarly the Norwegian Maritime Code includes in its definition of bill of lading[41] the requirement of it being presented for delivery to take place and the opposite occurring for seaway bills[42]. I imagine however, that not all countries include in their definition of bill of lading the requirement of presentation for delivery, in particular for straight bills of lading.

[37] See for example Treitel The legal status of straight bills of lading (2003) 119 L.Q.R. 608 and Todd at pg 215.
[38] *J I MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11. For a deeper discussion of the issue see Chapter 4 Section C.1.
[39] See further Chapter 4 Part II
[40] See further *J I MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11; [2005] 2 A.C. 423, particularly at 449 (per Lord Bingham) and page 102 of the thesis, accompanied by footnote 21 of Chapter 4 which argues that the Lords in *The Rafaela S* not only decided that the specific straight bill in that case required presentation for delivery but also stated *obiter* that any straight bill should be presented for delivery to take place.
[41] Sections 206 - 207
[42] Sections 208 - 209

The UCP must provide uniform solutions and rules for acceptance of documents and it is likely that where domestic laws conflict, as in the case with regards to the status of a straight bill of lading, the UCP cannot provide a satisfactory solution. On the other hand, if its purpose is to provide uniformity, then the only solution may be that the UCP reflects the current view of the majority of the market, despite the effect on domestic law. The UCP cannot obviously directly conflict with domestic law on purpose, but its purpose is to give effect to what passes as a compliant document on the trading and banking markets. If the market accepts bills of lading with delivery clauses, then the UCP should state this i.e.

Proposal 3

Article 20: *'Bills of lading indicating that they need not be presented to the carrier in order for the applicant to take delivery are acceptable'*

If the market does not accept bills of lading with delivery clauses then Article 20 should read:

'***Bills of lading indicating that they need not be presented to the carrier in order for the applicant to take delivery are not acceptable'***.

What of the issue that document checkers are not to look at carriage terms? I suggest that where the issue will affect the status of the bill of lading on the market, and the trading community will be very uneasy about the UCP putting into question the requirement of the bill being presented for delivery, the pressure to deal with the issue in the UCP from the market will be so big that looking at one carriage term will be allowed. Notably, if the second part to my proposal is adopted, then the result of sub-article 20 (a) (v) can only mean that the bank does not look at the conditions of carriage save for anything already required by the UCP. i.e. if the UCP say look at the delivery clause, then look at it but do not examine the rest of the conditions.

3. Transhipment

The best starting point I believe is to state that where goods are shipped in a container, trailer or LASH barge, then transhipment is permitted despite a prohibition in the credit itself. If a buyer wishes to make sure that transhipment does not occur when the sale contract is for such shipment, he must exclude sub-article 20 (c) (ii) *and* state in the credit that transhipment is prohibited, otherwise it is possible for transhipment to occur under 20 (c) (i). Where the goods are not shipped in container, trailer or LASH barge, it seems that all that is needed is a prohibition of transhipment in the credit, to alter the effect of 20 (c) (i). If there is no condition in the credit concerning transhipment then the bill may indicate transhipment as long as the entire carriage is covered by one and the same bill of lading.

This means that there must only be one contract of carriage and that the carrier is undertaking the liability for the whole journey[43]. The problem is that there may be circumstances where a journey allowing transhipment (or not expressly denying transhipment) also means a separation of carriers for each part of the route. i.e. Southampton – Piraeus is performed by Carrier A and after transhipment at Piraeus the journey from Piraeus to Constantza is performed by Carrier B. If there is indeed one bill of lading issued by Carrier A from port of loading Southampton to port of discharge Constantza, then this bill must state that Carrier A is liable for the *entire* journey despite having only performed the first leg. Only then does the document cover the entire carriage[44]. Such a statement would however form part of the carriage contract which under sub-article 20 (a) (v) we have already said should not be examined. How then is the bank supposed to make sure that where a bill allows transhipment, liability of the carrier is continuous? It either does have to look at the terms of carriage, or it does not. There cannot be two opposing requirements. This conflict in the UCP leads to the conclusion that perhaps what sub-article 20 (c) (i) means is simply that the journey must be covered by one bill i.e. that the beneficiary does not present one bill for Southampton to Piraeus and a second from Piraeus to

[43] For a discussion on whether the phrase "covered by one bill of lading" means indicates shipment from port of loading to port of discharge or means liability is covered by one bill i.e. no clause disclaiming carrier liability after transhipment see: Debattista, C. The new UCP 600: changes to the tender of the seller's shipping documents under letters of credit J.B.L, 2007, Jun, 329 - 354 at pgs. 344-350
[44] See *Jack* pg 218

Southampton. Surely however this eventuality is covered by sub-article 20 (a) (iii) that requires a bill to indicate shipment from port of loading to port of discharge? Clearly the two bills I gave as example above would not satisfy the requirement.

Nonetheless, I suggest that in the current form, the UCP should be read to mean that there must be one bill and just that; nothing concerning liability. If we were to allow it, it would create a vast array of other problems not least requiring hours of reading to go through the information. This would fit into sub-article 20 (d) also. This states that clauses in bills stating that the carrier reserves the right to tranship will be disregarded. Similarly therefore under this provision, the bank is not to look at the terms of carriage. It is difficult however to see how this can be reconciled with a credit that prohibits transhipment. We said above, that a buyer may avoid bills that contain indication that goods may or will be transhipped under 20 (c) (i) if he prohibits transhipment in the credit. Is a bill indicating that transhipment will or may occur the same as a bill stating that the carrier reserves the right to tranship the same? Well yes it could be. A bill that indicates that transhipment *may* occur is a bill which reserves the carrier's right to tranship. If the buyer can prohibit transhipment under 20 (c) (i) then he can also therefore prohibit it under 20 (d). 20 (d) however does not contain the requirement that the entire carriage is to be covered by one bill. As it is, the UCP mean that a bill including a clause reserving the carrier's right to a) tranship and b) not provide one bill covering entire carriage (either in terms of liability or port-port) will be acceptable. Or is it that 20 (d) is qualified by 20 (c) and 20 (a) (iii)?

All these possibilities I believe cannot be reconciled in the UCP at this time. There are several positions of conflict, perhaps not within the UCP, but within the field of trade finance. What I understand from the sub-articles, is that the bank is in effect looking at the carriage contract. The fact that it is dealing with transhipment to start with, necessarily means that it is looking at carriage terms. How is it to act on 20 (c) (i) and determine if the goods "may" be transhipped if it does not look at the carriage terms? The whole of the transhipment section casts doubt on whether the banks should be looking at carriage terms or not. I suggest that a possible solution would be to remove the section completely. This would result in any bills presented that refer to transhipment being accepted unless the credit specifically prohibited transhipment. That would include terms reserving the right to tranship. In the same light as the place of receipt v. port of loading causes doubt over the dispatch and requires a notation, the reservation of right to tranship (although may not imply that it has or will occur) does cast doubt over whether it might occur, and on such note the document should be rejected. It is not possible to decide such a case on whether the goods have actually been transhipped because the bank may be looking at the documents before the end of the journey. Where buyers have prohibited transhipment then the seller should make sure that the document he presents 1) does not indicate transhipment will occur and 2) does not allow transhipment to occur. Providing a contract of carriage that allows transhipment is in breach of the sale contract. The buyer wants to know that he has in his hands a document that fulfils the agreed requirements and those requirements are reflected in the credit. No transhipment means no possibility of transhipment either.

Does my approach mean I am looking at the carriage contract? Yes it does but this alters 20 (a) (v) anyway. If the buyer instructs the bank to confirm that no transhipment will or may occur, then it is directly modifying (a) (v) and requiring the bank to look at the specific clause in the carriage contract. Yes the bank must follow the UCP and look at documents on their face but as we argued in Chapter 2, this obligation relates to looking solely at the documents and not to the underlying sale transaction. Of course it does not mean that the bank should look at all the terms on the back of a bill of lading, but when it instructed to look at something specific, I do not see why it should not be obligated to do so. On this basis:

Proposal 4:

The transhipment sub-articles should be removed from Article 20

4. <u>Dates</u>

As we discussed in Section C.4 above, according to ISBP paragraph 13 a transport document must be dated. It does not state that a document must have an issuance date, just that it must be dated. In the scope of bills of lading, the issuance date is considered the shipment date, unless there is an on board notation declaring the shipment date. The present discussion point concerns bills of lading that have an on board notation date, but no issuance date. Are they acceptable? Opinion R659[45] states that if there is no field on the document requiring an issuance date, then it is acceptable. Immediately one asks: but what if there is a field and it is empty? For example, if there was a box on the document stating "Issuance date…" which was not filled in, then is the document acceptable? It can be inferred from the Opinion that it would not be acceptable. If the basis for accepting the document in Opinion R659 was that the bill had no field necessary to fill in an issuance date, then presumably having a field but being empty, would mean the document is unacceptable, otherwise why centre the requirement on the existence of a field? The problem is that in effect both documents lack the same information. It is just that one had no field and the other did. How can it be justifiable to accept one and reject the other? What is the basis of rejecting the second? According to the Opinion the basis is that there is a field not filled in. But there may be many fields not filled in on the bill of lading. Surely they cannot all be reasons for rejecting.

So, we agree that this reason is not sufficient. It must be something more; something linked to the non-existence of the issuance date. But this of course means that if the reason for rejection is due to the non-existence of the issuance date, this also rings true of a bill with no field to begin with. The reader can see that we are going round in circles. The point I am trying to make, is that the reasoning is logically flawed. A document either requires an issuance date or does not; it cannot depend on a box on the bill. Notably, "the mere fact that a document has a place for a signature does not necessarily mean that it is to be signed in all circumstances"[46]. Similarly the mere fact a document has a place for an issuance date, may not mean it needs to be filled in all circumstances. The existence alone of the place is of no consequence. The requirement is down to the UCP or the credit. If either require an issuance date, then an issuance date must be present. As it stands, the UCP does not require an issuance date (if it did, then the Commission would have declared the document in R659 unacceptable). Notably, where the ICC required an issuance date, it *has* been clearly stated in the UCP: Article 23 dealing with air transport requires under sub-article (a) (iii) the document to indicate a date of issuance. Therefore, if the ICC had intended an

[45] Banking Commission Opinions 2005 – 2008 Publication No. 697
[46] Opinion R274 Ref 128 in 1995 - 2000

issuance date to be required, it would have stated so directly in the UCP. As it stands, the reasoning in the Opinion only serves to cause confusion.

My proposal in this context is for clarification in the ISBP, not the UCP. The UCP in their current form contain no conflict. It is the Opinion which has caused the problem because it implies that where a document has a field for an issuance date, then it must be filled in or it will be unacceptable. However, for the reasons stated above, this cannot be reconciled with accepting a document with no field to begin with. Paragraph 13 of the ISBP should be redrafted to read:

Proposal 5

'Drafts, transport documents and insurance documents must be dated even if a credit does not expressly so require. *With the exception of documents examined under Article 23, transport documents need not indicate an issuance date if they contain a dated on board notation*'.

This proposal reaches the result intended by the ICC. That all documents are dated, but that the requirement may be satisfied via an on board notation. After all, it is *that* date which is crucial to the UCP. That date prevails as the date of shipment and thus determines the dates for presentation, the possibility of late shipment and the maturity date of a draft if necessary[47].

[47] See Shanlun, W. Whether the issuance date must be indicated in a B/L. in DCInsight Vol. 14 No. 3 July – September 2008 pg 11

PART III

E. Clean transport documents

It is very likely that during contract negotiations, the buyer will demand that there is an express clause in the sale contract that stipulates that the seller must tender a clean transport document[48]. 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 their 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 'claused'.

1. The sections of Article 27

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 claused. For example, if the transport document had a notation stating "99 containers not 100" then the bill will not be claused. 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 actually be deemed as clean. A necessary verification so

[48] 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.

that document checkers do not reject documents on the basis that they are not formally stated as "clean". Similarly, paragraph 107 of the ISBP[49] also focuses 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 claused unless it bears a notation declaring the goods/packaging to be defective.

2. The issue of time

The concept of "clean" and "claused" transport documents, particularly bills of lading, has been settled in English common law for a while[50] 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 shipment[51]. 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 or after shipment. This is a serious problem in the UCP[52] 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 buyer[53], 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 loss[54]) 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

[49] ICC Publication N. 681. See also paragraph 127 which states the same for Charter-party bills of lading.

[50] See in particular *British Imex Industries Ibid* 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.

[51] See *M Golodetz Ibid* at paragraph 4.97ff. Case involved a bill claused 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.

[52] Also identified by several academics including Todd, P. Bills of Lading and Banker's Documentary Credits 4th Edition, 2007, Informa, ISBN: 9781843116318 (hereinafter Todd) at pg 229; *Jack* 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.

[53] See Debattista, C. Bills of Lading in Export Trade 3rd Edition; 2008; Tottel Publishing, 978-1845923154 (*Debattista*) particularly at pgs 83 – 104.

[54] *Goode* at pgs. 941-943

reconciled and it is unacceptable for the rules to reject a document which on the market could not be rejected. I therefore suggest that the notations which the bank should be concerned with are only those at the time of shipment. The article should read:

Proposal 6

'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 Commentary[55] 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.

[55] Publication No. 680 at pg 127

PART IV

F. Article 26

Now that we have finished with the analysis of Article 20 and discussed proposals for Article 27, I wish, for reasons of completeness to also talk briefly about Article 26. This Article is a combination of miscellaneous provisions connected to all transport documents and covers cargo on deck, phrases such as "shipper's load" and also references to additional charges to freight. We take each in turn to clarify the position under UCP 600.

1. On deck

Sub-article 26 (a) states that "a transport document must not indicate that goods are or will be loaded on deck". Before we analyse the meaning of "indicates" let us take a note of English law[56]. Under Article I (c) of the Hague Visby Rules incorporated into English law by the Carriage of Goods by Sea Act 1971, the definition of goods covered by the Act does not include goods stated as being and are in fact so, carried on deck. The parties are free to contract on any terms or conditions they wish relating to the damage of such cargo. The reason is that the cargo is exposed to a higher risk due to the fact that it is stowed on deck. Similarly, the ICC wishes to protect the bank (who may end up with the goods in cases where the money has not been retrieved from the applicant) and the buyers so that this higher risk of damage is not acceptable. Where the buyer knows that the cargo will, or is likely to be carried on deck, then he must either exclude sub-article 26 (a) or amend it. Notably, the Article does not prohibit the document containing a liberty to stow on deck i.e. that the cargo *may* be carried on deck. What the UCP is concerned with is if the document indicates that the cargo *has or will be* stowed on deck.

At this point we return to the interpretation of the word "indicates". Whereas the Hague – Visby rules eliminate cargo on deck if it is stated to be so *and* it is in fact carried on deck, the UCP imply that the statement is enough i.e. the interpretation of the "indicate" does not, I submit, mean that the cargo *is* in fact carried on deck

[56] For further information see Wilson, J. F. Carriage of Goods by Sea 7th Edition, 2010, Pearson Longman, ISBN: 978-1408218939 at pgs. 178 - 181

(although it is likely to be) but that if it states it has or will be, then this is enough to reject the document. It is likely that the reason for this is that the bank / applicant have no way at this stage of ascertaining whether or not the cargo was in fact carried on deck. All they have to go on is the information on the transport document and if this shows that the cargo is carried on deck, then this is reason enough to reject the transport document. Presumably the use of the word “indicates” instead of “states” means that an express statement that the goods are on deck is not required in order for the document to be rejected. Indication in any form is enough.

2. Shipper’s load

Sub-article 26 (b) provides that a transport document containing clauses such as “shipper’s load or count” or “said by shipper to contain” is acceptable. This is in reference to many transport documents containing phrases such as “particulars declared by shipper”[57] which may in the buyers mind bring into doubt firstly whether the goods he has contracted for have actually been shipped and secondly what liability the carrier is seeking to avoid by virtue of these phrases. The purpose of allowing the phrases under the UCP is that, as mentioned, most transport documents will contain on their face a pre printed phrase similar to those above. It is therefore inevitable that at some point any given bank will come across such a document and the frequency of this must mean that the documents cannot be rejected merely because of a pre printed phrase. Such documents are therefore acceptable under sub-article 26 (b).

3. Additional charges to freight

The last sub-article of 26 states that “a transport document may bear a reference, by stamp or otherwise, to charges additional to freight”. Before we turn to the additional charges, it is important to note that under ISBP paragraph 111 (relating to bills of lading, 131 relating to charter party bills of lading and 87 relating to multimodal documents) if a credit requires a bill to show that freight has been paid or is payable at destination, then the bill must be marked accordingly i.e. stamped freight paid. If it is not, it fails the conditions of the credit and is not compliant. The instructions to the

[57] See for example Combinconbill 1995

bank concerning whether or not freight is to be pre-paid or collected must be specific[58].

Turning to costs additional to freight, the ISBP continues to note that if a credit states that additional costs to freight are not permissible, then a transport document will only be compliant if it does not indicate that costs additional to freight have or will be incurred. The reader may be thinking that this is the opposite result of Article 26. Two points must be made. Firstly, that the ISBP starts the paragraph with "If the credit states" i.e. where the credit has amended sub-article 26 (c) and does not allow bills indicating additional costs, then a bill indicating there has or will be such cost is not compliant with the terms of the credit. Secondly, sub-article 26 (c) says "*may* bear a reference" i.e. it is not the case that all documents which *do* have such a reference are acceptable. If they do, but the credit specifically requires a document without such costs, then it is non compliant by reason of not meeting the conditions of credit which have amended sub-article 26 (c).

The article is not the core of the UCP nor is it by any means high in the priority list for document checkers; but it is necessary to mention as the effect of not following the rules would mean that documents can pass the requirements of the transport Articles i.e. Article 20, but not satisfy Article 26 and thus be rejected.

[58] ISBP paragraph 112

PART V

G. Conclusion

It is inevitable that a seller of goods carried by sea will under a letter of credit be required to present a transport document. The most important information for the buyer is contained in that document and he will be extremely impatient to examine that his goods are as intended, before he pays for them. The bank will also want a document which it will feel secure with in the case that something goes wrong and it ends up with the goods as collateral. It is vital therefore that 1) the UCP rules concerning bills of lading, and all transport documents are clear and 2) that the seller and buyer have the confidence that any bank they choose to deal with will enforce the rules in the same way.

This chapter not only described the requirements of Article 20, but highlighted specific problem areas. The result of these highlights was again a list of proposals. I do not deny that some are very bold, especially concerning transhipment, but what I have tried to do is find the best result possible. I am sure that not all the proposals will meet with approval, much less will they solve each problem completely. But they are intended to make the UCP clearer and help the bank make more secure decisions about rejecting/accepting the documents.

The issue of how far to look into the contract of carriage is one that must be debated more fully in a separate paper. It is again a double edged sword. On the one hand it is a vital element of the sale agreement, on the other it is so specialised that it is impossible for the bank to determine compliance in every single aspect of carriage. None the less I have made my suggestions and these will continue in Chapter 4 concerning the carriage question. My proposals in this chapter are therefore:

Proposal 1: Article 20:

‘a. A bill of lading, however named, must appear to:

iii. *identify the name of the carrier as "carrier"* and be signed by:…’

Proposal 2: Article 20:

‘a. A bill of lading, however named, must appear to:

iv. *unambiguously identify* shipment from the port of loading to the port of discharge…'

Proposal 3

Article 20: '*Bills of lading indicating that they need not be presented to the carrier in order for the applicant to take delivery are acceptable'*

Or:

'*Bills of lading indicating that they need not be presented to the carrier in order for the applicant to take delivery are not acceptable'*.

It is my suggestion that perhaps the best solution in this proposal is the second alternative. It is best to make clear that "order" bills of lading cannot contain clauses permitting delivery without the surrender of a bill. The whole purpose of the buyer requesting a bill of lading and not a seaway bill is for the goods to be sold whilst in transit. Delivery to the correct buyer can only therefore be guaranteed when a bill is surrendered. The security this feature offers, which we shall discuss in Chapter 5, is invaluable. If only to protect the status of the bill of lading, delivery clauses should not be acceptable. What of the straight bill, one wonders? Even if we accept that straight bills with express provisions requiring presentation for delivery to take place must be surrendered, or indeed that 'plain' straight bills must be presented for the delivery of goods, we can still argue that straight bills with delivery clauses do the exact opposite. They make it clear that presentation is not necessary. Therefore, where a 'plain' straight bill can only be acceptable under Article 20 if it does not contain a delivery clause (because presentation of this bill is required by law), a straight bill with a delivery clause can only be accepted under Article 21. There is a mix of opinion here, my own included. One argument is that for life to be easy, *all* straight bills (no matter absence of delivery clauses) should be treated, for the purposes of the UCP as seaway bills. There are some fundamental characteristics of an "order" bill of lading that simply will not allow it to be anything other than a document which must be presented to the carrier in order for delivery to take place. On the other hand, straight bills without a delivery clause may well be accepted under Article 20 but straight bills with express clauses permitting delivery without the surrender of the bills must, under the UCP, be treated a seaway bills. What we are left with in Article 20 therefore is "to order" bills of lading and straight bills without express clauses permitting delivery to a named consignee. To protect the gravity of such documents, the second alternative in my proposal can be the only logical conclusion. It will thus be Article 21 which covers the ‘traditional’ seaway bill and straight bills with delivery clauses.

Proposal 4:

The transhipment sub-articles should be removed from Article 20

Proposal 5: ISBN paragraph 13:

‘Drafts, transport documents and insurance documents must be dated even if a credit does not expressly so require. *With the exception of documents examined under Article 23, transport documents need not indicate an issuance date if they contain a dated on board notation*’.

Proposal 6: Article 27:

‘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’*.

CHAPTER 4

Documentary Compliance 2 – The Sea-waybill, the Charter-party Bill of Lading and the Multimodal Transport Document

PART I

A. Introduction

Articles 19, 21 and 22 of the UCP 600 concern multimodal transport documents, seaway-bills and charter-party bills of lading respectively. In this next chapter we shall examine all three articles but again, much like in Chapter 3 we follow a structure whereby a short description of each article is presented and then discussion points follow. The reason I have grouped these articles together is that they are almost identical to each other (and to Article 20 concerning the bill of lading) save for the idiosyncratic features of each type of document. Hence the principles and provisions contained in Article 20 are applied to Article 19, *mutatis mutandis*. A second reason for grouping these articles together is that they shall in essence be analysed as alternatives to the bill of lading. In other words, we consider whether a transport document presented, irrespective of its name, is a port-port bill of lading and if not, then whether it is a sea-waybill, a charter-party bill of lading or a multimodal transport document.

PART II

Seaway-bills

B. Introduction

It is Article 21 in the UCP 600 that deals with seaway-bills and is completely identical to Article 20 save for the words "non-negotiable seaway-bill" where "bill of lading" is. I have mixed opinions about this Article, mostly due to the fact that it is identical to Article 20. If the UCP does not in essence (and substance) distinguish between the two documents, then what stops a bank accepting a seaway-bill (which under UCP has the same requirements as a bill of lading) as a bill of lading under Article 20. The seaway-bill covers port-port shipment, needs to be signed by the same parties as the bill of lading, and must show the same details as to loading and discharge. They are, therefore, the same in UCP eyes. The separation of the two documents in common law which is that the bill of lading is negotiable and a document of title whereas the seaway-bill is not, is not present in the UCP. So, I return to my question, if the two documents under UCP are identical, then what stops a bank accepting a seaway-bill instead of a bill of lading? Especially if the ICC in this revision of the UCP has gone so far as to stress that the transport articles concern substance and not form i.e. we do not look at the name of the document but to the substance, hence "however named"[1].

The issue that arises is of course that where the buyer requires a bill of lading, precisely due to the fact that it is a document of title, then accepting a seaway-bill will clearly be unacceptable. The Drafting group itself has commented[2] that it had initially considered forming only one article to deal with both documents due to the fact that they are identical rules. It was the ICC national committees which objected on the basis that it was unwise to combine two documents where one is not negotiable and the other may be. This is why Article 21 is named "*Non-negotiable* seaway-bill" and not simply "seaway-bill". The immediate question that arises is what makes a bank determine that a document is one to be examined under Article 21 as opposed to

[1] See for example Article 20 (a) and ISBP paragraph 92.
[2] Commentary pg. 97

Article 20? This distinction will not directly involve whether or not the document will be rejected due to not fulfilling the requirements of UCP (if the requirements of both articles are the same then no matter the document form the result of examination will be the same under Article 20 as under Article 21) but the document may not fulfil the requirements of the credit itself or of international standard banking practice. The former may for example require a bill of lading and if a seaway-bill is presented it may be wrongly accepted by a bank because it cannot distinguish between the two; the latter may imply that despite no distinction in the UCP a seaway-bill can never be accepted in lieu of a bill of lading because they are non-negotiable and not a document of title. Clearly, money turns on a bank distinguishing correctly between the two documents. In this section therefore I shall be looking at two things, first of all, how to distinguish between a bill of lading and a seaway-bill, including issues relating to straight bills of lading and the second is to question whether we are looking to substance or to form in the UCP.

C. The requirements of Article 21

As already mentioned Article 21 is identical to Article 20. Therefore a non negotiable seaway-bill must however named appear to:

1) "Indicate the name of the carrier"[3];
2) "Be signed by, [and signature identified as,] the carrier, master or named agent" thereof[4];
3) "Indicate that the goods have been shipped on board a named vessel"[5];
4) "Indicate shipment from port of loading to port of discharge"[6];
5) "Contain no indication that it is subject to charter-party"[7].

The article also contains the same rules concerning transhipment, originality and full set as well as the need of on board notations to clarify "intended" vessels or ports[8].

The discussion sections that follow, all serve to show that the dividing line between seaway-bill and bill of lading under UCP is almost non-existent. Yes the dividing line in common law is difficult and confusing, but under the UCP it is, I submit, much more questionable. It is easier for us to recognise the non-existence of distinguishing factors in the UCP between bills of lading and seaway-bills if we first take a quick look at the domestic law.

[3] For issues relating to the use of the word "indicate" see Part II, C. Section 2 in Chapter 3 which discusses the necessity of identifying the name of the carrier. Note that part of the argument in that section was based on ISBP paragraph 94 which requires the carrier to be identified. A corresponding paragraph dealing with seaway-bills does not exist in the ISBP (nor do any paragraphs concerning seaway-bills) which may lead to different conclusions. Either that the carrier need not be identified (which I submit is not intended by the ICC if you consider the Drafting Group's discussion in the Commentary at pg 98) or that the paragraphs dealing with bills of lading also relate to seaway-bills because the articles are identical. Clearly there are issues with such a proposition as these paragraphs *do not* and *cannot* cover seaway-bills because the two documents are entirely separate and thus require separate paragraphs reflecting the separate articles. However, it may be argued that just as the carrier needs to be identified in a bill of lading, due to the similarities of the documents, so should the carrier be required to be identified in a seaway-bill.
[4] Sub-article 21 (a) (i)
[5] Sub-article 21 (a) (ii)
[6] Sub-article 21 (a) (iii)
[7] Sub-article 21 (a) (vi)
[8] Sub-articles 21 (b)/(c), (a) (iv) and (a) (ii)/(iii) respectively.

1. Common Law

The Carriage of Goods by Sea Act 1971 (COGSA '71) by virtue of the Hague Rules as amended by the Brussels Protocol 1998 in its schedule, gives the shipper the right to demand from the carrier a bill of lading showing a number of details[9]. The Carriage of Goods by Sea Act 1992 (COGSA '92) goes on to essentially define the bill of lading and distinguish it from a seaway bill under sub-sections 1 (2) and 1 (3). A bill of lading must be capable of transfer[10]. A seaway-bill is not a bill of lading[11] but is a receipt for the goods, evidence of the contract of carriage[12] and identifies a person to whom delivery of the goods must be made[13]. What these sections reflect, is that the bill of lading is a negotiable[14] document of title, whereas the seaway bill is not. Goods will be delivered to the lawful holder of the bill of lading upon presentation of the document as opposed to the consignee on the seaway bill (without the need of presenting the document to the carrier). Bills of lading are commonly made out "to order" and this is the characteristic that makes them negotiable i.e. the cargo will be delivered to the order of the shipper. If there is a named consignee, then it is a straight bill of lading which is not negotiable. We shall not go into detail here about the division of straight bills and order bills as the UCP do not distinguish between these[15]; they are all examined under Article 20 but it is essential to note some confusion

[9] There is no need for us to go into any details here but see Article III sub-section 3 for further information.
[10] COGSA 1992 s1(2)(a)
[11] *Ibid* s1(3)
[12] *Ibid* s1(3)(a)
[13] *Ibid* s1(3)(b)
[14] Note that in effect what 'negotiable' in this sense means is in essence transferable, not negotiable in the sense that a bill of exchange is negotiable i.e. the transferor cannot transfer better title than he has. See further Pejovic, C. Documents of Title in carriage of goods by sea: present status and possible future directions J.B.L. 2001, Sep, 461 - 488 in particular pgs 463-467 and Lord Hobhouse in *Hamburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12 at [132] and *Trafigura v MSG* [2007] E.W.H.C. 944 (Comm) at [65]. For details on the transfer of title see *Gurney v Behrend* (1854) 3 El. & Bl. 622, 633-634 [118 E.R.1275, 1279]; *Kum v Wah Tat Bank* [1971] 1 Lloyd's Rep. 439 (P.C.) where Lord Devlin stated at 446 that when 'negotiable' is used in relation to bills of lading, this merely means 'transferable'; *J I MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11.
[15] The ISBP does however make a certain differentiation in paragraphs 101- 103. Perhaps the reason the ICC does not divide the bills of lading is because they are none the less all documents of title and it is this feature that distinguishes both the order bill of lading and the straight bill of lading from the seaway-bill.

surrounding the status of straight bills in UK law[16] to give a basis for our discussion of the UCP in this Chapter.

Above we stated that COGSA '92 required bills of lading to be capable of transfer. As a straight bill is incapable of transfer it is thus considered a seaway bill under this Act[17]. Under COGSA '71 however the position is different[18]. The House of Lords decision in *The Rafaela S*[19] has held that a straight bill is considered a bill of lading and not a seaway bill for the purposes of the 1971 Act and is a document of title since its rights are transferred by delivery, albeit only once[20]. To add slightly more confusion, the issue of whether or not straight bills must be presented to obtain delivery is still a moot point. The issue in *The Rafaela S* was whether the Hague – Visby Rules applied, through COGSA '71 to a straight bill of lading but the judgment also contains *obiter dictum* concerning presentation. The bill in question contained an attestation clause requiring presentation before delivery could be made. Upon this basis, the Lords decided that presentation of *this* and any other straight bills with such a clause, was necessary for delivery to be made. Thus, unlike seaway bills, delivery could not be made by mere identification of the consignee. However, the Lords did discuss whether straight bills without such clauses would also demand presentation and concluded that they did[21]. As the case did not involve such a bill, it is strongly arguable that the statements were *obiter* but none the less very persuasive as Lord Bingham made it clear[22] that were such a case to appear in front of him, he would

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[16] For a general introduction see Treitel, G. The Legal Status of Straight Bills of Lading (2003) 119 LQR 608

[17] S1(2)(a) COGSA 1992 requires a bill of lading to be capable of transfer. Straight bills on the other hand are transferred only once, to the name consignee. See also Halsbury's Laws of England, Carriage and Carriers, Volume 7 (2008) 5th Edition paragraph 364 which states at footnote 3 that it was clearly intended by the draftsmen of the Act that straight bills be assimilated to sea waybills: Rights of Suit in respect of Carriage of Goods by Sea, Law Comm No 196 at 2.5 and 4.12.

[18] See *Debattista* at paragraph 2.35 who discusses whether this apparent conflict has any substantive effect other than legislative inconsistency.

[19] *J I MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] 2 A.C. 423; [2005] UKHL 11.

[20] Note that again this is for the purposes of the 1971 Act and not for the 1992 Act: *Ibid* at 450. See also *Goode* pg 982

[21] Lord Bingham at 449 states "like Rix LJ in para 145 of his judgment, at p 752, (CA judgment at [2003] EWCA Civ. 556) I would, if it were necessary to do so, hold that production of the bill is a necessary precondition of requiring delivery even where there is no express provision to that effect". The "if it were necessary to do so" indicates the comment is *obiter*.

[22] *Ibid*

decide that a straight bill without an attestation clause required presentation[23]. Similarly, Lord Steyn stated that the Singaporean decision of *Voss v APL Co Pte Ltd*[24] which decided presentation of a straight bill was a requirement for the delivery of the cargo, was right. It is therefore strongly arguable, that straight bills of lading differ from order bills because they are not negotiable, but also differ from seaway bills because presentation is nonetheless required.

Much of the discussion[25] in the case also involved the form of the document as opposed to the substance e.g. if the document is titled "bill of lading" then it cannot intend to be anything other than that; it cannot be intended to be a seaway bill[26]. Conversely, a document marked "non-negotiable" has been held not to be a document of title despite having all the necessary characteristics of the status[27] due to its title. As we shall see, the UCP has a very different approach to distinguishing between documents based on their name. Whether or not straight bills of lading are indeed documents of title or deserve to be so is an issue entirely outside the scope of the present thesis, but now that the reader has a background reminder of English Law, we can continue more confidently in what rules the UCP offer and whether they are satisfactory.

Our further discussion points therefore question how the UCP deals with the division of Articles 20 and 21 i.e. the division of the bill of lading from the seaway-bill. This is important because the credit may call for one or the other and where the bank cannot determine which document it holds in its hands, it cannot determine if the criteria of the credit have been met. It is worthwhile noting that I consider the conditions of the credit being met, not the conditions of the UCP. The reason being that as we have said Articles 20 and 21 are in substance identical and so the criteria of a seaway bill under Article 21 are the same criteria for a bill of lading under Article 20. If the document were to fail the criteria of Article 21 it would also fail those of Article 20.

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[23] Whether a straight bill which does not contain an attestation clause but does contain an express statement that delivery can be made against identification only, would also be covered by Lord Bingham's conclusion is doubtful. Presumably here the court would want to give effect to the parties' intention and thus conclude that presentation was not necessary and the document was in fact but not form, a seaway bill.
[24] [2002] 2 Lloyd's Rep 707
[25] See e.g. Lord Bingham at [2005] 2 A.C. 423 at [5]
[26] See also *Voss v APL Co Pte Ltd* [2002] 2 Lloyd's Rep 707 at [48]
[27] *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, 445

D. Discussion Points

1. Subject to charter-party

A seaway-bill which contains an indication that it is subject to a charter-party is rejected under Article 21. The question is, whether this document is rejected under Article 21 and simply fails the requirements for presentation or whether the document becomes one that will be examined under Article 22? So, if a credit calls for a seaway-bill but allows presentation of a charter-party bill of lading and a seaway-bill is presented that includes the phrase "freight payable as per charter-party" which as we shall see[28] is a phrase that the ICC has decided does indicate the document is subject to charter-party[29], can it be examined under Article 22? Ironically, this confuses further the dividing line between seaway-bill and bill of lading. Article 22 concerns "charter-party *bills of lading*" but where the UCP does not distinguish between seaway-bill and bill of lading satisfactorily, can it distinguish between seaway-bill and charter-party bill of lading? I suggest not. If we recognise the possibility of a seaway-bill being accepted as a bill of lading under UCP, then we must also recognise the possibility that that seaway-bill may be subject to charter-party and thus a charter-party bill of lading under UCP. What these examples show, is that the possibilities under UCP are so confused that clearly, some sort of distinguishing factor is necessary. Be that the notion of negotiable document or the characteristics of a document of title.

2. The name

Perhaps the solution to the issues stated above is to be found in the title of the article. It is termed "Non negotiable seaway-bill" and not simply "Seaway-bill". My immediate question is what is the consequence of this naming? Does it mean that the document must be stated as "non-negotiable"? Or does it mean that the document must *be* non-negotiable? And of course one wonders how the document checker is expected to know what is negotiable and what is not. Not least because such details may be contained in the carriage terms which he is not supposed to examine under

[28] See below Part III Section H.1.
[29] Opinion R 647 in 2005 - 2008

sub-article 21 (a) (v). The ICC have stated[30] that the purpose of dividing Articles 20 and 21 was to emphasise the fact that documents under 21 are non negotiable and contain in their title that they are so, whereas documents under 20 are likely to be (although not always are) negotiable. My query is: how is the document checker supposed to know that this is the distinguishing factor? Is it by the inclusion of "non-negotiable" in the title of Article 21? In the circumstances of the UCP this is difficult to argue as the ICC has continuously stressed that the title of the document is not the issue. The issue is the contents hence "however named". How then can they now argue that the *only* distinguishing factor between Articles 20 and 21 is that 21 contains in the title and most likely in the title of the document that it is "non-negotiable"?

Let me emphasise the fact that I do not intend to argue that seaway-bills are negotiable, or that they are the exact same thing as bills of lading. What I am arguing however is that the UCP does in effect treat them as the same thing. So much so that the ICC had thought about combining the two articles but did not do so because of the negotiable nature of the bill of lading[31]. The presence however in the title of Article 21 of "non-negotiable" is, I submit, no where near enough evidence of what distinguishes a bill of lading from a seaway-bill. After all, the document checkers are instructed to look at the contents of the document, not to the name. So, when they are presented with a transport document covering port-port shipments they first turn to Articles 20-22. The next question is: does it contain a reference to charter-party? Yes means it is examined under 22. No means it is either 20 or 21. Now, how does the document checker choose which? Most practitioners and academics would say look to the title of the document. The UCP though say, "however named" i.e. irrespective of the title. This is the point at which the document checker is stuck[32]. It will not matter if the credit allows both to be presented because the rules are the same, hence the result the same. But it will matter if the credit calls for only one document. Where a credit calls for a bill of lading and a seaway-bill not marked "non-negotiable" is presented (the distinguishing factor in the UCP-although as we have seen this is still not enough) which the document checker wrongly accepts under Article 20 the buyer

[30] Commentary pg 97
[31] *Ibid*
[32] See http://www.letterofcreditforum.com/lcfbackup/content/sea-way-bill where a document checker explains he treats the seaway-bill as a bill of lading even though it was marked "non-negotiable seaway-bill" because of the "however named" rule.

will be faced with tremendous consequences. He has a document which he cannot re-sell and crucially may not even include his name as consignee (thus unable to take delivery).

The "however named" inclusion in the UCP also negates the notion in common law we discussed above, that a document named "non negotiable seaway bill" can only be intended to be a seaway bill and a document named "straight bill of lading" can only be intended to be a bill of lading. We know that bills of lading and seaway bills are divided in English law by negotiability. Under the UCP is a document entitled "non-negotiable seaway bill" enough to denote that it is a seaway bill and not a bill of lading? I suggest not because of the "however named" provision. It is better, that we look to substance, not form. So, the document has to also *be* non-negotiable to be a seaway bill.

3. Negotiable v. Non negotiable

How can a document checker determine if a document is negotiable? His first point of call will be to check whether the document is made "to order" or to a named consignee. Negotiable documents are those which expressly state so. Documents to a named consignee are in most cases seaway bills; those to order are bills of lading. It must be noted however that it is not necessary for the document to actually state the words "to order". It may state analogous wording such as "consignee or to his or their assigns". Similarly, it may be made out "to bearer"[33]. Crucially however, there are documents capable of being issued either in negotiable form or non-negotiable form according to the way certain blanks have been filled in[34]. For example, a document may state "Consignee: BL not negotiable unless 'ORDER OF'". It then becomes necessary for the document checker to look deeper into whether the specific document has been completed in such a way as to make it negotiable or not. Moreover, the mere existence of a named consignee will not on its own necessarily make the bill non

[33] See further Girvin, S. Bills of lading and straight bills of lading: principles and practice J.B.L. 2006, Jan, 86 – 116 at 89.
[34] See further Treitel, G. The Legal Status of Straight Bills of Lading (2003) 119 LQR 608

negotiable[35]. For example, the consignee box may simply state a name, but the document may simultaneously contain pre-printed words referring to delivery of the goods to "consignee or to his or their assigns" which, although not printed in the consignee box, will still have the effect of making the bill negotiable. The point is, that the issue in law is not as simple as checking whether a specific consignee has been named. The consignee box must be read in conjunction with other terms printed on the document to determine whether it is negotiable. If those terms show that the bill is intended to be "to order" then it is negotiable. If they show it is not intended to be to order, then it is non-negotiable. The best approach is for the checker to determine whether the document is capable of, by endorsement and delivery, transferring constructive possession of the goods to the holder[36]. The way to do this would be to make sure that the document is made out "to order" and that there is not anything else in the bill to show that it was not intended for the words to have the effect of making it negotiable. Within the UCP field, this check will be limited to everything other than the carriage terms as the bank is supposed to over-look these. In law the case may be different but from a UCP perspective, the checker will want to see a named consignee and no sign of "to order" on the bill to decide it is negotiable. The result is that he is able to choose between Article 20 and 21. It is submitted that this is a better distinction than the document checker ascertaining whether the document is required for delivery or not. This would involve looking at the terms of carriage which he is instructed not to do under both Articles. Issues relating to a bank accepting a bill of lading with a delivery clause have been dealt with in Chapter 3 section D.2.

An issue with this proposition is the existence of paragraphs 101 – 103 in the ISBP. The ISBP does not contain any paragraphs dealing with seaway bills at all, and this is a separate issue I shall emphasise as being a necessity, but it does contain a section on "Consignee, order party, shipper and endorsement, notify party" in relation to the bill of lading. It states that if a credit calls for a bill of lading to show the goods are consigned to a named party rather than to order, then it must not contain the words "to order". I.e., if a credit requires a straight bill of lading, then that document cannot

[35] See *Parsons Corporation and Others v. C.V. Scheepvaartonderneming 'The Happy Ranger'* [2002] EWCA Civ 694; [2003] 1 C.L.C. 122 at 133 of Lord Justice Tuckey's judgment.
[36] Girvin, S. *Supra* nt.33 at pg 88.

contain *any* words which would bring into doubt whether it was negotiable or not. The opposite is also true, if a credit calls for a bill of lading made out to order, then a document showing that the goods are consigned to a named party is not acceptable.

What I praise the UCP for, is the words "if a credit". Read carefully, the paragraphs emphasise that what is important are the instructions of the buyer. *If the credit* calls for a negotiable bill of lading, then it must not have goods consigned to a named party in order to be accepted under Article 20. It is not, the general requirement therefore that all documents examined under Article 20 must be negotiable. It is only where the credit calls for this. If it requires a non-negotiable straight bill, then a negotiable bill is not acceptable. In essence, the ICC is directing the buyer to dealing with whether he wants a negotiable or non- negotiable document in the letter or credit contract and not expecting that the UCP will demand a negotiable/non- negotiable bill. Two points must be made. The paragraphs clearly indicate that straight bills of lading are to be considered under Article 20 and not Article 21[37]. Requiring the bank to check if a bill is "to order" or consigned to a named consignee in order to determine if it examinable under Article 20 or 21, cannot therefore be correct. Hence, it cannot be argued that all non-negotiable bills are seaway bills. The UCP recognise straight bills of lading as non-negotiable forms of the traditional bill of lading. If it is not the name that divides bills of lading and seaway bills, and it is not negotiability, then what does divide them? The only thing that remains is that one is or may be a document of title, and the other is not. Before we look at this, let us agree on a conclusion:

Seaway bills are always non-negotiable transport documents. A document made out "to order" will always be negotiable and hence a bill of lading. A document made out to a named consignee is always non negotiable but it may be either a straight bill of

[37] As mentioned, the ISBP do not contain any paragraphs relating to seaway bills. Paragraphs 91 – 114 fall under the "Bill of Lading" section of the ISBP. The discussion of straight bills at paragraph 101 therefore can only mean that banks consider these documents as bills of lading and not seaway bills. Contrast with *Gutteridge* at pg 205 who states that "a straight bill of lading…[is] referred to in the UCP as "non-negotiable sea waybill"" and Rainey QC in *The Rafaela S* [2005] 2 AC 243 at 441 who argued that bankers regard such documents as seaway bills and not straight bills. The purpose of this Chapter is not to determine whether straight bills should be examined under Article 20 or 21; it is made clear by the ICC at page 97 of the commentary that although documents under Article 21 will always be non-negotiable, documents under Article 20 will be in "most cases…negotiable". Hence, in some cases i.e. straight bills, they will be non-negotiable. The purpose is instead to discuss how a document checker is to realise whether the document in front of him is non-negotiable under Article 20 (i.e. a straight bill) or non negotiable under Article 21 (i.e. a seaway bill).

lading or a seaway bill. We can use the proposition of: to order = negotiable; named consignee = non-negotiable, to at least reach closer to determining if the document is examinable under Article 20 or 21. If it is "to order" the document checker goes directly to Article 20. There is nothing in the UCP or the ISBP saying that a document to order should be anything other than a bill of lading. If it is to a named consignee, the document checker still has to decide if it is Article 21 or Article 20. Non - negotiable documents, we have discovered, by virtue of the ISBP, cannot all be seaway bills. Straight bills of lading are examinable under Article 20. If we return to the initial problem or dividing seaway bills and straight bills of lading, I conclude the UCP does not make a clear distinction and the document checker will be confused as to whether a port-port document not subject to a charter party is examinable under Article 20 or 21. If he has knowledge of the ISBP, he may conclude that "to order" documents are examinable under Article 20, and named consignee documents may be either 20 or 21. How to decide that a document is a straight bill of lading examinable under Article 20 as opposed to a seaway bill examinable under Article 21 is the remaining question.

4. Delivery

One way to distinguish between the straight bill of lading and a seaway bill is to utilise the common law approach i.e. a straight bill of lading is most likely to be required to be presented in order for delivery to take place whereas a seaway bill is not needed. In essence, a straight bill of lading under *Rafaela S* is a document of title but a seaway bill is not i.e. the straight bill passes property in the goods but the seaway bill is merely a receipt. The UCP cannot deal with such notions however; they are a set of rules that determine if a document is compliant. It is difficult to see how we can insert the notion of a document of title in the UCP without causing complications both to the notion of a document of title and to domestic law. For example, if the UCP were to claim that in order for documents to be considered bills of lading they must be documents of title (thus including all forms of bills of lading and excluding seaway bills – the desired result) there may be huge conflict with the domestic laws of other countries. Not all states recognise straight bills of lading as documents of title[38]. What if we turn to the practical implication of the notion of document of title? The practical result is that a document of title allows the buyer disposal of the goods before delivery. It is the person who holds this document who has the right to sell the goods without them actually being in his possession (i.e. afloat). The document is so important therefore, that delivery can only be made against presentation of the document. So, we turn to delivery. The position of the seaway bill is the opposite. The goods can only be delivered to the specific named party, but also they cannot be sold whilst en route, they are not at the buyer's disposal before delivery.

4.1. Full set

It can be argued that the reason Article 20 requires a full set of all original bills of lading, is that possession of the bill will allow delivery and the bank (and buyer) is protecting itself if it knows that all originals are with them. If there was no such term in Article 21, it could be implied that because the document is not needed for delivery, all originals are not necessary. The UCP however takes the opposite view. It requires all original seaway bills to be presented. Unfortunately this confuses the position as between bill of lading and seaway bill further[39]. If goods can be delivered without presentation of a seaway bill to an identified named party, then why are all originals required? An article in the UCP on seaway bills is necessary because they may be required by the credit as evidence of the contract of carriage and receipt of the goods, but it is not necessary for a copy to be presented for delivery. Perhaps the intention is to focus on the fact that the goods have been shipped. Seaway bills are often in the received for shipment form[40] (precisely because they are available before shipment takes place as the buyer is specific and sent to him before the vessel reaches the destination) but the UCP oppositely requires them to be shipped. Unfortunately this is another example whereby the UCP confuses the line between seaway bill and

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[38] See Ulph, J. The UCP 600: documentary credits in the 21st Century J.B.L. 2007, Jun, 355 – 377 at 369 and footnote 46.

[39] Notably, Lord Bingham in *J I MacWilliam Co Inc* v *Mediterranean Shipping Co SA* [2005] 2 AC 423 at 444 stated that "if this document (referring to a straight bill) was a mere receipt or sea waybill there was no purpose in following the traditional practice of issuing more than one original". Hence our argument that requiring the presentation of all originals leads to the conclusion that the document we have in front of us is a bill of lading, albeit a straight bill, instead of a seaway bill.

[40] See Todd, P. at pg 226 para. 8.22 and Schmitthoff at 15-033 and see e.g. GCBS Seawaybill 1979 or P & O Nedlloyd Waybill 1978

bill of lading. The bank will therefore only consider transport documents covering a port-port journey if they indicate that the goods have been shipped. This is logical, since it will only want to pay out against a recognition that the goods are on their way. However this rule will limit the documents capable of being compliant under the UCP. In any case, shipped seaway bills are required.

Returning to the issue of delivery, basing the division of seaway bills and straight bills of lading under the UCP on whether the document needs to be presented in order to obtain delivery is dangerous. It means that the bank will have to check carriage terms which it has, by virtue of sub-article 21 (a) (v) been instructed not to do so. An argument exists however; that in essence the bank is looking at the carriage terms anyway i.e. whether shipment has taken place between the correct ports is a term of the contract of carriage. Oppositely one can argue that although the journey term may be one contained in the contract of carriage, what the bank checks are the details on the front of a transport document i.e. the boxes which clearly state the port of loading/discharge. Again however we are reminded that the bank is not to look solely on the front of the document, but also to the back if necessary[41]. What is a term of the contract of carriage, and what simply details of the carriage, is therefore arguable. For example, on the one hand the vessel utilised is simply a detail i.e. vessel X used, on the other hand, the fact that vessel X specifically is used may be a term in the contract of carriage. Can we say then that what the bank is checking is the function of the bill of lading as a) a receipt of the goods and b) evidence of the contract of carriage? Does a combination of a) and b) mean checking that the goods are on the right ship on the right route? If the bank is only checking a) and b) functions, which are also common to the seaway bill, then what, under the UCP distinguishes the bill of lading from a seaway bill? I still do not find a satisfactory answer in the UCP.

[41] See further Chapter 2 Section C.2.

E. Conclusion

The aim of the above analysis was to show that the UCP does not, I submit, effectively distinguish between a seaway bill and a bill of lading. The ISBP points towards the division of seaway bill and traditional bill of lading by separating the "to order" bill and named consignee bill but what remains is the division of a straight bill of lading and a seaway bill. As we have said, the ISBP makes it clear that straight bills are to be examined under Article 20 and not Article 21, but there is no guidance on what characteristics make a document a straight bill of lading as opposed to a seaway bill. What I believe was intended by the title of Article 21 "non-negotiable seaway bill" was that the document presented must not be expressly negotiable. The absence of "negotiable" or "non-negotiable" bill of lading in the title of Article 20 implies that it may be either but seaway bills can only be non-negotiable. Unfortunately the UCP do not provide satisfactory guidance to the bank as to what is a straight bill of lading and what is a seaway bill. The result of the bank accepting a seaway bill where a credit called for a straight bill of lading, may be that the bank is found in breach of its obligations. Under English law it can be argued that where a buyer demanded a straight bill of lading, he did not wish to on sell the goods (just like under a seaway bill) but he did intend to be required to present the bill to take delivery and accepting a seaway bill may put into jeopardy delivery as he may have not made provision for such a document to be consigned to him. It seems that despite the "however named" rule in the transport articles and the insistence of the ICC that banks are to look at substance not form, the differentiating factor is indeed the name of the document. Where the rules in Articles 20 and 21 do not differ at all, then the substance of the document cannot differ. The substance not examined by the UCP may differ, but the bank is instructed not to look at that. The only thing it can look at is the title. I conclude therefore that, in this case, the UCP directs the bank to consider a document entitled "seaway bill" under Article 21 and "straight bill of lading" under Article 20. It is the title which will determine what the document is, and whether it complies with the credit. Where a buyer requires a straight bill of lading and does not mind a seaway bill, he must state this in the credit otherwise a document which is identical to the one he requested may be rejected (thereby delaying the whole sale process) simply due to the name of the document.

The proposal I have to make as far as seaway bills are concerned is the following:

Proposal 1: The ISBP must be amended to contain corresponding paragraphs covering the entire Article. In particular, it should give guidance as to what is considered a seaway bill in the market. For example:

"A seaway bill is a document covering port – port shipment to a named consignee. If it states it must be presented for the applicant to take delivery, it is not a seaway bill".

The proposal may be subtle in the sense that it still does not distinguish between the seaway bill and straight bill of lading, but under the UCP it does not need to. I suggest the argument that banks should not look at carriage terms can arguably not hold here. The fact that a seaway bill need not be presented to obtain delivery is such an essential feature of the document that it seems unreasonable that the bank should not confirm the existence of the feature. If the only way to do this is to check the delivery terms, then so be it. The bank need not trawl through the entire carriage contract, but it must be reasonably convinced that the document need not be presented for delivery to take place. Issues concerning the security of the bank due to this feature must be faced through the methods mentioned above. If what is considered a seaway bill on the market is a document not required to be presented for delivery, then this should be reflected in the ISBP at least.

PART III
Charter – party bills of lading

F. Introduction

During our discussion on bills of lading and seaway bills, we mentioned that the UCP require the documents to be free of any indication that they are subject to charter party. Charter-party bills of lading on the other hand are the opposite; they are documents which do contain indications that they are subject to charter party. This definition is provided in sub-article 22 (a). What is an indication under UCP and what is not, shall be considered below in the discussion points. Again the article follows Article 20 with the necessary changes to incorporate the characteristics of a charter bill of lading. First we shall look at the general requirements set out in Article 22 and then again we turn to our discussion points. Having analysed the bill of lading and the seaway bill extensively, there are only a few points I wish to make concerning the charter party bill of lading; nonetheless the clarifications are necessary.

G. Article 22

1. The rules

A charter-party bill of lading will only be acceptable if the credit calls for one. The article goes directly to the issue of signature i.e. does not require the carrier to be named, as such bills do not usually do so[42]. The people who can sign are the master, owner, charterer or named agent thereof[43]. The "signature…must be identified as master, owner, charterer, agent"[44] and "any signature by an agent must indicate whether [he] has signed for or on behalf of the master, owner or charterer".[45]. If an agent does sign "for or on behalf of the owner or charterer [he] must indicate the name of the owner or charterer"[46]. Again the goods must be "shipped on board a named vessel from port of loading" to port of discharge[47] (which here can be a range of ports or geographical area as per credit) but the provisions relating to "intended" vessel or port of loading found in Articles 20 and 21 are absent probably due to the fact that if the bill of lading is subject to charter party then the vessel and journey will no doubt be specified and as per credit. Again the document must "be the sole original or if issued in more than one original be the full set"[48]. Lastly, the bank may not examine the actual charter party[49] and the sub-articles relating to transhipment are absent (clearly a charter party bill of lading will be for the specific charter of the specific vessel).

[42] See *Jack*, pg 223 para. 8.109
[43] Sub-article 22 (a) (i)
[44] *Ibid*
[45] Sub-article 22 (a) (i)
[46] *Ibid*
[47] Sub-article 22 (a) (ii)/(ii)
[48] Sub-article 22 (a) (iv)
[49] Sub-article 22 (b)

H. Discussion Points

1. The indication

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. I must state from the beginning, that as far as I can understand, the ICC has decided[50] 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 market[51]. 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, I submit, has essentially decided that *any reference* to a charter party will mean the bill is to be examined under Article 22. I submit that this is 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

[50] Opinion R647
[51] 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

party despite the missing date. Notably, case law has held[52] that the effect of the blank date 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. I suggest therefore that the ICC have taken the definition in Article 22 further to include reference to charter parties. This is potentially a very dangerous conclusion 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" rule in Article 20 has 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. In practice we are ignoring the "however named" principle. Even so, this is the effect of the Banking Commission Opinion.

2. "Subject to"

Confusion in this article 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 in order to evidence that a bill of lading is subject to a charter party, 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 parties[53]. For

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

[53] 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

example, the Cementvoybill 2006[54] 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 I am suggesting 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 document checkers are not allowed to look at carriage terms (and thus conclude whether or not 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, I submit, the use of the word "indication". The checker is not supposed to determine whether or not 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 party[55] although were it to state "Cementvoybill – Charter party bill of lading" this would be enough[56].

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:

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[54] 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.

[55] Commission Opinion R648 in Opinions 2005 – 2008 Publication No. 697: we follow the "however named principle" of Article 20 discussed at Section C.1.

[56] R647 *Ibid*

"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 the 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. A similar provision in article 22 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 R648? 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 20[57]. 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

[57] 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.

their own constitute a strong enough indication that the bill is subject to a charter party. These bills will be examined under Article 20 instead. Thus Opinion R648 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”. The opinion must be clarified, as it is submitted reference to charter party does not make a bill a charter party bill. Such clarification will also reconcile the issue with the practice followed in the shipping market.

I. Conclusion

My conclusion is 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 the 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 dependant 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 bill of lading 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 2: ***Opinion R 647 should be overruled and clarified to state that mere reference to a charter party will not constitute an indication that a bill is subject to a charter party. 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* (charter party bill of lading) must…".

The proposal requires reinterpretation 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”. They key is that the document is “subject to a charter party”; not that it contains an indication that it is so.

PART IV

Multimodal documents

J. Introduction

What I have termed "Multimodal Transport Document" is referred to in the UCP 600[58] as a "Transport Document Covering at Least Two Different Modes of Transport"[59]. This is in contrast with the UCP 500 which utilised the former phrase. The purpose, according to the Drafting Group[60] of rephrasing the Article which covers such documents (Article 19) was twofold. Firstly, such documents are still a relatively new concept (compared to bills of lading for example) and lack specific name recognition. I like to think of this explanation as meaning that these documents do not currently have a universal, uniform and 'official' name. Hence the title of the Article referring to the movement of the goods rather than to the name of the document. This is the second reason provided by the Drafting group. It wishes to stress the importance of the nature of the document rather than the name, hence "however named" in sub-article 19 (a). The reader may be cross referencing with Article 20 which we discussed in Chapter 3 and thinking that the phrase "however named" is also used in connection to bills of lading. This is true; and if so then why make the specific distinction with documents covered by Article 19? The reason is that whereas a bill of lading is a well recognised concept and the nature of the document can be clearly linked to the name of the document, a transport document covering more than one mode of transport is currently a little more ambiguous for parties involved in trade and trade finance, and the name of the document may vary from "Multimodal" to "Combined" to "Intermodal". One can assume the intention of the Drafting Group was to make sure that where a document checker is presented with a document entitled "Combined Transport Document" he does not dismiss it because it is not called "Multimodal Transport Document" but rather that he looks to see

[58] Article 19
[59] I continue to refer to this transport document as "multimodal" throughout the thesis simply for reasons of easy terminology but the reader must remember that I denote a document covering at least two modes of transport.
[60] Commentary pg 81

whether *any* transport document he is presented with covers more than one mode of transportation[61].

Now that we have made it clear which type of transport document we are talking about, I must mention the position of Article 19 within the "set" of transport Articles for the change from UCP 500 was purposely made and indicative of the advancement of these documents in the International Trade sector. As the reader may have realised, multimodal transport documents are positioned before bills of lading in the UCP 600 (hence Article 19 the former and Article 20 the latter) and also before charter-party bills (Article 22) and seaway-bills (Article 21). The intention of the Drafting Group[62] was to emphasise the increasing use of the document in the trade community[63]. Firstly, transport by more than one means is common if not exclusive for international trade (e.g. when I order a television from China a truck will take it from the factory to the warehouse; a train from the warehouse to the container yard, another truck from container yard to the port, a ship from port to port and a truck from the port to my house in the UK). Secondly the increase in use of the document reflects the growing intention of transport companies to control the entire carriage of cargo from point of dispatch to point of destination. Similarly one can understand that buyers will be keen to receive *one* transport document which covers the complete journey of the goods whether or not that journey consisted of several modes of transport or several carriers. These reasons reflect the positioning the Multimodal Transport Article within the UCP 600.

The reader may be wondering why then, did we not discuss multimodal documents in Chapter 3 before bills of lading? I have given precedence to bills of lading because of their history, legal significance and importance in international trade. Similarly, our focus in this thesis is specifically geared to cargo carried by sea (we do not look into Articles 23 and 24 concerning air, road and rail). Therefore my main port of call is the bill of lading as this has traditionally been the core document concerning carriage by sea. Multimodal documents as a relatively new concept may be more common, but

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[61] Note that these explanations are another example of contradictions between the "however named" principle in the UCP and issues relating to the division of bills of lading and seaway bills which we discussed in Parts II and III above.

[62] Commentary pg 81.

[63] A point also made by Pejovic, C. in <u>Documents of title in carriage of goods by sea: present status and possible future directions</u> J.B.L. 461, 2001 at 474

are still in my opinion secondary to the bills of lading analysis of the UCP in legal terms. It is easier to understand the multimodal when you have analysed the bill as the nature of the bill in essence forms *part* of the nature of a multimodal. For example, if sea carriage forms part of a multimodal document and we have already discussed the bill of lading, then we are already half way to understanding the multimodal[64].

In this section our premise will be a sale of goods transported partly by sea carriage and partly by other modes of transport. What is essential is that I will not be looking at carriage not involving sea transport. What we are looking at is simply *extending* the bill of lading i.e. the sale we held as a background base in Chapter 3 concerning bills of lading, is the sale we hold as a background in this Chapter, but here we recognise that there may have been (or likely to have been) carriage before the goods were shipped on board a vessel at the port of loading and carriage after the goods arrived at the port of discharge. E.g. a truck transported goods from warehouse to port, a vessel from port to port, and a truck from port to inland destination. Whereas in Chapter 3 the bill of lading covered only port to port carriage, the multimodal will indicate carriage from warehouse to inland destination. Thereby the reader understands my concept of *extending* the *nature* of transport in the bill of lading.

[64] Notably *Jack* also discusses bills of lading in depth first (see pgs. 211 – 220) and only runs through particular differences between the multimodal rules and bill of lading rules (without analysis) after he has mentioned charter-party bills and seaway-bills (see pgs. 223 – 225). *Gutteridge* on the other hand groups together the transport documents and discusses the core rules as a whole with specific reference only to the bill of lading (see generally Chapter 7, in particular pgs. 204 – 227).

K. Article 19 requirements

Again I shall give a short description of the Article. It covers documents which involve "at least two different modes of transport [and] must appear to indicate the name of the carrier and be signed by the carrier, master or named agent" thereof[65]. The "signature…must be identified [and] any signature by an agent must [also] indicate whether [he] has signed for or on behalf of the carrier…or…master"[66] . Sub-article (a) (ii) is the equivalent to the "shipped on board" in Articles 20, 21 and 22 and requires the document to show that the goods have either been "dispatched, taken in charge or shipped on board" depending on the type of transport used for the first part of the carriage journey. It must similarly indicate the route called for in the credit i.e. "indicate the place of dispatch, taking in charge or shipment to the place of final destination stated in the credit even if"[67] an additional place of dispatch etc. is stated or the word "intended" is used in connection to vessel or port of loading/discharge. Lastly, the full set of original documents must be presented[68], they may contain terms and conditions of carriage which should not be examined[69] and transhipment[70] is allowed in the same way to the bill of lading/seaway bill provisions. Clearly transhipment will occur in multimodal transport because of the nature of the carriage; it is transfer from one mode of transport to another[71].

[65] Sub-article 19 (a) (i)
[66] *Ibid*
[67] Sub-article 19 (a) (iii)
[68] Sub-article 19 (a) (iv)
[69] Sub-article 19 (a) (v)
[70] Sub-article 19 (b) and (c)
[71] See ISBP para. 68

L. Discussion Points

1. On board notations

As we discussed in Chapter 3 with bills of lading, where there is any ambiguity as to whether the goods have left the specific place of dispatch, a notation will be needed to clarify if the goods did indeed leave the place agreed in the credit. What is not present in the UCP but is provided for by Banking Commission Opinions R 641 and R 642[72] is that where the first leg of the journey involves sea carriage, a notation will always be required. If one looks at the examples given in R 642, this is the conclusion they will come to. For example, a document showing port of loading X and vessel C will nonetheless require a dated on board notation despite nothing in the "place of receipt". Similarly a document showing the place of receipt and port of loading as port X will nonetheless need an on board notation. Hence, I conclude that what the ICC means is that where carriage by sea is the first mode of transport, a dated on board notation is always required. I suggest that the reason for this is that the bank must be sure that where sea carriage takes place first, the goods are indeed shipped on board a named vessel on a specific date, as opposed to taken in charge of at the port on that date by the carrier. The problem is, that the UCP does not provide for this; nor does the ISBP. It is understandable that when the first leg of the journey is sea carriage, then the document must clarify that the goods are on the correct ship at the correct time much like a traditional bill of lading[73]. My suggestion is that if this is the requirement; why not state it directly in the UCP or the ISBP? For example, sub-article 19 (a) (ii) can include at the end a paragraph reading:

Proposal 3: "*Where the transport document indicates sea carriage as the first mode of transport, then it must contain a dated on board notation indicating that the goods have been shipped on board a named vessel at the port of loading.*"

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[72] In Opinions 2005 -2008

[73] For further comments regarding on board notations in all transport documents see Erdemol, H. Is UCP language re on board notation sufficient? In DCinsight Volume 15 No. 4 October – December 2009 at pg 10 and Andrle, P. Notations and multimodal transport documents in DCInsight Volume 16 No 1 January – March 2010 at pg 16.

2. Partial shipments

The UCP and the ISBP both deal with partial shipment but I have decided to discuss the issue here because it is perhaps more likely to occur where multimodal transport is involved. The first stage for the bank is to note that under Article 31 (a) partial shipments are allowed. A presentation of separate sets of transport documents which cover shipment on the same means of conveyance, on the same journey bound for the same destination does not, for the purpose of the UCP, constitute partial shipment. Hence, paragraph 80 in the ISBP allows such a presentation to be accepted even if the credit prohibits partial shipments. What I understand the ICC is trying to emphasise is that such shipments in the eyes of the UCP are not partial and thus prohibition of partial shipments in the credit will have no effect on the presentation. If more than one set of transport documents are presented then the latest date of shipment evidenced in the documents is deemed to be the date of shipment. This date must of course be either on or before the latest date of shipment for the presentation to be compliant.

M. Conclusion

Although multimodal documents are likely to be issued prior to shipment, the ICC has come to a decision in the Opinions that where the first leg of the journey requires sea shipment, then there must be an on board notation much like the one required under Article 20 to clarify the shipment details. I have proposed therefore to include this rule directly in the UCP and have not left it to a Banking Commission Opinion not least because not all document checkers/traders will be aware of the requirement. I have not here gone into the distinguishing factors between bills of lading and multimodal documents as we covered the nature of a bill in Chapter 3 section C.1 above but it is convenient to note that the distinguishing factor of a multimodal document is the fact that it covers different modes of transport whereas documents under Article 20-22 all cover solely sea transport.

PART V

N. Chapter Conclusion

This Chapter has focused on the less 'famous' transport documents. Namely, the seaway bill, the charter party bill of lading and the multimodal transport document. As far as the seaway bill is concerned, the rules are identical to those in Article 20 and thus the same issues apply. If a document meets the requirements of Article 20, then it also reaches the requirements of Article 21. Hence, if it is compliant under one, then it is compliant under the other. This compliance however relates only to compliance to the rules. As we discovered in Chapter 2 however, a compliant presentation is one that satisfies the conditions of the UCP but also the conditions of the credit and of international standard banking practice. Therefore, where a credit calls for a bill of lading and a seaway bill is presented, the presentation will be rejected whether or not the substance of the document satisfies the conditions of the UCP under Article 21 (and thus Article 20) and despite the fact that a bill of lading would, under the UCP be identical to that seaway bill. Our process of investigation has led us onto a very important debate in law and that is: the status of a straight bill of lading. In the context of the UCP, we are concerned with what can a document checker do in order to distinguish the straight bill of lading (examined under Article 20) from the seaway bill (examined under Article 21)? The reader can see from the debate that the answer to this riddle is complicated but I have made my own conclusions as to how the UCP at least should deal with the dilemma and that is in essence to look at delivery i.e. whether the document needs to be presented for delivery to take place.

Charter party bills and multimodal transport documents are perhaps easier to deal with because they do have specific distinguishing factors in the UCP to allow a document checker to clearly choose under which Article they are to be examined. Multimodals, whether negotiable or non-negotiable and whether presentation is required for delivery, will always be examined under Article 19 because they cover at least two modes of shipment. Similarly, charter party bills will only ever be charter party bills because they are subject to a charter party. The issues with the two documents have been discussed and without going into detail again I state them below along with the specific proposal for Article 21.

Proposal 1: The ISBP must be amended to contain corresponding paragraphs covering the entire Article. In particular, it should give guidance as to what is considered a seaway bill in the market. For example:

'A seaway bill is a document covering port – port shipment to a named consignee. If it states it must be presented for the applicant to take delivery, it is not a seaway bill.

Proposal 2: ***Opinion R 647 should be overruled and clarified to state that mere reference to a charter party will not constitute an indication that a bill is subject to a charter party. 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* (charter party bill of lading) must…".

Proposal 3: Sub-article 19 (a) (ii) can include at the end a paragraph reading:
'*Where the transport document indicates sea carriage as the first mode of transport, then it must contain a dated on board notation indicating that the goods have been shipped on board a named vessel at the port of loading.'*

CHAPTER 5

Banks' Security

A. Introduction

In Chapter 1 we briefly referred to the issue of the bank's security. Where a bank opens a letter of credit at the request of its customer (applicant/buyer), it is providing a service. This service will put the bank at considerable risk. Not only is the bank paying out its own money to someone it does not know (the seller/beneficiary which is not familiar to the bank) but it is also facing the possibility that its own customer (the applicant) could go bankrupt. Worse still, the bank is also concerned that one or both of those parties may be acting fraudulently. I realise that with the current state of the economic climate and the bad feeling towards banks today, the last thing the reader wishes to read is prose concerning sympathy for banks that put themselves at risk for the benefit of their customers; nonetheless the risk is still there. They will of course get paid handsomely for the service but this fee may be miniscule compared to the cost of the goods involved in the credit. Even more so if we are talking about bulk shipment of commodities which could cost millions of pounds. In Chapter 8 we shall look in depth at fraud. The issue here is not what the bank can do when it is faced with the possibility of fraud, but if and how the bank can protect its interest in the money (and thereby the goods) through the transport documents. Can these documents give the bank any security?

There is of course security in the insurance document also; something which should not be underestimated. The bank will want to know that if at any point it gets stuck with the goods, not only can it make a claim under the carriage contract, but that certain risks are covered under an insurance policy which may be easier to claim under than starting legal proceedings against the carrier. In this Chapter however we focus only on the transport documents. The reason is simply that security in the insurance document would warrant an entirely separate chapter if it were to be analysed satisfactorily, and the present thesis does not offer the space. Transport documents take precedence as it is the transport document that is the primary source of direct rights in the goods and the basis of the contract of carriage with the carrier, the party most likely to be at fault during transit. The effect of an insurance policy as security for a bank will therefore have to be the subject of a separate paper.

In this chapter we continue with the bill of lading with our investigation focusing on three key questions:

1) Can the bank stop the buyer from taking delivery?
2) Can the bank take physical possession of the goods? And
3) Can the bill be endorsed to the buyer in the event of repayment?

The importance of these questions shall be explained in turn as we investigate in Section B. We then take a look at the remaining transport documents simultaneously in Section C: Seaway-bill, Charter-party bill of lading and Multimodal Transport Document. The reason that I have grouped the last documents together is that the perspective of our investigation changes in Section C. Whereas for the bill of lading we are looking at the security offered by the nature of the specific document i.e. irrespective of the UCP; for the rest of the documents we shall look directly at the UCP provisions which result in the increase/decrease of security highlighting security issues in the nature of the documents as examples. The difference is that the bill of lading is in comparison a more favourable document for the bank to possess (due to its function as a document of title and a negotiable document) rather than anything other than a bill of lading. It is best understood by thinking of the bill of lading as the standard, and the other documents as variations of the standard. The standard is a lot more certain so the UCP can at most enhance security. With the variations, the role of the UCP becomes a lot more important.

1. <u>A simplified account</u>

Before we begin, allow me to present a simplified account of the letter of credit arrangement, to exemplify the issue of security. If one considers the process of the seller/beneficiary submitting documents to a bank against payment as part of the sale transaction and not the credit transaction, one can see that essentially what is happening is that the bank is *buying* the goods from the seller on behalf of the buyer/applicant[1]. That is why the contract between seller and bank is independent of that between seller and buyer. Hence, any breach of the conditions of the contract between buyer and bank will have no effect on the seller getting paid. The idea is, if the buyer goes bankrupt and the bank has already paid the seller against the documents, the risk falls on the bank not the seller. It is the bank who has lost money (legally I might add) and not the seller. It is the bank who has the problem. What the bank needs to know is if it finds itself in that situation, where legally the risk is with it; does it at least hold in its hands a set of documents which entitle it to the goods? Yes it will lose the actual cash, but does it have disposal of the goods to make back the money paid out? To secure that control the bank will turn to the documents tendered and the first thing it will look at is the transport document. As we have seen these documents may carry with them title to the goods and the right of disposal. We shall in this section therefore look at three things. Firstly, do the UCP transport Articles 19, 21 and 22 contain any provisions that decrease the risk the bank faces? Secondly, do the UCP Articles contain any provisions that increase that risk? And thirdly are there any methods outside the UCP which the bank can follow to decrease the risk?

[1] This proposition is further supported if one considers Section 32 of the Sale of Goods Act 1979 which states that where a seller under a sale contract is required to send the goods to the buyer then delivery of the goods to the carrier is prima facie deemed to be delivery to the buyer. Similarly delivery of the documents to the bank can be considered constructive delivery of the goods to the bank.

B. The bill of lading

1. Can the bank stop the buyer from taking delivery?

Where a bank faces an insolvent or fraudulent buyer, the first thing it will want to make sure of is that the buyer is not capable of taking delivery of the goods. If the buyer does, no matter the documents the bank holds in its hands, it will have a tremendous odyssey in recovering its loss. Before the bank can even begin thinking about selling the goods to obtain as much of the money it paid to the beneficiary as possible, it must make sure that it is the only party which is able to take physical delivery of the goods. It will therefore want to know that the carrier is not going to deliver to anyone it should not and to enforce that restriction it will want to impose upon the carrier a liability for wrong delivery. The bank is therefore looking for security in two things, firstly the carriage contract (so that it can control the actions of the carrier) and that carriage contract is the bill of lading (contained therein) and secondly in the terms of its credit contract with the buyer/applicant (by requiring him to present a contract of carriage in the form offering security) which include the UCP conditions.

The term the bank is looking for, is that the only person to whom the carrier can deliver to is the holder of the bill of lading. Whatever happens, the bank is the only one who has possession of the document; it has after all paid the seller/beneficiary upon presentation of the documents. The UCP require the full set to be presented, as we have stated in Chapter 3[2]. The bank therefore has sole possession of all original copies of the bill of lading. By requiring the carrier to deliver only to the person who holds the bill the bank will feel secure in the knowledge that it is the only party which has all original bills. Two things must also be certain however. Firstly, that the national law supports the requirement that the carrier delivers only to the sole holder of the bill of lading (remember the bank does not have any direct dealings with the carrier nor does it take part in the negotiation of the carriage contract) so that the bank which does not have any direct say in the carriage contract is certain that the carrier is required to deliver against presentation of the bill of lading only. Similarly, that there

[2] Sub-article 20 (a) (iv)

is a strong enough punishment for the carrier where he decides to deliver to a party other than the bank against an indemnity[3]. Secondly, that the bank not only has possession of all original copies of the bill, but that the bill gives the *specific* bank the right to delivery i.e. that the bank is the lawful holder of the bill with the right of taking physical possession of the goods. We come to this point in section 2 below (the realisation of security). For now, the first step to security is that the buyer/applicant (or indeed any other party) is estopped from taking delivery.

1.1. Term within the document

The first thing the bank will want to see is a term within the bill itself (as evidence of the contract of carriage) which declares delivery against the holder of the bill only (and simultaneously *does not* contain a term allowing delivery without the surrender of a bill of lading i.e. a delivery clause as discussed in Chapter 3 Section D.2). Checking the document may seem superfluous to the reader where we know that bills of lading are documents of title and thus required by common law to be presented for delivery[4] but we must not forget that that is English common law and in this investigation we must consider that the applicable law may not have the exact same rules as that of the UK. Moreover, not all document checkers can possibly know all legal rules in connection to the documents and may thus feel a lot more comfortable with a clear term in the bill disallowing delivery without presentation of the bill[5]. This

[3] E.g. delivery without presentation of a bill is a breach of the carriage contract depriving the carrier of any exclusions/limitations which would have otherwise been available. See *Sze Hai Tong Bank v. Rambler Cycle Co* [1959] AC 576. This is an application of the doctrine of fundamental breach as an extension of the doctrine of deviation i.e. delivery without presentation is a deviation from the agreed contract, and a breach so fundamental to the contract that it deprives the party of any exclusions. Today, the doctrine is in sharp decline in view of the decisions in *Suisse Atlantique Societe d'Armement SA v. NV Rotterdamsche Kolen Centrale* [1967] 1 AC 161; *Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827 in particular, and *George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds* [1983] 2 AC 803. The effectiveness of a clause purporting to exclude liability for fundamental breach of contract is now treated as an issue to be determined by a construction of the contract. On a different note, the shipper may also have an action in damages for wrongful delivery: *The Stettin* (1889) L.R. 14 P.D. 142.

[4] See chapter 3 Section D.2 as Per Justice Butt in *The Stettin* (1889) L.R. 14 P.D. 142 at 147.

[5] The issue of whether the bank is required to look at such terms (i.e. carriage terms) by virtue of sub-article 20 (a) (v) is inapplicable here. Firstly, we are not presently talking about UCP provisions affecting the bank's security; we are simply talking about the security offered by the transport document in general. Secondly, the bank is to not look at the carriage terms during its determination of whether or not the documents are compliant with the UCP and credit. We can assume however that it can look at the carriage terms for other purposes if it wishes to and in connection to security it will be keen to check that the documents are secure for their criteria. What the bank can do if they are not is a separate issue.

moves us swiftly on the conditions found in the domestic law that require the bill to be presented for delivery.

1.2.UK common law and statute

Clearly an English bank (and a contract subject to English law) will find comfort in the fact that common law requires a bill of lading to be presented in order for delivery by the carrier to be made[6]. Similarly the Carriage of Goods by Sea Act 1992 vests in the "lawful holder of [the] bill of lading"[7] all rights of suit as against the carrier. The "holder" is the party with possession of the bill[8]. If this is the party with the right to delivery, then the characteristic the bank will be looking for to confirm that it is the lawful holder of the bill of lading, is physical possession of the bill i.e. requiring the party to present the original bill to confirm that it is to him that delivery is to be made. The bank will therefore feel secure that where the bill itself does not indicate whether or not it needs to be presented for delivery, it is definite that the common law and COGSA 1992 *do* require the carrier to deliver against presentation of a bill.

1.3.Conclusion

It is clear from the above analysis that the fact that the bank holds physical possession of all original copies of the bill of lading it is protected from possibility of the buyer taking delivery of the goods. If the bank is the only party with possession of the bills and delivery can only be made against presentation of an original bill, then it is secure

[6] "A ship-owner is not entitled to deliver goods to the consignee without the production of a bill of lading" as Per Justice Butt in *The Stettin* (1889) L.R. 14 P.D. 142 at 147. Note, deliver to the *consignee.* This sentence denotes two things; that the production of the bill is necessary and secondly that delivery is to the consignee. This is why the second question in our investigation (see Section A. above) is whether the bank can take physical delivery of the goods i.e. does it need to be consignee to be capable of taking physical possession of the goods? For an extensive discussion on the right to claim delivery of the goods see Chapter 2 of Debattista, C. <u>Bills of lading in Export Trade</u> 2nd Edition, 2009, Tottel Publishing, ISBN: 978-1845923150 particularly pgs. 37 and 38 on the presentation rule; cases *London Joint Stock Bank Ltd v. British Amsterdam Maritime Agency Ltd* (1910) 11 Asp MLC 571 (carrier must deliver to holder of bill who presents) and *The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266 "ship-owner must not deliver…otherwise than against presentation of an original bill" at 272.

[7] Section 2 (1) (a)

[8] Section 5 (2). Possession of the bill is only one of the requirements under COGSA 1992 for the party to be the lawful holder. The other requirement is the status of the party in relation to the bill. We shall look at this in section B.2. of this chapter.

in the knowledge that the buyer cannot walk off with the goods[9]. It is of course crucial that it does possess *all* original copies for it is common for bills to state that where delivery is made against one original, the rest are deemed void. Where the buyer holds one original therefore and takes delivery, the originals the bank holds would be void[10]. The first step therefore that the bank should take to protect its security is to make sure it has all original bills of lading which require to be presented for the carrier to deliver the goods.

2. Can the bank take physical possession of the goods?

Having secured the fact that the goods are with the carrier (or at the warehouse) and that they will not be removed by the applicant, the next step that the bank will want to secure is itself being able to take physical delivery of the goods. It is all very well that the bank is capable, through possession of the bill of lading, of stopping the buyer/applicant from taking delivery, but where the bank will want to make back the money it paid the seller for the documents, it will need to be able to sell the goods itself[11]. It will therefore also need to be able to have physical control of the goods. It will need to be the "lawful holder" of the bill of lading. The question that arises is how can a bank, not party to the contract of carriage or the contract of sale, possibly be entitled to the delivery of the goods? If the credit is simply a mechanism for payment, then it is not a contract for the goods. However, in the 'simplified' account of the letter of credit that I presented in the introduction of this chapter I urged the reader to think of the credit, in essence, as a sale of the goods to the bank. It may not be a sale in legal terms, but in reality it is just that because where a buyer becomes insolvent, it is the bank which is left with the goods and not the seller. If the buyer

[9] It is unlikely that the carrier will be willing to delivery to the buyer without surrendering a bill because the consequences will be severe.
[10] See 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 pg 333. It is also unlikely that the carrier would be liable for mis-delivery as he would have presented against the (or in this case "a") holder of the bill of lading. The issue of whether the carrier should know if the bill is forged or if the buyer is the "lawful" holder is debated in *Motis Exports v. Dampskbsselskabet AF* [1999] 1 Lloyd's Rep 837 which decided that a carrier *would* be liable for mis-delivery. The decision has however been rightly criticised; see in particular Todd, P. Delivery against Forged Bills of Lading [1999] LMCLQ 449.
[11] For the rights of an unpaid *seller* see Sale of Goods Act 1979 Part V. He has a lien over the goods, a right of resale and in the case of insolvency of the buyer a right of stopping the goods in transit (Section 39-48). It can possibly be argued that the bank is in the same position as an unpaid seller (especially if we take into account the simplified version of a credit we discussed in the introduction of this chapter) and thus has similar rights to an unpaid seller.

goes insolvent, the seller has been paid and the bank cannot revert to him for the return of the money. The risk lies with the bank. The problem the bank faces is how does the reality tie in with the law? Yes it is stuck with the goods but how can it legally take physical possession to resale? The law provides several routes.

2.1.The bank as consignee

Where the bill names the bank as consignee, clearly it is the party to whom delivery is made. Section 5(2)(a) of COGSA 1992 makes the consignee in possession of a bill of lading the lawful holder to whom delivery should be made[12].

2.2.The bearer bill

Section 5(2)(b) of COGSA 1992 also includes within the definition of a lawful holder of the bill of lading a party with possession of a bearer bill of lading. Possession of such a bill by the bank means that delivery is to be made to whoever holds the bill as stated by the bill itself.

2.3 Endorsement

A bank is the lawful holder of the bill of lading and entitled to delivery where it has possession of a bill endorsed to its order by virtue of section 5(2)(c) of the Act. The issue with this solution is that the banks' ability to take physical possession will depend on another party i.e. on the party to whose order the bill is initially made out to. That is the party that will have to endorse the bill to the bank and that party may be another bank, the buyer/applicant or the consignor. This situation is best avoided but nonetheless a possibility.

2.4. The pledge and our Conclusion

The solutions for the bank to have physical control of the goods I have discussed thus far all concern making the bank a lawful holder of the bill of lading under COGSA

[12] For issues relating to the effect of the bank being named consignee see section C. 3 below.

1992 and thus having all the rights as a normal buyer. Another possible route is provided by the common law in the form of a pledge. Jack describes this[13] as the transfer of the possession of the goods to the pledgee with the ownership of the goods remaining with the pledgor. This pledge gives the right to the pledgee of sale. Hence in *Rosenburg v. International Banking Corporation*[14] Lord Justice Scrutton stated that the pledge gives the bank an independent right to secure the amount that it advanced to the seller through the right of sale. So, where a buyer becomes insolvent, the bank, through the pledge, has the right to take possession of the goods and reimburse itself through their sale.

It is clear that the pledgee is the bank, but who is the pledgor? Is it the seller or the buyer? I.e. beneficiary or applicant? The bank's right to sell will depend on the default of the buyer thus making him the pledgor; but it receives the documents from the seller who could also be argued as the only possible pledgor, being the party that actually gives the bank the documents. What the situation actually is, is that the buyer is the pledgor, with the seller being the party pledging the documents on behalf of the buyer or with his consent[15]. Consequently the seller must at the time of presentation of documents have general property in the goods[16].

This pledge does not add anything further to the bank's security where it is already consignee, holder of a bearer bill or has a bill indorsed to its name, as the banks' right is already present in COGSA 1992. Jack does however suggest[17] that where the bill is to the order of a party other than the bank, it still obtains a pledge. The problem is that there is no evidence on the bill itself that the particular bank has a right to the delivery of the goods. Thus, it is unlikely that it will be able to convince the carrier that it is the party that should have possession of the goods. In light of the fact that the pledge offers the same security as COGSA, it is suggested that the bank and the carrier will most likely want to look at the Act to determine if the bank should get possession of the goods as opposed to the common law pledge. Perhaps it is best thought of as the common law giving ground for the Act. So, although the bank is not a party to the

[13] *Jack* pg 324
[14] *Rosenburg v. International Banking Corporation* (1923) 14 L1.L.R 344
[15] *Ross T. Smyth & Co v. T.D. Bailey, Son & Co* (1940) 67 L1.L.R. 147
[16] *The Future Express* [1993] 2 Lloyd's Rep 542
[17] Pg 326

initial carriage contract (and thus how can it possibly be a lawful holder of the bill) due to the pledge of the documents, it gains the right of sale where the buyer defaults on the terms of the credit (i.e. does not pay) and upon this pledge it may also become simultaneously a consignee, a holder of a bearer bill or named as the party to whom the bill is indorsed, thus making it under COGSA a lawful holder of the bill and therefore now party to the carriage contract. If the bank does want the protection of the pledge without any liabilities or rights under the contract of carriage (save for the right to sell the goods) it may simply consider itself as pledgee. However, it is likely that the carrier will look to COGSA for a more reliable route to determining whether or not the bank is entitled to delivery of the goods.

3. <u>Buyer/applicant repays</u>

Where the bank is the party entitled to delivery by any of the routes discussed above, but the buyer does manage to later pay the bank, the bank will need to endorse the bill to the buyer so that he is now the one able to either take physical delivery or on-sell the goods. This is the last step the bank will need to complete so that it is put in a position where is does not have any liabilities concerning the goods and has the money it paid to the seller. If the bank follows the steps I have discussed above, it will be the best method to follow to secure the money it has invested in a credit. It stops another party taking physical delivery and is then able to sell the goods itself if need be. The extent of the security offered by the bill of lading is therefore dependant on the characteristics of the specific bill presented. As these vary, so does the security.

C. Seaway-bills, Charter-party bills of lading and Multimodals

1. Provisions in the UCP decreasing risk

During our discussion of seaway-bills in Chapter 4 we mentioned in Section D.4.1 that one of the reasons the UCP require a full set of seaway-bills is for extra security concerning the disposal of the goods. This is particularly true of transport documents which carry with them the requirement that they are to be presented to the carrier for delivery to take place. One of the provisions which therefore decrease the risk the bank faces is the full set provision found in Articles 19-22. Similarly, seaway-bills and charter-party bills of lading must be in the "shipped" form as opposed to "received for shipment"[18]. This is another provision that increases security; the bank is sure that the goods have at least left the port of loading and are headed for the (correct) destination. The reader may have noticed however that in this second example of decreasing the risk I have not included the multimodal transport document. This is because the UCP do not require it to be "shipped" due to the nature of the document itself. This moves us swiftly on to the provisions in the UCP which increase the risk (or the lack of provisions).

2. Provisions in the UCP Increasing risk

2.1. Multimodals taken in charge

We have already mentioned that multimodal transport documents may indicate that the goods have been dispatched, taken in charge *or* shipped on board in Chapter 4. We have also discussed the fact that the Banking Commission requires an on board notation indicating that the goods have in fact been shipped on board a named vessel when the first leg of carriage is sea transport. Where the first leg is by road for example, it is enough that the document indicates that the goods have been taken in charge. Clearly this would make the transport document a "received for shipment" form. If this is so, what security does the bank have that the goods are in fact on their

[18] Unlike the position under English law which by virtue of Section 1 (2) (b) of the Carriage of Goods by Sea Act 1992 includes in the definition of "bill of lading" bills in the "received for shipment form" (for the purposes of the Act).

way to the destination? How can the bank be sure of the location of the goods if they have merely been "taken in charge" and notably how can it know the date of their actual arrival? The answer is it cannot. To make matters more complicated, let us assume that a shipper, upon arrival of the goods at a port of loading (the second leg of carriage after truck transport) exercises his right under COGSA 1971 (Hague Visby Rule Article III (7)) to demand from the carrier a "shipped" bill of lading. The carrier makes a dated on board notation that the goods have been shipped on board the named vessel at the named port of loading bound for the named port of discharge. Are we now looking at a multimodal transport document under Article 19, or a bill of lading under Article 20? The significance would be twofold. Firstly, the credit may call for a multimodal transport document only (and thus if the document checker considers this a bill of lading it would be rejected) and secondly, in the bank's favour, a shipped bill of lading will be a much better option for security than a multimodal transport document in the "received for shipment" form.

Notably, COGSA 1992 does not differentiate between a multimodal transport document and a bill of lading; thus one can suggest that where the Act does not expressly exclude a multimodal document from the definition of bill of lading, it is included. Included are also received for shipment bills by virtue of Section 1 (2) (b) which as I have mentioned would therefore include multimodals indicating the goods have been taken in charge. The conflict between the UCP and the statute is that the UCP *does not* recognise "received for shipment" multimodals as bills of lading. Whereas COGSA 1992 would require the buyer to present a received for shipment multimodal in order to obtain delivery[19] based on the interpretation that a multimodal is a bill of lading, the UCP would not do the same. The UCP would regard such a document as a multimodal and nothing more.

The relevance to the bank would of course be whether the document needs to be presented so that delivery can take place. Where it has not been reimbursed by the buyer for the price of the goods paid to the seller, a bank would feel safer holding a bill of lading which it knows needs to be presented for delivery, rather than a

[19] Section 2 (1) (a) provides the 'lawful holder of a bill of lading' with the 'rights of suit under the contract of carriage' which must include the right of delivery: see Debattista, C. Bills of Lading in Export Trade at pgs. 32-33

multimodal which may or may not be needed. I say may because multimodals tend to state expressly that they need to be presented for delivery to take place[20]. Whether or not this bears any significance for the bank has been discussed in Chapter 3 Section D.2.

2.2. Charter party bills signed by charterer

We have already noted that charter party bills of lading signed by the charterer are acceptable under Article 22. How such a bill could pose possible security risks for the banks is best understood through an example:

Imagine a seller under a CIF contract of sale. He decides to fulfil his carriage obligation by chartering vessel X for voyage A - B[21]. This makes him charterer. He may also be the shipper and under a letter of credit contract he will also be the beneficiary. The bank will therefore be paying money to a person who is beneficiary, seller, shipper and charterer. Alarm bells would be ringing that the bill presented could be completely fabricated. Where the bill is signed by the owner, it is in his interest to make sure that there is no fraudulent information. Where the bill is signed by the charterer as carrier the bank receives a document which guarantees shipment of Y goods on boat X from the person who is shipping the goods and from the person who is getting the money. Clearly it would be very easy for such a person to sign a bill claiming Y goods are on ship X in order to get paid when in fact nothing has been sent. By the time the bank realises this after it has paid upon complying documents, the beneficiary could have disappeared. The provision in Article 22 that allows charterers to sign charter-party bills of lading is therefore very problematic for banks. Clearly a buyer would not be happy with such a document and as we discussed above, if the bank is in effect buying the documents from the beneficiary, then there is no reason for it to be happy with the document either.

The issue may be resolved in two ways. The first is by the bank insisting that Section 22 (a) (i) should be amended so that accepting a bill signed by charterer is not

[20] See for example BIMCO's COMBICONBILL and MULTIDOC 95 and the Negotiable FIATA Multimodal Transport Bill of Lading.
[21] For details on Voyage Charter-parties see Wilson, J. F. Carriage of Goods by Sea 7th Edition, 2010, Pearson Longman, ISBN: 978-1408218939 at Chapter 3

permissible. The problem is of course that the bank is to follow the applicant's instructions and it may be difficult to reconcile those interests where the buyer would want to allow a charterer signed bill. The second is by the ICC itself amending the UCP by removing the applicable provision from Article 22. My proposal therefore is the following:

Proposal 1:

Article 22 (a) (i) should read:

"A [charter-party] bill of lading…must appear to be signed by:

- ***the master or a named agent for or on behalf of the master, or***
- ***the owner or a named agent for or on behalf of the owner."***

The rest of the Article should thus also be amended to remove the references to charterer.

In this way the bank receives a document signed by a party other than the one to whom it is forwarding money and the applicant still receives a properly signed charter-party bill of lading.

3. <u>Outside the UCP</u>

There are circumstances where a bank will feel unsecure with certain transport documents due to the very nature and intent of the document. I am referring to any form of seaway-bill specifically. As already discussed, these documents do not need to be presented for delivery to take place. In fact, their very purpose on the trade market is to allow goods of a single sale contract to be delivered directly to a specific named person known prior to shipment. This characteristic of a true seaway-bill cannot be altered or amended but will mean that a bank in the middle of a letter of credit arrangement may find itself out of pocket. It may have paid the seller/beneficiary against complying documents and simultaneously the buyer/applicant may have already run off with the goods having only shown an identification card to the carrier for delivery. In this day and age it may well be the case that the documents take longer to go through the letter of credit than the goods take to reach the destination. A bank would be mindful of a suspicious applicant and would want to secure a control over the goods as security for payment. The easiest way to do this is actually outside of the UCP rules. There is no proposal for me to make here; this is just a note to clarify the usual practice banks should and would follow to secure their interest when a credit calls for a seaway-bill. Much of our investigation in the thesis has indeed been into the UCP provisions themselves but I suggest it also vital in this section to mention the issue of bank's security.

3.1 Consignee

The bank can protect itself by requiring that it is named consignee on the waybill and that the buyer is included as notify party. It will then be able to assign its rights to the buyer and inform the carrier of delivery to him upon settlement of the account[22]. The document is not a document of title and therefore simple endorsement to the buyer will not suffice. The result of this solution would be that the bank is the party to which delivery should be made; hence the buyer is not able to take delivery and run off with the goods. However, a problem does persist in the fact that the consignor has a right to alter the identity of the person to whom delivery should be made (consignee) all the way up to the time of discharge[23]. The bank may therefore be sitting comfortably during the entire credit transaction and at the last minute the applicant may still be able to take delivery without having reimbursed the bank. The bank therefore must deal with the consignor's right for which is the two options we discuss in section 3.2. and 3.3. below. It may also alternatively require that the waybill contains a clause allowing a lien over the goods and delivery only against written authority from it[24].

[22] Note however that this will result in the bank becoming party to the contract of carriage and thereby liable under, which may be undesirable. See *Jack* pg. 221. See also Debattista. C. Banks and the carriage of goods by sea: secure transport documents and the UCP 500 B.J.I.B. & F.L. 1994 9(7) 329-338 at pg. 333 and footnote 38 who argues that the bank becoming consignee may not of it self result in it becoming liable under the carriage contract.
[23] This is due to the fact that the seaway-bill is not a document of title and the consignee has a right to the delivery of the goods so long as he remains consignee i.e. s 5(3) of COGSA 1992 identifies the person entitled to the goods as that named as consignee *for the time being*.
[24] *Jack* pg. 222.

3.2 Consignee and Consignor

The first solution would be for the bank to require itself to be named both consignee and consignor. The right to vary the identity of the consignee would therefore be with it. Thus far in this section, we have assumed that there is only one bank in the credit transaction. However, there may be several others and one can imagine huge objections of, for example, the confirming bank being named consignor but the issuing bank not named. The confirming bank would have security, but what guarantees the issuing bank delivery of the goods even if it is named consignee? Clearly the conflict would result in more trouble than it is worth. This issue is one of the reasons that the second option to the bank discussed below is perhaps a better solution.

3.3 Consignee and removal of right to alter

If the bank wants to make sure that the consignor does not alter the name of the consignee (i.e. the bank itself) then instead of becoming consignor (which would also bring with it the obligations and liabilities under the contract of carriage) why not simply restrict the right in the first place? We must not forget that these are contracts, clearly negotiable and able to be amended. A good example is found in the CMI[25] Uniform Rules for Sea Waybills 1990 which gives the shipper the option to transfer the right of control to the consignee (no later than at the time of receipt of the goods by the carrier). This would be a good solution for the bank because it would have the right of control vested in it without any liabilities under the carriage contract[26]. Returning to the UCP however, the reader must remember that such a condition needs to be stipulated in the credit i.e. "Seaway-bill noting exercise of shipper's option to transfer right of control to consignee" so that they are applicable to the credit transaction because the UCP do not deal with such details. If the bank wishes to protect itself in this manner it must do so through the conditions of the credit, hence why this option is listed outside the UCP in our investigation.

[25] Comite Maritime International. See Article 6 (ii).
[26] There is still of course the problem of which bank is consignee and thus has the right of control.

D. Conclusion

The purpose of this chapter was to indicate the other side of a letter of credit. On the one hand we have the seller/beneficiary and the buyer/applicant who will be concerned with getting paid (the former) and getting the right goods and documents (the latter), and on the other hand we have the bank which is putting itself in a risky position to serve the needs of its customer. Although in the rest of the thesis we look at the concerns of the seller and buyer and how the bank will determine compliance of the documents in accordance with those concerns, this chapter looks at the concerns of the bank. Clearly, it is favourable that a bank receives a bill of lading as opposed to any other variation of a transport document. The bill of lading offers the greatest security. However, we must be realistic and this means recognising the frequent use of other forms of transport documents. This recognition has resulted in processes the bank can follow in order to make the credit a more secure transaction in its favour. Whether or not the bank utilises these processes will determine the extent of the risk it takes in paying money to a party it does not know in return for a few pieces of paper.
Although this chapter does not add any proposals to the UCP (save one concerning charter-party bills) the issues we have dealt with were necessary because no doubt they will influence the negotiation procedure between bank and buyer as well as possibly influencing the type of document a bank is willing to accept as compliant on behalf of the applicant.

My proposal from this chapter is therefore:

Proposal 1:
Article 22 (a) (i) should read:

"A [charter-party] bill of lading…must appear to be signed by:

- *the master or a named agent for or on behalf of the master, or*
- *the owner or a named agent for or on behalf of the owner."*

The rest of the Article should thus also be amended to remove the references to charterer

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CHAPTER 6

Documentary Compliance 3 – The Insurance Document and Commercial Invoice

PART 1

A. Introduction

One must not underestimate the importance of the insurance document in an international sale. It is true that the transport document is perhaps the most important between the two because it represents the goods and allows the buyer to check whether the goods are in the correct condition, on the correct vessel leaving from the correct port, but the insurance document will be vital in the event that something goes wrong. Where the goods are damaged in transit, and risk has passed on shipment, the buyer will be looking to get his money back. The seller has no obligations as it is proven the goods were damaged after shipment, and the buyer will be looking to the carrier, or the insurer to claim compensation. Clearly, the insurance document is therefore vital, especially during the credit phase when the goods may still be in transit. Our background, as always, is the seller trying to obtain payment from the bank on the basis that his presentation meets the required UCP and credit conditions. In this Chapter we look at the conditions for accepting a compliant insurance document and also look at the conditions of the Commercial Invoice. The importance of the Invoice lies primarily in the fact that it is the only document required by the UCP that is required to contain a description of the goods which must correspond with the description in the credit. Whereas the bill of lading or other documents may simply be linked to the goods in question, the invoice must be clear (although not identical) in its description of the goods. Clearly, the buyer (applicant) and the bank itself will be extremely interested in checking that it is the correct goods for which money will be paid out (and indeed at the correct price).

B. Structure of the Chapter

The Structure of this Chapter is similar to Chapter 2 above; we work through the UCP Article dealing with insurance documents and in the process discover not only the rules governing the examination but also areas in the UCP that will need amendments and additions. As always, the publications that accompany the UCP (ISBN, DOCDEX and Commission Opinions) are used to aide the investigation. Again the reader will find throughout the chapter my recommendations for change which are highlighted with my own part of the proposal in italics. The last part of the chapter deals with the invoice, in similar light to the insurance document.

PART II

C. The Insurance Document

Throughout this paper, we have been examining the UCP rules against the backdrop of an international sale of goods carried by sea. Such contracts will also involve insurance for the goods for the period of transit. The obligation of who is to procure such insurance depends on the terms of the sale contract[1]. It is not our place in this paper to delve into such matters suffice to say that when the sale agreement dictates that it is the seller who shall organise the insurance[2], then along with the transport document, commercial invoice and any other required documentation such as certificates of quality; he shall also be obligated to tender an insurance document. In letters of credit governed by the UCP 600, which is our present, and only hypothesis, the standards this document must reach are stated in Article 28. An initial comment I must make with regard to Article 28 is that it is a much desired list of requirements that an insurance document must reach as part of the presentation of documents for payment. The common law in the United Kingdom has not as yet comprehensively addressed the issue of what minimum standards the insurance document must meet in order to be considered good tender under a sale agreement; unlike the existence of thorough discussions on the minimum requirements that a bill of lading must reach in order to be considered good tender[3]. What the requirements at common law are for an insurance document is a topic for an entirely different paper[4]; however, the lack of

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[1] See for example ICC Incoterms 2010: rules for the use of domestic and international trade terms. Publication No. 715, Paris 2010, ISBN: 978-9284200801 which divides the cost and responsibilities of the seller and buyer into several groups, the most common used being CIF (Cost Insurance Freight) and FOB (Free on Board); the former allotting obligation to procure insurance with the seller and the latter allotting obligation to the buyer. The terms also dictate who will organise carriage. For a comprehensive explanation on the terms (which also form part of UK common law) see Sassoon, D. CIF and FOB contracts 4th Edition 1995, Sweet and Maxwell, London, ISBN: 0421513209. The book is very old in legal terms but remains *the* authority in this area of law; a new edition is due for publication 2011.

[2] In our case a CIF agreement. CIP (Cost Insurance Paid) also requires the seller to procure insurance but is often used for multimodal/containerised shipment and in this paper we shall focus on transport solely by sea on CIF terms.

[3] See particularly, Debattista, C. Bills of Lading in Export Trade 3rd Edition; 2008; Tottel Publishing, 1845923154 at pg. 123-243

[4] A few examples are 1) the amount of cover the document must give is the reasonable value of the goods at the time of shipment (*Tamvaco v. Lucas* (1861) 31 L.J.Q.B.; *Johnson v. Taylor Bros. & Co. Ltd.* [1920] A.C. 144. 2) covering the whole transit (*Landauer v Craven & Shipping Bros* [1912] 2 K.B. 94).

common law clarification means that the UCP are not only an example of how UK law may be clarified, but also fill the current vacuum.

In this Section therefore, we shall investigate the requirements an insurance document must reach, according to the UCP 600, in order for a bank to accept it under the letter of credit agreement. The reader must not forget that in addition to such specific requirements, the insurance document must also fulfil requirements under Articles 14[5] and 17[6] and must also comply with any terms in the credit itself, international standard banking practice[7] and be presented correctly as far as place and time of presentations are concerned[8]. Only then will the document be accepted as compliant. Throughout this investigation the main objective is to analyse the UCP in order to identify provisions which fall short of their intended purpose, confuse their meaning through bad drafting or overlook certain issues entirely, and make proposals for the redrafting of the Article where appropriate.

1. Policies, Certificates or Declarations?

The first issue that arises is the question of what type of insurance document must the seller present. If the credit calls for an insurance policy to be presented, then this and only this will be acceptable. In cases where the credit calls for a certificate of insurance or a declaration under open cover then the rules are satisfied by the presentation of such a document but also by the presentation of a policy. This is stated in sub-article 28 (d). The problem with the sub-article is that it only provides presentation of a policy in lieu of a certificate/ declaration. It does not clarify the opposite position i.e. is a certificate acceptable in lieu of a policy. Why is this important? Let me give an example.

When I stated that a credit calling for an insurance policy can only be complied with if an insurance policy is presented, I did not refer to Article 28. There is no provision in that Article that states that when a policy is called for a policy *must* be presented otherwise the document is not compliant. That statement was made on the basis of

[5] Consistency, Description of Goods, Linkage. See Chapter 2 above Section E.3, E.4, E.5.
[6] Original. See Chapter 2 above Section B.2.1.
[7] See Chapter 2 Section F.
[8] See Chapter 2 Section B.

Article 2, that a complying presentation is one that is in accordance with the terms and conditions of the credit. So, if a term of the credit requires an insurance policy, then the presentation must include an insurance policy in order to be compliant. Now, if a credit calls for a certificate, and the seller provides a policy, then we have a double edged sword. If the bank accepts the document, it does so, on the basis of sub-article 28 (d) (and thus meets the requirements of the UCP) but nonetheless does not meet the requirements of the credit and implicitly the instructions of the buyer. On the other hand, a confused document checker who may not be so accustomed with the UCP (and lets hypothesise unaware of sub-article (d)) will look at the credit, see that it requires a certificate and not a policy (and may be completely unaware of the significance of either document) and reject the presentation, thus complying with the terms of the credit, but not with the UCP. Notably, a seller who may have even less knowledge of the UCP rules may not be aware that the bank should have accepted the document under sub-article (d) and thus does not raise the argument. Moreover, it should be noted that sub-article (d) states:

"An insurance policy *is acceptable* in lieu of a…certificate…or a declaration…".

My question is: what does "is acceptable" mean? Does it mean that the bank is obligated to accept a policy in lieu of a certificate if a policy is presented i.e. *must* accept? Or does it mean that the bank *may* accept a policy in lieu of a certificate? Arguments are strong both ways. If we say must, then we oblige the bank to accept a policy, when the buyer, for whatever reason specifically required a certificate, and this is what he instructed the bank to do. If we say may, then a seller is faced with the rejection of a document which is of greater value to the buyer than the certificate.
I do not intend to argue that acceptance of a policy instead of a certificate is the wrong action, I am just presenting the doubts that lead me to the following proposal:

Proposal 1

Article 28 (d) should be redrafted to:

"An insurance policy is acceptable in lieu of a…certificate…or a declaration *but not vice versa*".

It is therefore clear, that the documents are not interchangeable and that allowing a policy in lieu of a certificate, is based on the reasoning that it is the policy which will be required by the buyer in order to lodge a claim; that is the actionable document; that is the document which contains the terms of the insurance contract. The certificate of insurance on the other hand, is merely evidence of insurance cover, it is not by itself sufficient for the buyer to claim on the insurance[9]. On the basis of the above reasoning, it will also be useful if sub-article (d) clarifies whether or not a bank *must* or *may* accept a policy in lieu of a certificate. It is suggested that *must* is the better option. It seems unreasonable to reject a policy in lieu of a certificate when it is the policy which the buyer will require in order to make a claim. If the buyer definitely requires a certificate, then he should expressly modify Article 28 (d) (or exclude it altogether) so that he does not receive a policy instead of a certificate. I submit that the solution is thus:

"When a credit requires an insurance policy, no document other than an insurance policy shall be accepted. When a credit requires a certificate of insurance or a declaration under open cover, an insurance policy shall be accepted in lieu of such certificate or declaration".

This proposal spells out the fact that only a policy is accepted when a policy is required and that a policy will be accepted in lieu of a certificate/declaration. We know that this was also the result intended by the ICC through their Commentary[10] which states that "presentation of an insurance certificate or declaration under an open cover is not acceptable if the credit requires an insurance policy"[11] due to the fact that in a case of conflict between the certificate/declaration and the policy, the policy will prevail. It also leaves it to the buyer to modify the term if he wishes only a certificate/declaration to be accepted when such is called for by the credit.

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[9] In many jurisdictions it is not an actionable document. See Fung. K, UCP 600 and insurance documents in DCInsight (Trade Finance Quarterly of The International Chamber of Commerce) Vol 14 No 4, October – December 2008 pg. 16. For further information on Marine Insurance and the Insurance system see Bennett, H. The Law of Marine Insurance 2nd Edition, 2006, Oxford University Press, ISBN: 0199273596 particularly Chapter 2. See also Gilman, J. Arnould's Law of Marine Insurance and Average 17th Edition, London, 2008, Sweet and Maxwell, ISBN: 9780421727106.
[10] ICC Commentary on UCP 600 Publication No. 680, France, ISBN: 9789284200153
[11] *Ibid* at pg. 131

A last point to note is that under sub-article 28 (c) “cover notes will not be accepted” as insurance documents.

2. Issue and Signature

Now that we know what type of document the bank may accept, we must also clarify by whom it must be issued and signed[12]. There are three options under sub-article 28 (a). The document “must appear to be issued and signed by:

i) an insurance company or,
ii) an underwriter or,
iii) their agents or… proxies”.

Under option iii) it is possible for a broker (as agent of an insurance company) to issue and sign in his capacity as agent, an insurance document[13]. When a party from option iii) signs the document, it must be indicated whether they have signed for and on behalf on the insurance company or the underwriter. Banking Commission Opinion R685[14] decides that when an underwriter signs an insurance document, it should also be indicated in what capacity he is signing (i.e. whether on behalf of the company or in its own capacity as underwriter).

An interesting point to make is that, unlike the transport document Articles, there is a comparative lack of requirements with respect to identifying the insurance company and the signature. For example, under Article 20 (Bill of Lading) which we discussed in Chapter 3, we saw that the document must appear to indicate firstly the name of the carrier and also identify the signature as well as the capacity in which the document is signed. For example:

Identity of Carrier = X
Signed by master = Y

[12] For the definition of signature see Article 3 “Interpretations” which states that a document may signed by handwriting, facsimile, stamp, symbol, perforated signature or any other mechanical/electronic method of authentication.
[13] See paragraph 172 ISBP. See also Banking Commission Opinion TA 673 Rev; R232 Ref 212, R233 Ref 213 in Banking Commission Opinions 1995 – 2008
[14] See Banking Commission Opinions 2005 – 2008

For or on behalf of Carrier X.

With the insurance document, the requirement is for the document to appear to be issued by the insurance company (I.e. I assume this could mean be on the stationary of the company) and be signed by the company/underwriter/agent/proxy indicating for or on whose behalf they are signing. So, the bank need not check the identity of the insurance company and need not check the identity of the person signing. All that the bank needs to check is that when the signature is of an agent or proxy (or an underwriter as per R685) then it indicates the capacity in which they sign. However, without making it necessary to identify the person signing, then how is the document checker supposed to know whether that signature is of the company (and thus does not need "for or on behalf of") or is of the broker and does need "for or on behalf of"? Why is this important? When person A signs the document, and is part of the insurance company but does not identify himself as such, the document may be wrongly rejected as non-compliant because of the lack of "for or on behalf of".

I do not suggest that it is necessary to identify the insurance company generally, because any insurance document, be it a policy a certificate or declaration under open cover will indicate the name of the insurer simply because that is the essence of the insurance contract. That is the core term i.e. insurer A covers risks of B C D and agrees to pay Buyer in case of loss/damage. But I do suggest that it is necessary to identify the person signing, otherwise the document checker may be confused as to identifying the capacity in which it is signed. One must be dependant on the other. The article therefore should include a complete addition of the following provision:

Proposal 2

'Any signature by the insurance company, underwriter, agent or proxy must be identified as that of the insurance company, underwriter, agent or proxy.'

It must then continue with the current provision:
"Any signature by an agent or proxy must indicate whether the agent or proxy has signed for or on behalf of the insurance company or underwriter".

We must add a third paragraph however to include R685:

Proposal 3

'Any signature by an underwriter must indicate whether the underwriter has signed for or on behalf of the insurance company or the underwriter itself'.

If the ICC requires identifying the capacity in which the underwriter has signed, there is no use leaving the requirement in a Banking Commission Opinion, it is much better placed directly in the UCP and for this reason I have drafted the above provision.

3. <u>Originals and Dates</u>

Sub-articles 28 (b) and (e) deal with the issues of originals and dates respectively. "Where the document indicates that there is more than one original then all originals must be presented" and this is despite the fact that the credit may make reference to only one original[15]. This last statement is in the Commentary of the UCP and actually conflicts with Banking Commission Opinion R359[16] which decided that even if more than one original is issued, where the credit calls for one original only, one is required. This problem is that on one hand we have an official Opinion saying A and a Commentary from the Drafting Group saying B.

The only explanation I can find is that the old UCP 500 Article (on which Opinion R359 is based) read the same as the current 28 (b) but continued: "unless otherwise authorised by the credit". So, where the credit authorises only one original, only one is required. The issue is, that it can be argued that the removal of "unless authorised by the credit" from the article was not in order to reach the position advocated in the Commentary (i.e. despite what the credit authorises if more than one original is issued then all must be presented); it was removed in the general 'clean up' of the UCP. Previously, UCP 500 contained in almost every article the phrase "unless stipulated in the credit" denoting that each article was subject to express terms in the credit itself. This phrase is deleted in the 600 version in view of the provision in Article 1 which clearly allows the modification or exclusion of any article. If so, then Opinion R359 cannot be reconciled with the Commentary. Two examples evidence the problem:

[15] Commentary pg. 131
[16] Ref 215 in Opinions 1995 -2000

CASE 1

SWIFT LC 1: Field 46: Documents Required: A

B

C

Original Insurance Policy

D

Here, where the credit does not expressly indicate the number of insurance policies to be presented, but the document itself states: “First of Two Originals” and thus indicates two originals where issued, there is no doubt that the presentation will only be determined compliant if both originals are presented.

CASE 2

SWIFT LC 2: Field 46: Documents Required: A

B

C

One Original Insurance Policy

D

In this case, it is clear that the credit calls for one original. If the document again contains the phrase “First of Two Originals” sub-article 28 (b) comes into play which will require the bank to reject the presentation if only one original is presented. But let us suppose that the “One Original Insurance Policy” was intentionally inserted by the buyer in the knowledge that the second original cannot be presented by the seller as it has already been forwarded to another party. Surely rejecting the presentation is unreasonable? This will however be the result under UCP 600. I submit, not that the UCP should be changed (because it is clear in my mind that where the buyer expressly calls for one original then he is modifying the rules) but that the Drafting Group must clarify their position in the Commentary. For example, what constitutes an express modification? Will the buyer have to expressly exclude Article 28 in order for only one original document to be acceptable; or will the reference to one original in Field 46 suffice to be express modification of Article 28?

Proposal 4

I suggest the best approach is clarification through a Commission Opinion clarifying that *where the credit expressly calls for one original, only one is required.*

Lastly, under paragraph 171 of the ISBP, all originals must be countersigned if this is required by the credit or the document itself.

The issue of the date of the insurance document is a little more complex. Sub-article (e) states that "the date of the insurance document must be no later than the date of shipment *unless* it appears from the…document that the cover is effective from a date no later than the date of shipment". In practice, it is likely that an application for insurance is sent to an insurance company some days after shipment (allowing the seller/shipper to have obtained all the required details of the shipment in advance) and the company then backdates the issuance date of the insurance document to match the shipment date[17]. Immediately bells are ringing concerning backdating malpractice and so the "*unless…*" provision in sub-article 28 (e) provides an adequate solution. This suggests that the insurance document should have two dates; an issuance date and an effective date. The issuance date is the date the document was issued (and in absence of an effective date also the date from which cover commences as per sub-article (e)) and the effective date is the date from which cover commences. So, a document checker should look for an effective date of cover first, to determine if the document complies (i.e. cover is at least from date of shipment) and if he cant find an effective date, to check the issuance date and see if this is at least the date of shipment. In this respect Article 28 needs no amendments and indeed solves the issue of dates[18].

We must make the following clarification however: where the article states "unless it *appears…*" this must be adequate evidence that the goods are covered from the date of shipment. For example, where an insurance document has been issued on date B, and contains the phrase "sailing / dispatch date A" (and A is earlier than B

[17] See Fung, K. *supra* nt. 9
[18] We shall not go into whether it is necessary for a document to contain an issuance date or not. We have discussed this in Chapter 3 above under Discussion point D.4. and the same comments apply here.

chronologically) this will not be an acceptable document because it does not clearly state if cover was effective from that sailing/dispatch date[19].

A last note on dates in insurance documents concerns paragraph 174 of the ISBP. The type of date we are concerned with in this case is the "expiry date". If the document does contain such a date, it must be clear that this date relates to the latest date for loading/dispatch/taking in charge of the goods and not to any expiry date for presentation of a claim. As we shall see further into our investigation, the ISBP becomes an essential part of determining whether the insurance document is compliant and thus is a necessary tool that we must have knowledge of.

4. Is there a minimum amount of cover?

If the whole purpose of an insurance contract is to insure you against loss or damage to a specific set of goods on a specific route, then it is obvious that one of the essential terms in that contract is the amount of cover you have. That is why sub-article 28 (f) (i) requires the insurance document to "indicate the amount of cover". It also requires that this amount is "in the same currency as the credit". The key part of the sub-article however relates to the minimum cover the document must provide. Where "there is no indication in the credit of the insurance coverage required, [it is deemed by the UCP to be] *at least* 110% of the CIF or CIP value of the goods"[20]. If this value cannot be determined from the documents then the calculation will be on the basis of the amount for which honour is sought, or the gross value as per invoice, whichever is higher. According to Opinion R469 and ISBP paragraph 178, where the invoice only represents part of the gross value of the goods (for example due to prepayment) then the cover must be based on the full gross value of the goods. Where a credit does indicate that cover is a percentage of the value of the goods/invoice, then this is the minimum cover. For example, where the credit says that minimum cover is 100% gross value of the goods, then that is the minimum and not the 110%. Several questions arise. Firstly, is there a maximum cover? No. It is clear from the Commentary[21] that there is no limit on the maximum amount[22].

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[19] See Banking Commission Opinion R290 Ref 214 in Opinions 1995-2000.
[20] See also Opinion R468 Ref 216 in Opinions 1995-2000 which upholds the provision.
[21] at pg 132

Secondly, must cover be exactly the percentage quoted? No. As per Opinion R468 where a credit or the UCP say for example 110% of the value then this is the minimum coverage, not an exact one. i.e. if cover is 111% it is not discrepant. If the buyer requires an exact amount, this should be expressly stated in the credit.

Thirdly, must one document cover the entire shipment? Yes, *unless* documents for partial cover are presented which clearly reflect (by percentage for example) the value of each insurer's cover and that each insurer will bear its share of the liability severally and without preconditions relating to the other insurance cover.

This third question is important because it does not feature in the UCP itself; it is actually paragraph 174 of the ISBP. Again we see how vital this document is in adding to the provisions of the UCP. It is suggested that the division of the liability does not encompass division physically (i.e. insurer A covers risks from Southampton to Piraeus and insurer B covers from Piraeus to Constantza). It must only cover division in money terms (i.e. Insurer A covers 60% of damage and Insurer B covers 40% of damage) because otherwise it cannot be reconciled with sub-article 28 (f) (iii). We shall discuss this in section 5 below but for now it is convenient to state that this provision requires that the document provides cover for the goods "at least between the place of…shipment to the place of discharge"[23]. If we were to divide the liability physically, then although presenting two documents is acceptable under paragraph 174, they would not satisfy sub-article 28 (f) (iii) because they could not indicate cover between shipment and discharge. Dividing the liability physically would necessarily mean that each document would indicate cover from Shipment to Division Point and from Division Point to Discharge, respectively.

The key question is, if a document checker is presented with two different insurance Documents each dividing the liability physically, does he reject due to failure of sub-article 28 (f) (iii) (i.e. one document covering entire period) or does he accept under paragraph 174 if the documents clearly indicate their own cover and satisfy the credit? It is submitted that the documents should be accepted. Although it does not seem that

[22] Unless it is expressly stated in the credit that the cover must be exact, in which case over insurance for example will be deemed as a discrepancy.

[23] Also from the Place of taking in charge to the Final Destination; although as we have mentioned this study focuses particularly on carriage solely be sea.

sub-article 28 (f) (iii) leaves room for the acceptance of two documents, if partial cover under 174 can be considered to be partial in the sense of partial route, and the documents clearly say from A to B and from B to C, then there is no reason the documents are not complying. The seller has presented insurance documents covering the entire route for the amount/risks required which can be clearly identified in the document. Could it be clearer? Yes it is suggested that the phrase "partial cover" in the ISBP should be clarified. As it stands, partial cover indicates dividing the monetary liability. If it were physical liability it may have read "partial cover period". However, as explained above, documents which cover separate parts of the route (but together do indicate that they cover the whole route) should be acceptable. Hence, necessary classification and/or addition to paragraph 174.

Proposal 5

***Clarification of the term "partial cover"* in ISBP paragraph 174**

5. Is there a minimum period of cover?

We have already answered this question in the above section but for reasons of completeness, it is convenient to state that the insurance document must provide cover at least between the place of taking in charge of the goods/shipment to the place of discharge/final destination[24]. In this paper we are focusing on shipment by sea and so shipment and discharge is what we are concerned with but it is important to note that where shipment includes any other modes of transport it is between the place of taking in charge and final destination that cover must be provided.

6. Risks

Now that we have clarified the most of the main elements of insurance (the amount of cover; the period of cover) the last essential element is what risks are covered. Here we turn to sub-articles 28 (g) and (h). Under (g) "*the credit* should state the type of insurance required and if any, ther additional risks to be covered". In essence, it must state the risks which the document must cover. If it says something like "usual risks"

[24] Sub-article 28 (f) (iii)

then the document presented is acceptable without regard to any risks not covered. If it says "all risks" (sub-article 28 (h)) and the document contains an all risks clause (whether titled as such or not) then the "insurance document will be accepted without regard to any risks stated to be excluded". There are two points that I must make. First of all, "all risks" does not mean exactly what it says in layman terms. It does not, and cannot cover every single risk. It will, according to ISBP paragraph 173 be satisfied by the Institute Cargo Clauses A[25]. At the same time however, there must be a limit to the number and severity of exclusions that can be allowed so that the cover remains "all risks". It is not however, the job of the document checker or the bank to know too what extent exactly the list of exclusions results in the cover not in effect being "all risks". Industry practice will be the only determinant here and this is where the international standard banking practice (no capitals) as per Article 2 will play its role. It is suggested what is accepted on the market as "all risks" is the standard for how many exclusions will be allowed under the UCP. This of course cannot be quantified, but I do suggest some sort of limit is imposed within the UCP. Therefore sub-article 28 (h) may read:

Proposal 6

"When a credit requires insurance against "all risks" and an insurance document is presented containing any "all risks" notation or clause…[it] will be accepted without regard to any risks stated to be excluded, ***unless those excluded risks render the document as not "all risks" according to international standard banking practice*****".**

It would not be possible to compare the list of excluded risks directly to the insurance market because a document checker may not have access or knowledge of such as market. However, a bank is able to know whether such a document with such a list of exclusion would be acceptable by other banks and by the banking community, hence comparing it to standard banking practice.

[25] For a copy of Institute Cargo Clauses (A) 2009 see: http://www.lmalloyds.com/AM/AMTemplate.cfm?template=/CM/ContentDisplay.cfm&ContentID=14813

7. Exclusion Clauses and Franchise/Excess

7.1 Exclusion Clauses

The above section leads us on to the issue of exclusion clauses in general. Of course exclusion clauses are permissible in insurance contracts and this is an even stronger argument today due to terrorism[26]. Banks shall accept insurance documents which include exclusion clauses on the basis of sub-article 28 (i) which simply states that "an insurance document may contain reference to any exclusion clause". The Drafting Group had thought[27] about including a list of exclusion clauses within this sub-article to deal with the problem of terrorism (so that the banks are aware of what clauses are usual/not usual in the trade) but this list does not today form part of the UCP and in my opinion, correctly so. The reasoning for not including the list is that the insurance market is an ever moving business where today one clause is usual because of threat A and tomorrow it is not. Thus the UCP would have to be continuously updated. What can be inferred (and thus supports my proposition of extending sub-article 28 (h) above) is that banks are to look to the trend in the market to determine to what extent exclusion clauses are permissible. It is obvious that excluding risks which render the insurance document worthless, makes the presentation non-compliant. This does put banks in a difficult position because they find themselves checking clauses and determining if this is market practice, which to a certain extent is not their job or qualification, but on the other hand, it is their duty to determine if the presentation is compliant with the terms of the credit, the UCP *and* international standard banking practice. I therefore submit that the issue of exclusion clauses falls within international standard banking practice.

Some banks have taken to excluding sub-article 28 (i) altogether i.e. an insurance document presented that includes *any* exclusion clause will be rejected[28]. The Banking Commission in Opinion R634[29] recognised however that today it is very rare to find an insurance document which does not contain any exclusion clauses. The practice of the bank will simply lead to complicated credits, either by requiring the

[26] See Commentary at pg 133 and Opinion R686 in Opinions 2005 -2008
[27] *Ibid*
[28] Opinion R634 in 2005 – 2008 Publication No. 697
[29] *Ibid*

beneficiary to obtain an amendment where it is impossible to obtain a document with no exclusion clauses (in order to allow the specific exclusions) or by amending the credit to remove the exclusion of 28 (i) completely. The issue in the Opinion went hand in hand with excluding simultaneously sub-article 28 (h) dealing with “all risks”. Presumably the bank was seeking cover for “all risks” by layman definition, not by insurance definition, hence also excluding 28 (h). The Commission explained that the purpose of 28 (h) was to discourage banks from stipulating simply “all risks” in the credit (by providing the penalty of having to accept any all risks clause despite exclusions). They were trying to encourage the practice of stipulating exactly the risks which the insurance document should cover. Excluding 28 (h) will mean even less detail in the credit which is the practice the Commission was seeking to avoid. The outcome of the Opinion is that it is a much better option for all parties concerned that the bank is clear as to what risks are covered and what risks are excluded and in credits that contain such a definitive list, this overrides 28 (i) and 28 (h). Excluding these sub-articles will simply mean no presentation is accepted.

7.2 Franchise / Excess

We now turn to the issue of franchises and excesses. These are not exclusion clauses but they do affect the amount paid out in case of loss/damage. They are permissible under sub-article 28 (j) and are defined in Banking Commission Opinion R 234[30]. Franchise is the amount below which claims will not be honoured. For example, claims below £100 will not be honoured but if a claim is £101, the whole £101 is paid. Excess on the other hand is the amount which will be deducted from the value of any claim. If the excess is £100, then any claim under £100 will not be paid and if the claim is £101, then only £1 will be paid. According to the case, a franchise as a percentage of the value of the goods is permissible, and in the particular case the franchise of up to 30% was acceptable. What we are to understand is that despite cover being required for at least 110% of the value of the goods, the bank must ignore a franchise which will in effect deduct from the cover, unless of course that franchise the same percentage as the cover.

[30] Ref 217 in Opinions 1995-2000

8. The insured party

Paragraphs 179 and 180 of the ISBP make very important additions to the UCP concerning the insured party. Where necessary, the document must be endorsed by the party to whose order claims are payable. A document issued to bearer is acceptable when the credit calls for endorsement in blank and vice versa. If the credit is silent as to the insured party then a document indicating claims are payable to the seller/beneficiary is not acceptable. The document must be endorsed/issued so that the right to receive payment under it passes upon or prior to the release of the documents. These paragraphs are important when one considers a string sale (i.e. back to back sale agreements) and where the insured party will change as the string progresses.

PART III

D. The Commercial Invoice

The last specific document we shall look at is the Invoice or Commercial Invoice. It is one of the documents which is very likely to be included in the list of documents required under a credit which has as its underlying transaction a sale agreement. It is Article 18 which deals with the Commercial Invoice and although it does not provide a definition, paragraph 57 of the ISBP details that a credit requiring simply "invoice" will be satisfied by any type of invoice presented irrespective of the fact that it may be called Commercial, Customs, Tax, Final or Consular Invoice etc[31]. What is not acceptable is an invoice identified as "provisional" or "pro-forma" which denotes invoices for goods issued prior to despatch (and thus indicate an estimate price). As we have seen under Article 28 (Insurance Document) the invoice may be a base to calculate amount of cover for the goods. It would be unacceptable therefore to present an invoice which only indicates an estimate price. Other documents depend on the invoice and so it must be specific.

1. The elements of the Invoice

Sub-articles 18 (a) (i) – (iv) detail the elements required by the invoice and they include:

i) "must appear to have been issued by the beneficiary;
ii) must be made out in the name of the applicant;
iii) must be made out in the same currency as the credit; and
iv) need not be signed"

The last two elements are easy enough to understand; no signature necessary[32] and the same currency required[33]. The Drafting groups makes it clear that where an invoice is

[31] See also DOCDEX Decision 227: The invoice does not need to state "Commercial" invoice.
[32] Also no date as per ISBP para. 62

made out in the same currency as the credit and an equivalent amount in local currency is shown, the document is not discrepant. Where the invoice is made out in the local currency however, despite the existence of an equivalent amount in the credit currency, the documents *will* be discrepant. It is easy to see the necessity of this sub-article (which was not found in UCP 500) as differences in the currency quoted are very likely to result in disputes when the exchange rates change over the course of a few days, especially when the credit involves a huge amount of money, a small change in the exchange rate could mean thousands of pounds.

The first two sub-articles (concerning the names of the beneficiary/applicant) are qualified by Article 38 (Transferable credits). Before we discuss this Article, it is worthwhile to mention that sub-article (i) states "must appear" while sub-article (ii) states simply (must). It is to be understood that the second, is a stricter standard i.e. the invoice no matter what *must* be made out in the name of the applicant[34] (save circumstances Article 38 which we mentioned) but it need only *appear* to be issued by the beneficiary. The difference I suggest is that a clear statement is required for the applicant whereas for the beneficiary, the fact that the invoice is issued on the company's letterhead may be enough. It is also I suppose less important by whom the document is issued. The beneficiary will in any case be paid under the credit (i.e. the bank is sure of who it is paying – it will not depend on the invoice) but it must make sure that the specific invoice is for goods bought by the specific applicant to ascertain the correct price.

1.1 Transferable credits

The necessity of the document being issued by the beneficiary in the name of the applicant has as an exception the situation of transferable credits. For the purpose of Article 38, "transferable credits are those that specifically state that they are "transferable"" (sub-article (b)). Where the goods have been sold in transit (i.e. the applicant becomes the beneficiary (2nd beneficiary) and a third party is now second

[33] This requirement of course means that the invoice must evidence the value of the goods shipped: see para. 60 ISBP.
[34] See *Fortis Bank SA/NV v. Indian overseas bank* [2010] 1 Lloyd's Rep. 227 where agent of the actual buyer applied for the credit and thus was named as applicant on invoice. Court decided that the document is acceptable because the applicant is the key name on the invoice under Art. 18, not the buyer.

buyer), then the first beneficiary (the initial seller) may substitute their own invoice for that of the second beneficiary, as long as the amount in the second invoice is not in excess of the credit amount. The name of the beneficiary can then be substituted for the name of the applicant in the credit. This situation allows for the exception to sub-articles 18 (a) (i) and (ii).

2. Commercial Invoice with excess amount

The second sub-article of Article 18 deals with invoices issued for an amount in excess of the amount in the credit. It states that "a bank may accept a commercial invoice [note, *may* be accepted not *must* be accepted] issued for an amount in excess of the amount permitted by the credit…provided that the bank has not honoured or negotiated for an amount in excess". I find this sub-article very confusing. The bank may accept an invoice in excess of the amount in the credit, as long as it "*has not honourED"* for an amount in excess. A bank cannot honour unless it has determined compliance, and it cannot determine compliance unless it has received and checked the document. How then can it accept an invoice *after* it has honoured? The invoice must be received and checked *in order to determine whether to honour*. The bank cannot therefore have already paid out in excess (or indeed in any amount) before it receives the invoice. Clearly, there has been a drafting mistake. Simple enough, the tense of the word needs to be changed from past, to future. It is interesting to see that such a small mistake can cause a huge problem. The article in its current form is completely useless. Allowing the bank to accept an invoice in excess unless it has already honoured in excess is simply ridiculous. If it has already honoured what difference does it make? Even better, it would receive an invoice for the amount it has actually paid out.

I suggest the intention of the ICC (as seen also in the Commentary "provided banks do not honour" note, no past tense) was to allow banks to accept invoices in excess, as long as they did not then honour the excess. Hence the sub-article must be redrafted to read:

Proposal 7

'A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may accept a commercial invoice issued for an amount in excess of the amount permitted by the credit, and its decision will be binding on all parties, provided the bank in question *does not honour or negotiate* for an amount in excess of that permitted by the credit'.

If the Article is not redrafted, there is nothing stopping a bank to accept such an invoice *and* pay in excess than the credit amount on the basis that the rule only estopped it from accepting a document after payment. If it accepted it before payment and then paid the excess, it was allowed to do so.

3. <u>The description</u>

The Commercial Invoice is the one document in which the description of the goods must correspond with the description in the credit[35]. In other documents, the description may be in general terms not conflicting with the credit (Article 14 (e) discussed in Chapter 2 above). The description does not need to be exact[36] (i.e. the format and layout need not be the same[37]) and does not need to be a mirror image[38] but it must show what has actually been shipped[39]. The problem lies with the issue of what forms part of the description and what does not and how precise it must be.[40] In Opinion R236[41] the Commission was divided as to whether the term "FOB Japan" in the invoice corresponded with the "FOB Shimonoseki" in the credit. The question was: is "FOB Japan" precise enough to be accepted instead of "FOB Shimonoseki"? The majority decided that yes it was, but only because it was evident from the bill of

[35] Clearly this requirement is an express term in the credit and sale contract but we find something similar in the Sale of Goods Act 1979 by virtue of Section 13. The section provides that where there is a sale by description there is an implied term that the goods will correspond with the description. Hence, the description in the invoice should correspond with the description agreed in the sale contract and thus the description in the credit (the credit conditions are a reflection of the sale conditions).
[36] R292 Ref 224 in Opinions 1995 - 2001
[37] R471 Ref 230 *Ibid*
[38] See ISBP para. 58 and DOCDEX decision 229
[39] ISBP para. 59. See also *Fortis Bank SA/NV v. Indian Overseas Bank* [2010] 1 Lloyd's Rep. 227 which suggests where invoice includes port in description it must be the actual port of loading. For example, credit described goods including port of loading "either A or B" and invoice included only "B" port in description. This is not discrepant because invoice indicated actual port of loading.
[40] See for example Justice Leggatt in *Astro Exito Navegacion SA v Chase Manhattan Bank NA* [1986] 1 Lloyd's Rep 455 at 458 who discusses what the description actually entails.
[41] Ref 221 in Opinions 1995 - 2001

lading that Shimonoseki is a port in Japan. The minority however decided that the credit called for “FOB Shimonoseki” specifically, a particular place defined, and the invoice does not correspond simply by stating “FOB Japan”.

The reader may be wondering: well what has FOB[42] got to do with the goods description? Opinion R237[43] decided that the wording “FOB…” is usually within the goods description field in the L/C and where parties have agreed that it does form part of the description[44], then the invoice must reflect this. Similarly, ISBP paragraph 61 states that where a trade term is part of the goods description in the credit or stated in connection with the amount, then the invoice must state that term. If credit also provides the source of the trade term, then this too must be in the invoice. i.e. “CIF Singapore Incoterms 2000” in the credit would not be satisfied by “CIF Singapore Incoterms” in the invoice.

3.1 Additional words

When the description in the invoice is more precise than that of the credit, the invoice is acceptable (as long as the information does not conflict with the credit or any other document of course). Additional words do not make an invoice discrepant because this addition does not alter the nature of the goods, nor does the UCP require a mirror image of description[45].

3.2 Tolerance

The start of this issue is that the quantity of the goods in the invoice must not conflict with the quantity of the goods in credit (or with other documents[46]) where the credit has specified that the quantity must be exact. Where it has not specified, there is a tolerance of +/- 5% allowed under ISBP paragraph 65 and Article 30 (b). This

[42] Free on Board: The seller is only responsible for selling, it is the buyer who pays for freight/insurance. See further generally Sassoon, D. M. CIF and FOB contracts 4th Edition, Sweet and Maxwell, 1995, ISBN: 978-0421513204
[43] Ref 222 in 1995 - 2001
[44] See for example DOCDEX decision 208
[45] See Opinion R456 Ref 187; R583 Ref 387; R584 Ref 388 in Opinions 1995 – 2004. See also DOCDEX Decisions 208 and 228.
[46] See ISBP para 63

however is in cases of bulk shipment. Where there is a specific number of units, then there is no tolerance at all. This is always subject to the credit itself. For example, in Opinion R 688[47] the credit stated:

125 Pieces A
100 Pieces B
25 Pieces C

250 Total +/- 10%

The documents were rejected by the bank on the basis that the allowance was exceeded in some items (despite being under 275 Total). The bank argued that the +/- 10 % was for the total only, and that Pieces A had to be exactly 125, Pieces B exactly 100 and pieces C exactly 25. It does not take much to see however that the tolerance in the total necessarily means that there must be a tolerance in the individual categories too; otherwise the tolerance in the total is pointless. There cannot be +/- 10% in 250 if there is no +/- in the individual pieces. The Commission stood by this opinion. The question which was not answered is whether the tolerance in the individual pieces is also 10% exactly. Why does this make a difference? Well if there is only a 10 % tolerance in pieces B for example, then only an extra (or less) 10 are allowed to be sent. If we allow a greater individual tolerance i.e. 20%, then pieces B will be 120, but if A and C are exact, we are still within the 250 +/-10% tolerance. So, my question is, in the LC of this case, yes there must be a tolerance for each individual piece if there is one for the total, but *how much is that tolerance*? Does it mean that each individual must not exceed 10%? Or does it mean that the individuals may exceed any percentage as long as the total does not exceed 10 %?

My suggestion is that where the credit does not specify, it is best to impose a 10% +/- on all the individual categories and the total. That way, the buyer is more likely to get the proportion of goods he intended, as opposed to vast numbers of one and few numbers of the other. Clearly, a bank needs to be more specific in its credit to avoid such impositions.

[47] In Opinions 2005 - 2008

Proposal 8: ISBP paragraph 66 (Insert):

Where a credit indicates a tolerance to the total number of goods, the same tolerance is permitted to any individual categories that make up the total.

PART IV

E. Conclusion

Similar to Chapters 2, 3 and 4, Chapter 6 has strived to analyse the requirements of the UCP in connection to the standard an insurance document and a commercial invoice must meet, in order to be determined as compliant by the bank, and allow payment to the seller / beneficiary. Now that we have finished the investigation into what makes a presentation compliant, the reader may feel that there is no hope for a beneficiary on first presentation. The requirements are high, they are broad and in certain areas they are strict but simultaneously confusing. This is true, but this is also the purpose of the thesis. We are analysing the UCP to provide an understanding of what is required and in the process finding areas that need redrafting.

We must not forget that the rules work in both directions. What I mean is that yes the seller must meet these standards, but simultaneously the bank must also fulfil its own obligations as against the applicant. It has been charged with checking if the documents are satisfactory and it can only deviate from those instructions as far as the UCP and the credit will allow.

What I find most interesting in this chapter is the issue of whether the document must cover the entire voyage. It is a topic which can be related to the issue of a bill of lading needing to cover the entire carriage which we discussed in Chapter 3 in connection to transhipment. With the bill of lading, it was difficult to decide if this concept referred to cover in terms of liability or cover in terms of parts of the journey. With the insurance document, we are clear that the cover may be divided in terms of liability as long as it is clear how much each insurer is liable for. If I were to draw similarities with the bill of lading, then it can be argued that a bill which indicates liability of carriage is divided, but none the less covers the whole voyage (despite not being with one carrier) can be acceptable. What I am suggesting is that the UCP can in some ways be considered a rather more fluid concept than legislation. I believe that the purpose of the UCP is to be fair to all parties, and maintain my argument in Chapter 2, that the imposition of the rules depends on the particular case at hand. Therefore, although the rules are strict, depending on the circumstances of the case, their effect may be different. Yes, they are there to provide a uniform practice in all countries that deal with letters of credit, but they are also there to increase acceptance of presentations, and they must therefore be fluid enough to adapt to each case.

In terms of the insurance document and the commercial invoice, my general comment is that the rules are currently less problematic than their counterparts in bills of lading or the general examination of documents. They too however have areas that need redrafting and my proposals are thus:

Proposal 1

Article 28 (d) should be redrafted to:

"An insurance policy is acceptable in lieu of a…certificate…or a declaration *but not vice versa*".

Proposal 2 Article 28 (a):

'Any signature by the insurance company, underwriter, agent or proxy must be identified as that of the insurance company, underwriter, agent or proxy.'

Proposal 3: Article 28 (a)

'Any signature by an underwriter must indicate whether the underwriter has signed for on behalf of the insurance company or the underwriter itself'.

Proposal 4: Commission Opinion in connection to Article 28 (b):

Where the credit expressly calls for one original insurance document, only one need be presented.

Proposal 5

Clarifications of the term "Partial cover" in ISBP paragraph 174

Proposal 6: Article 28 (h):

"When a credit requires insurance against "all risks" and an insurance document is presented containing any "all risks" notation or clause…[it] will be accepted without regard to any risks stated to be excluded, *unless those excluded risks render the document as not "all risks" according to international standard banking practice*".

Proposal 7: Article 18 (b)

'A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may accept a commercial invoice issued for an amount in excess of the amount permitted by the credit, and its decision will be binding on all parties, provided the bank in question *does not honour or negotiate* for an amount in excess of that permitted by the credit'.

Proposal 8: ISBP: Paragraph 66 (Insert):
Where a credit indicates a tolerance to the total number of goods, the same tolerance is permitted to any individual categories that make up the total.

With the implementation of these recommendations, I submit that the UCP will be better understood and lead to a clearer determination on whether the documents will be accepted or rejected. They are not all earth-shattering proposals, but they are my own thoughts on how the UCP should be improved.

CHAPTER 7

The Bank's Obligation to Honour or Refuse

A. Introduction

In the previous Chapters, we discussed the requirements that a presentation made by the seller must meet in order for payment to be effected. We now turn to the responsibility of the bank to pay and the technicalities it must follow if it decides to refuse payment. As always, our main source will be the Uniform Customs and Practice (UCP) but we also require the ISBP[1] particularly for the issue of drafts[2] and maturity dates[3]. Of note are several DOCDEX Decisions and Banking Commission Opinions.

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[1] International Standard Banking Practice for the Examination of Documents under Documentary Credits. 2007 Revision for UCP 600, ICC Publication Number 682, Paris 2007, ISBN: 9789284200191

[2] Definition: A document ordering the payment of money. See Oxford Dictionary of Law, OUP, 7th Edition, 2009, ISBN: 0199551243.

[3] Date on which a financial instrument (in this case drafts) become due for settlement. See Oxford Dictionary of Business and Management, OUP, 5th Edition 2009, ISBN: 0199234892; or date on which the principle amount of a draft becomes due and payable. See Oxford Dictionary of Finance and Banking, OUP, 4th Edition 2008, ISBN: 0199299740

B. **Honour**

The obligation to pay the beneficiary is dependant upon the compliance of the presentation of documents. Details as to what makes the documents compliant have been discussed in the previous Chapters but it is convenient to note that in summary, the documents must comply with the provisions in the credit, the provisions in the UCP and the provisions of international standard banking practice. Once the bank is satisfied these have all been met, it has an obligation to pay the seller (or connecting bank, depending on the number of parties involved in the credit). Therefore, we first turn to the Article of the UCP which provides this obligation.

1. The bank *must* honour

Article 15 is a new addition to the UCP which states the bank *must* honour a complying presentation. The reason that I am emphasising the word 'must' is to stress that the obligation is to pay, not to choose to pay. This is in contrast to the possibility of the bank refusing payment under Article 16 where it "*may*" refuse to honour. So, no matter what, the bank must pay against complying documents, without regard to whether it has, or will be, reimbursed by the applicant (buyer)[4]. Once it has agreed to open (in the case of the issuing bank) the credit or confirm (in the case of the confirming bank) the credit, it must pay. English Law provides one exception to this rule, the Fraud Exception[5], which will be discussed in Chapter 8. Whether or not the UCP deals with fraud or indeed leaves room for any such exception will also be argued in Chapter 8. At the moment, it is evident from Article 15 that the bank *must* honour the credit upon determining a complying presentation.

[4] See Commentary pg. 69

[5] See leading case of *United City Merchants (Investments) Ltd v. Royal Bank of Canada* [1983] AC 168 (HL) for the UK. See also similar rules in other jurisdictions: United States Uniform Commercial Code (UCC) Article 5 of which deals with letters of credit; specifically paragraph 109 "Fraud and Forgery". See also P.R.C. rules: *The rules of the Supreme People's Court Concerning Several Issues in Hearing Letter of Credit Cases* promulgated by the Adjudication Comm. Of the Supreme People's Court, Oct 24, 2005, Effective Jan. 1, 2006 translated at http://www.icc-china.org/New_Folder/Chinese%20Supreme%20Court%20Provisions%20on%20LC%20cases1.doc

2. The issuing, confirming and nominated bank

Sub-article (a) provides the main obligation for the issuing bank and sub-articles (b) and (c) deal with the obligation of the confirming and nominated banks respectively. The latter provisions are a little different because the banks' positions are different. Although it is not the objective of this paper to detail the relationship between the banks[6], it is convenient for reasons of completeness to give a little background. The confirming bank is the bank which "adds its confirmation to [the credit] upon the issuing bank's authorisation or request"[7]. It thus adds its undertaking to pay to that of the issuing bank. The nominated bank is "the bank with which the credit is available"[8]. It therefore pays *on behalf of the issuing bank* where it might or might not have its own obligation.

We shall not go into issues of reimbursement, although this is touched upon necessarily in Chapter 8 due to its connection to the Fraud Exception[9]. However, there are two reasons why the banks in Article 15 are treated separately. The first is that the nominated and confirming banks, may choose to either honour the presentation (in this case we shall define honour simply as pay outright) or negotiate (which according to Article 2 means "the purchase of drafts and/or documents by advancing funds to beneficiary on or before reimbursement is due"). The issuing bank can only honour because it will not receive a reimbursement from another bank. The second reason is that a confirming bank and a nominated bank "must forward the documents to the issuing bank" (sub-article 15(b) and (c) respectively). This sentence was added to impose pressure on the banks to release the documents immediately[10]. Clear advantages are apparent. A last point to make is that whereas the confirming is obligated to honour or negotiate *and* forward the documents, the nominated bank

[6] Said to be that of Principle and Agent unless otherwise agreed. See *Gutteridge* pg. 86-99; *Jack* at pg 97 para. 5.18 who says that as between issuing bank and nominated bank the relationship can be characterised as principle – agent and as between issuing bank and confirming bank it is that of guarantor.
[7] UCP Article 2 "Definitions"
[8] *Ibid*
[9] See footnote 35 of Chapter 8
[10] See Commentary pg. 70 where ICC states that several ICC national committees saw this as a critical issue: nominated banks did not release the documents immediately even in cases where they had already been reimbursed.

under sub-article 15 (c) is not obligated to pay (as per the instructions given to it by the issuing bank). *When* it does, then it *must* forward the documents.

3. When must it honour?

The ICC itself has emphasised[11] that the crucial point of Article 15, is not the obligation to honour[12] but the obligation to honour at a specific point in time. That is why all the sub-articles start with the word "when". i.e. "When an issuing bank determines that a presentation is complying, it must honour."[13] Clearly this means that as soon as the determination is made, payment becomes due. Similarly the actions of the confirming / nominated banks must take place as soon as they have determined that the presentation is complying. This does not mean that actual payment must be made (i.e. the funds being with the beneficiary) but that the process of payment or negotiation must begin as soon as the presentation is determined as compliant. There is no waiting about.

Now, a connection must be made with Chapter 2. We discussed that the banks have a five day maximum period after the day of presentation (each) to determine compliance under sub-article 14 (b). This also means therefore that the issuing bank for example, becomes obligated to start the payment process within that 5 day time period. If it determines on day 2 that the presentation is complying, then that is the point at which payment commences. Notably, the ICC has also stated[14] that the use of the word "when" was necessary due to the removal of the concept of "reasonable time"[15] from the equivalent Article 14 in UCP 500 (sub-article 13 (b)). This supports the suggestion above that if the bank determines that a presentation is compliant on day 2, payment commences on that day. I say 'payment commences' because the reality is that it may take some time for the transaction to be completed. The ICC suggests[16] anything ranging from an hour to a day which is reasonable not least

[11] Commentary pgs 6 and 7: "The essential word in each of the sub-articles is *when*".
[12] After all, this obligation is so obvious in the context of letters of credit that even not mentioning the obligation of payment itself, would not render the UCP unworkable. Letters of credit are mechanisms of payment and thus one cannot exist without the other.
[13] Sub-article 15(a)
[14] Commentary pg 70
[15] The obligation under UCP 500 was to examine the documents within reasonable time not to exceed 7 banking days. See Section E. 8 of Chapter 2.
[16] Commentary pg 70

because the payment process may in fact be taken up by another department of the bank. In any case, the result remains that the beneficiary may not actually receive the funds on the day of determination. The article intends to emphasise that the banks should not delay payment, not that a beneficiary will have the funds at his disposal on a specific day.

C. Availability

Now that we are clear that a bank must honour a complying presentation at the time it has determined it as compliant, the immediate question is: How? How must payment be effected? How can the bank "honour" the presentation. The first stage is to define honour. We shall then continue to examine what different ways there are of honouring; which way must the bank follow and when is the deadline for payment. This covers Articles 2, 6, 7 and 8. I refer to these Articles collectively as the "Availability" of the credit in terms of funds, as opposed to availability in terms of place, as we discussed in Chapter 2[17].

1. Definition of Honour

It is the purpose of Article 2 of the UCP to define certain concepts in the rules. One of these concepts is "Honour". The word could mean:

a) "to pay at sight…
b) to incur a deferred payment undertaking and pay at maturity[18]…or
c) to accept a bill of exchange (draft) drawn by the beneficiary and pay at maturity"[19]

Article 6 (Availability, Expiry Date and Place for Presentation) in turn reflects these methods of payment in sub-article (b) and adds "negotiation", requiring the credit to state by which method of payment it is available. It is important to note at this point that the methods of payment are not mutually exclusive. The credit may be available

[17] See Section B. 1. Chapter 2 that discusses where the credit is available i.e. where the beneficiary must present the documents.
[18] Note: honour does not mean to pay at maturity. It means to *incur* a deferred payment undertaking and pay at maturity. I.e. when we were discussing Article 15 above that the bank is obligated to honour once it has determined compliance within the 5 day maximum, in cases of deferred payment it means that the undertaking is incurred at that point in time, and actual payment is at maturity, not as soon as possible; as opposed to sight payment where the process to pay and payment may correspond on the same day. This is less likely with deferred payments.
[19] Again the same note should be made as footnote 18 above.

by a combination of methods a) b) c) above in which case it is termed "mixed payment"[20].

2. A note on Negotiation

Negotiation is also defined by Article 2 as "the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by *advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank*". It is important to discuss negotiation a little further as this is an alternative to honouring the credit for the confirming/nominated bank.

Credits available by negotiation caused much discussion under the UCP 500[21] which resulted in the issuance of ICC Position Paper No. 2[22]. Under UCP 600 the important things to note in relation to negotiation are firstly, that sub-article 12 (c) (Nomination) makes it clear that the examination and forwarding of documents does not constitute negotiation. There must be an advancement of funds or an agreement to do so. An agreement to advance funds *if* and *when* the corresponding bank has received funds from the issuing bank is not negotiation[23]. This is tied with sub-articles 7 (c) (Issuing Bank Undertaking) and 8 (c) (Confirming Bank Undertaking) where the Issuing or Confirming Bank will only reimburse the nominated bank once it has "honoured or negotiated" and this means the physical payment of money or the independent promise to pay[24].

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[20] See ICC Commentary at pg. 17.
[21] *Ibid* pg. 22. See also Benjamin's Sale of Goods First Supplement to Seventh Edition pg. 115 and ft. 69ad.
[22] As stated to the Introduction of the UCP at pg 12 these are not applicable to UCP 600.
[23] *Supra* nt 21
[24] The ICC Commentary also makes reference to ICC Banking Commission Opinion TA 569 which is found in ICC Publication 697 Opinions 2005 – 2008 R66 at pg. 82. The Opinion stated the structure of a documentary credit by negotiation as "[this credit] should specify that the nominated bank is to send the documents to the issuing bank, and upon the issuing bank's ascertaining that it complies with the terms and conditions of the credit, the issuing bank will reimburse…". The point I would like to make here is that this statement implies that not only must the nominated bank negotiate; it must also wait until the issuing bank has ascertained compliance of the documents before it will be reimbursed. Sub-article 7 (c) of UCP 600 however states that the issuing bank will reimburse a nominated bank that has negotiated a complying presentation and forwarded the documents. It makes no direct reference to the requirement that the documents are first to be determined compliant by the issuing bank. Is this implied by the phrase "negotiated a complying presentation"? It could be, but then why don't the UCP say so directly? I.e. the issuing bank will reimburse the nominated bank that has negotiated a presentation and forwarded the documents once it has determined compliance. Sub-article 16 (g) states that when a bank

Secondly, as sub-articles 15 (b) and (c) require the confirming bank and nominated bank to "honour *or* negotiate" once compliance is determined, it is clear that the beneficiary is not required *to seek* negotiation i.e. his failure of doing so cannot amount to non-compliance. Compliance has passed and the banks must now either honour or negotiate. They cannot deny negotiation just because the beneficiary did not ask for it.

A last point to make on negotiation is that an issuing bank cannot negotiate documents. This is logical as negotiation is defined as the purchase of documents. The issuing bank on the other hand is under an unconditional direct obligation to pay upon a complying presentation[25]. This is also clearly stated in Article 2 of the "Negotiation" definition as it is the purchase of documents *by the nominated bank*[26] which *ipso facto* means that it cannot be an issuing bank. Moreover, under Article 7 the issuing bank does not have the option of negotiating at all, whereas the confirming bank under 8(a)(ii) does. An issuing bank can never simultaneously also be a nominated bank but a confirming bank can. Thus both are under obligation to honour by negotiation if another nominated bank has elected to negotiate but in fact does not (sub-article 7(a)(v) for the issuing bank and 8(a)(i)(e) for the confirming bank) but the confirming bank will also be able to negotiate itself if it wishes under 8(a)(ii).

3. The bank's undertaking

The reader may be a little confused thus far as it may seem that a bank has several methods of fulfilling its obligation to pay. It is Articles 7 and 8 of the UCP however,

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refuses to honour because the presentation does not comply, *it shall then be* entitled to a refund of the reimbursement with interest. This suggests that an issuing/confirming bank reimburses the nominated bank before it has looked at the documents, but if on looking at them and determining they don't comply, it can claim a refund. The construction of the UCP therefore allow the nominated bank to be reimbursed immediately upon honouring and forwarding a presentation, but if the connecting bank later refuses payment, it will receive a refund.

[25] See for example sub-article 7 (b) Issuing Bank Undertaking "An issuing bank is irrevocably bound to honour".

[26] A distinction should be made between credits available by negotiation, and negotiation credits. The former, are credits of the type we have discussed here, which are available with *the* stipulated nominated bank as opposed to the latter, which are available with *any* third party bank. Hence, the definition in Article 2 of "Nominated bank" as *the* bank with which the credit is available or *any* bank in the case of a freely available credit.

which sum up quite clearly Articles 2 and 6 which we have discussed above, that provide a list of the issuing and confirming banks' undertakings respectively[27].

The core obligation is that the issuing and confirming banks are "irrevocably bound to honour"[28] as long as the compliant stipulated documents are presented to either the banks themselves or to a nominated bank. The former is bound "as of the time it issues the credit"; the latter "as of the time it adds its confirmation to the credit". We must not forget that the confirming bank may honour *or* negotiate. The issuing bank may honour by:

a. sight payment (payment on presentation directly after compliance has been determined)
b. deferred payment (payment on the conclusion of a specific time period after presentation)
c. acceptance (accepting a bill of exchange drawn by the beneficiary[29])

Under sub-articles 7 (a) (ii) (iii) and (iv) it must also honour via these methods when the nominated bank itself fails to pay i.e. if the credit is available by deferred payment and the nominated bank does not pay on maturity or refused to incur a deferred payment to begin with, then the issuing bank must pay on maturity. The last sub-article (7 (a) (v)) requires the issuing bank to honour when the nominated bank does not negotiate a credit available by negotiation.

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[27] The nominated bank's obligations (or in some ways lack of) are contained in Article 12 "Nomination". 1) The authorisation to honour or negotiate does not impose an obligation to do so unless the nominated bank is the confirming bank or the nominated bank has expressly agreed to do so and communicated that agreement to the beneficiary. 2) The receipt or examination of documents and forwarding of documents by a nominated bank does not make it liable to honour or negotiate. 3) Lastly, by nominating a bank to accept a draft or incur a deferred payment undertaking, the issuing bank also authorises it to prepay or purchase a draft accepted or deferred payment undertaking incurred by that nominated bank.

[28] Sub-article 7(b) and 8(b) respectively.

[29] Note that sub-article 6 (c) does not permit credits issued to be available by drafts drawn on the applicant (buyer). These documents may still be called for by the credit (i.e. be one of the stipulated documents) as per ISBP paragraph 54 but a credit may not be available by such drafts. The UCP 500 in sub-articles 9 (a) (iv) and 9 (b) (iv) also reflected the position of para. 54 (that such drafts will be treated as additional documents) but the ICC now states (at pg 34 of commentary) that the phrase has been removed form the UCP 600 so that it is clear a credit available by draft drawn on the applicant is not allowed. I suggest the phrase be removed from the ISBP also. If a phrase has been removed from the UCP for a specific purpose then it serves no use in the ISBP. Ironically the ICC Commentary goes on (in the next immediate paragraph) to say that such a draft would be treated as an additional document; reiterating the point of paragraph 54 which it previously said it removed from the UCP to make the exact opposite provision.

The confirming bank on the other hand must honour through one of the methods above (including upon the failure of the nominated bank)[30] or negotiate if the credit is available by negotiation with the confirming bank. Negotiation is not a method of honour; it is a distinct process of payment which the confirming bank may follow if the credit is available in this way. The issuing bank on the other hand, does not negotiate its own documentary credit.

The last sections of article 7 and 8 concern the reimbursement undertakings. These emphasise the idea that the obligation to reimburse a bank which has paid out on a complying presentation is independent of the obligation to pay the beneficiary i.e. a beneficiary will get payment from the issuing/confirming bank if the presentation is compliant despite any internal disputes between the banks. Notably, the reimbursement for a credit available by acceptance or deferred payment is due *at* maturity despite any prepayment or purchase by the nominated bank *before* maturity. I shall not go into further detail about this issue here; the only thing we must emphasise is that the banks undertake to reimburse the nominated bank only if the presentation is compliant and the documents have been forwarded[31].

4. Concluding remarks

So far what we have done is set the scene and method by which the bank is to effect payment. This information is essential in order for us to further analyse 1) issues relating to which bank bears the risk when a 'mistake' is made as to compliance but the credit has been honoured and 2) issues relating to the refusal to honour. We cannot understand issues relating to the refusal of honour if we do not first know what honour is.

[30] See sub-article (a) (i)

[31] For a discussion on whether the nominated bank is reimbursed only after the issuing/confirming bank has also determined that the presentation is compliant, see nt. 24 above.

D. Refusal to honour

The bank has an obligation to make payment when it has determined that the presentation made is compliant. It follows therefore that when the presentation does not comply[32], the bank is entitled to refuse payment. Turning to the issue of refusal, we shall find in Chapter 8 that there are a number of other possible[33] reasons for refusal apart from non-conformity. These include[34]:

1) Issuance of credit induced by fraud or misrepresentation
2) There is established fraud
3) The governing law makes it illegal to honour the credit
4) Credit issued to support an unlawful transaction / for unlawful purpose

Before we turn to those reasons however, we shall first look at the process for refusal under the UCP. It is vitally important to understand this process because the consequence of not following the process correctly may result in the complete opposite result than that intended by the bank.

1. Process

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 Commission[35]. This in turn resulted in the publication of the ICC paper entitled "Examination of Documents, Waiver of Discrepancies and notice under UCP 500"[36]

[32] 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.
[33] As we shall see it is often the case that whether or not certain presentations can be refused payment depends on the particular facts and is not governed by a specific 'set-in-stone' rule.
[34] See *Goode* at pg 990 and 991 who lists these possibilities.
[35] See pg. 72 of Commentary. 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 and another 11 in Publication 2005 – 2008.
[36] ICC Commission on Banking Technique and Practice Discrepant Documents, Waiver and Notice Published on 9 April 2002; Document 470/952rev2

which provides a clear explanation of the procedure (also applicable to UCP 600) and a flow diagram for a bank to follow. It very boldly states[37] that a bank which follows the rules will have no risk and I suggest and this is certainly true at least to the extent of suffering from the preclusion rule we shall discuss below.

1.1 <u>Preclusion to claim compliance of documents or of presentation?</u>

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"[38]. The reader should take note that the preclusion takes effect 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 intended by the ICC? I am not sure. In the Commentary the ICC states[39] 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 by me] 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 discussed in Chapter 2 above). 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. I therefore submit that the reading of sub-article (f) does, to my mind mean 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 on the grounds that the presentation was late.

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[37] *Ibid* at pg 7
[38] Sub-article 16 (f) UCP 600. The potent effect of this sub-article is evidenced in *Fortis Bank SA v Inidan Overseas Bank* [2011] EWCA Civ 58 which we will discuss in section 1.3 below on Notice.
[39] See pg. 74

I have several points to make on whether this would be the correct route to take or not. 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 differently[40] 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 relating 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 as a "Presentation" under the UCP it must also be within the time-frame; that definition concerns a "Complying Presentation".

[40] 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.

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 with regard to the arguments made above, I submit the following:

That the wording of sub-article 16 (f) be changed to:

Proposal 1

'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*'.

1.2 To waive or not to waive?

Article 16 (a) states that "when a…bank determines that a presentation does not comply [with the UCP and the credit] it *may* refuse to honour or negotiate". This '*may'* refers to the fact that the bank is not obligated to refuse, but that it has a choice whether or not to refuse. Its other option is to waive the discrepancies and honour the credit despite non compliance. The bank may waive the discrepancies of its own accord, or in the case of the issuing bank[41] approach the applicant for waiver. Sub-article 16 (b) states that "*in its sole judgment,* the bank may approach the applicant for a waiver". Again, it is not obligated to do this, it is a choice. This is a particularly important provision in the UCP because of its practical implications.

In the Introduction to the UCP 600[42] Gary Collyer tells us that a number of global surveys indicated that approximately 70% of documents presented (under UCP 500) were being rejected on first presentation. Whether or not the percentage is as high under UCP 600 remains to be seen, but the point is that one practical method to

[41] Approaching the applicant for waiver is in theory permissible for any bank to do but it may cause practical difficulties. For example, in the case of a nominated bank, it may first have to approach the confirming bank, the confirming bank will then in turn have to approach the issuing bank, which will in turn approach the applicant for a waiver. This is too lengthy a process for the purposes of documentary credits. Moreover, it is likely that the applicant is the customer of the issuing bank only and therefore the other banks will not have any particular interest in if the underlying transactions fails; it is better that they refuse of pay promptly. This view is to be found in *Jack* at pg 113 para. 5.57.

[42] Pg. 11 of Publication No. 600

reduce this percentage is to allow waiver. In *Bankers Trust v State Bank of India*[43] we find expert evidence that says "in the vast majority of cases, the applicant when consulted [said] that the issuing bank should accept the documents". Additionally, one witness stated that this occurred in 90% of cases. Sir John Megaw emphasised the advantage of such a practice not least because some of the discrepancies may be so immaterial that they have no actual effect on the transaction.

Where a bank itself waives the discrepancies without approaching the applicant (or despite the applicants refusal to waive) it will be a very big risk for it to take because it will have to honour without any sort of guarantee that it will recover the money from the applicant (indeed if discrepancies where found it is very likely that the applicant will refuse to pay). Approaching the applicant will not extend the time limit of 5 banking days to determine compliance as per sub-article 14 (b) discussed in Chapter 2 and it is implied by sub-article 16 (c) (iii) (b) that the bank will have to continue with the refusal process (communicate single notice to the beneficiary stating the refusal, discrepancies and status of the documents) despite waiting for a possible waiver.

This sub-article states that one of the options for describing the status of the handling of the documents in the refusal notice is that the bank is "holding the documents until it receives a waiver from the applicant". The fact that this option exists means that in the case that the bank is waiting for a waiver, it still must continue with the process of refusal. If the bank's obligation after choosing to ask for a waiver was simply to wait and only upon the decision of the applicant honour or refuse, then there would be no reason for option (b) to exist. In effect therefore, the bank *has* refused the presentation, but there is a chance that may accept it after a waiver has been received from the applicant. Refusing to honour and making a beneficiary wait for the chance of a waiver may seem unfair, especially in a volatile business market. Read in its entirety, the sub-article provides a solution by stating that the bank will hold the documents until it receives the waiver *or* receives instructions from the presenter (beneficiary) prior to agreeing to accept the waiver. This way the beneficiary does not have to wait for the applicant's decision. This is the only case where a notice of

[43] CA judgment [1991] 2 Lloyd's Rep 443 at pg 456. See also Evidence D. 3 pg 75H in Commercial Court [1991] 1 Lloyd's Rep 587

refusal may be withdrawn without the direct agreement of the presenter[44]. Because the presenter has a right to request the return of the documents under sub-article 16 (c) (iii) (b), it is implied by his absence of such a request that if the bank receives a waiver and agrees to accept it, it will withdraw the refusal and honour.

It is my suggestion, that where money is concerned, and in the world of commodities markets, a lot of money is concerned, the possibility of refusal should not be left to implications in rules. I submit that sub-article 16 (b) that allows the bank to approach the applicant for a waiver should also clearly state that in the meantime the process of refusal must continue, otherwise the bank may find itself precluded to refuse under sub-article 16 (f). It should therefore read:

Proposal 2:

'**When an issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies. This does not, however, extend the period mentioned in sub-article 14 (b)** ***or relieve the bank of its obligations under sub-articles 16 (c) and 16 (d)*****.'**

There are a few last points to make. First of all, we have already mentioned several times the bank may *agree to accept* the waiver. The ICC made it clear in its paper on Article 16[45] that "the mere fact that an applicant waives the discrepancies does not obligate the issuing [or confirming] bank to waive the discrepancies"[46]. The bank itself decides if it will refuse or accept the waiver and honour. Secondly, the fact that the bank may on its own decide to waive the discrepancies is not mentioned in the UCP rules (but of course not precluded either) most likely for the reason that it is too risky a decision to take which will pose serious questions on the bank's reimbursement from the applicant. It is discussed in the ICC paper however[47] which states that taking such a decision will not "amend the credit or bind the…bank to

[44] The refusal may be withdrawn at any time but only with the agreement of the presenter. See *Jack*, pg. 119 para. 5.76. See also *Jack* at 5.69 – 5.71 concerning rule under UCP 500 which differed as notice with waiver was invalid.
[45] See *Supra* nt. 36
[46] *Ibid* pg. 7. See also Banking Commission Opinion R 327 (Ref 90) in Collected Opinions 1995 – 2001.
[47] See pgs. 6 and 7

honour subsequent drawings with the same discrepancies under that or other credits"[48].

Lastly, the applicant may be deemed to have waived the discrepancies if he takes possession of the goods. However, this waiver is in connection solely to the sale contract. I.e. he has waived the discrepancies in the documents and is liable for the price directly to the seller (beneficiary). He has not waived the discrepancies under the actual letter of credit; the credit has simple failed and the *bank is not* liable for the money[49]. This practice may cause a number of complicated issues for the beneficiary because the agreed method of payment has failed, but he does not have control of the goods either and has to go searching for the buyer to get his money. Of course, this is outside the present research; issues the seller has with the buyer are of no concern to the bank and all the bank has to do is refuse payment as per Article 16 and return the documents; it is then outside of the game.

1.3 Notice

There is no need to go into any particular detail of the process that notice must be given, but for reasons of complete research we shall look at the essential steps:

a) Single notice of refusal to honour/negotiate[50]
b) Sent no later than the close of the 5th banking day following day of presentation[51]

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[48] *Ibid* pg 7.
[49] See *Uzinterimpex JSC v Standard Bank Plc* [2008] 2 Lloyd's Rep 456 which at para. 29 discusses *Saffron v Societe Miniere Cafrika* (1958) 100 CLR 231.
[50] Sub-article 16 (c); For the possibility of incorporating a previously sent communication into the second communication and the combination thereof constituting valid notice see *Total Energy Asia v Standard Chartered Bank (Hong Kong) Ltd* [2006] HKCU 2134. I do not agree with the judgment; the UCP make it clear the ONE SINGLE notice is required and if it does not fulfil the requirements the bank has failed in its obligations. When the first notice is invalid, it cannot be cured by a second: See Opinion R271 (Ref 89) in Collected Opinions 1995 – 2001 and Opinion R 530 (Ref 335) in Unpublished Opinions 1995 – 2004.
[51] Sub-article 16 (d). Note that the deadline IS NOT the close of *business* on the 5th banking day but the close *of* the 5th banking day. I.e. the bank has until midnight of this day so giving notice after the normal banking hours is within time: see Opinion R 424 (Ref 109) in Collected Opinions 1995-2001. Lastly, if the bank determines compliance (or lack of) on the second banking day must it send notice then or can it wait until the 5th day? I submit that it cannot wait; sub-article 16 (a) (b) and (c) all start with "when a…bank determines…that a presentation does not comply". This indicates that once a decision has been made, the refusal process begins and notice cannot be delayed.

c) Via the mode of telecommunication or if not possible by expeditious means[52]

d) Containing:

   i) a statement that the bank is refusing to honour/negotiate[53]

   ii) each discrepancy if refusing[54] and

   iii) the handling status of the documents[55]

The question that remains is once a refusal notice has been given, when will the beneficiary actually have possession of the documents? Sub article 16 (e) states that where the bank is holding the documents pending instructions from the presenter (either whilst waiting for waiver or simply once documents have been refused) it may return the documents at any time. The ICC Commentary states[56] that the purpose of the sub-article is to give the bank the option of simply returning the documents when the presenter has not sent any instructions. Is there an obligation to do this as soon as possible? No; not in the rules[57]. Of course it would be difficult for such an obligation to function. There are two competing time limits. The first is the limit the bank will impose on the presenter for him to give instructions. The second is the limit the bank

[52] Sub-article 16 (d). With regard to the time limit for the notice, we assume that telecommunication will result in the notice being sent and received instantaneously. If not, then is the requirement of sub-article (d) fulfilled at the time the notice is sent or at the time it is received? I suggest the time it is sent. The article reads "notice…must be *given*". This action *may or may not* include receipt. So, the bank's obligation is to send the notice, not to chase the beneficiary and check if it has been received. However, the notice must at least be sent, if the electronic device malfunctions from causes other than *force majeure* and it is not sent at all, then the risk lies with the bank. Face to face communication has been held at sufficient in *Seaconsar Far East Ltd v. Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 even where telecommunication was possible. I do not in general agree with the decision in this aspect; the UCP clearly state that the mode is telecommunication and *if that is not possible* other expeditious means. i.e. face to face is acceptable if telecommunication is not available. However the particular circumstances of the *Seaconsar* case (a senior representative of the beneficiary was present at the issuing bank) made the decision practical along with the rational that a term permitting such notice can be implied into the credit contract.

[53] Sub-article 16 (c) (i)

[54] Sub-article 16 (c) (ii). If the discrepancy is ill founded then the bank will be liable for wrongful refusal and will not later be permitted to rely on genuine discrepancies not listed. If the beneficiary re-presents the bank can only invoke discrepancies not remedied or new discrepancies not present in the first presentation, in order to refuse payment: See *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 at 149 and *Hing Yip Hing Fat Co Ltd v Daiwa Bank* [1991] 2 HKLR 35. The position at common law is a little different; *Kydon Compania Naviera SA v National Westminster Bank Ltd, The Lena* [1981] 1 Lloyd's Rep 68 allows the bank to rely on discrepancies not listed in the notice unless it is proved that the beneficiary relied upon a representation or promise from the bank that were the discrepancies cured, it would accept the documents.

[55] Sub-article 16 (iii) (a): holding documents pending instructions from presenter (b): holding until receives and accepts waiver or further instructions of presenter (c): returning documents and (d): acting in accordance with instructions previously received from presenter.

[56] At pg. 74

[57] See however *Fortis Bank SA v India Overseas Bank* [2011] EWCA Civ 58 which decides that Article 16 implies that an issuing bank returning documents should do so in reasonable time or if it fails, will be precluded under sub-article (f) from claiming they are non complying.

faces of being late in returning the documents. I would suggest that if it is clear the presentation will be rejected, the documents should be returned to the presenter as soon as possible. If the bank decides to wait for instruction, it would be wise to state in the refusal notice not only that it is doing so, but that it gives the presenter until a specific date to convey his instructions. If he does not, the bank will be from that date responsible for returning the documents without delay. That way the presenter can get on with curing the discrepancies/entering another transaction and the bank no longer has to deal with the documents. Under no circumstances however can the bank keep the documents against reimbursement of any payment already made to the presenter; it does not have a lien over the documents.[58]

The predicted problem of the bank retaining documents after notice has this year come to the forefront in *Fortis Bank v Indian Overseas Bank*[59]. The case involved five separate letters of credit issued by Indian Overseas Bank (IOB) three of which where confirmed by Fortis (thus making is confirming bank) and two of which were unconfirmed with Fortis acting as advising bank only. IOB refused payment for all five LCs in November 2008 and sent notice that it was returning documents for four of the credits and holding documents for the fifth credit pending further instructions from the presenter (Fortis). IOB returned all the documents three months later in February 2009.

The Court of Appeal held that IOB were precluded from claiming that the documents did not constitute a complying presentation under sub-article 16(f) because they failed to return the documents within reasonable time. The problem with this is that 16(f) applies only when the bank has not acted in accordance with the other provisions of Article 16. As discussed above, there is no express requirement in Article 16 for the bank to return documents at a specific time. Sub-article 16(e) relates only to circumstances where the bank holds documents pending further instructions. In *Fortis* the bank stated in the first four LCs that it was returning the documents and in the fifth that it would hold pending instructions. In the former, without express provision in the UCP as to the time of the return what breach of Article 16 has the bank

[58] See *Banker's Trust Supra* nt. 48 and *Benjamin First Supplement to 7th Edition* at pg 135 para. 23-236AK
[59] [2011] EWCA Civ 58

committed for it to be precluded under sub-article (f)? The court decided that a notice that the documents will be returned implies an obligation that they will be returned promptly and without delay (effectively implying into sub-article 16(c) the obligation to return quickly). This was more for policy reasons than for giving effect to the parties' intentions, as evidence was produced that most banks would return promptly and IOB was simply unreasonable in its delay of handling of the documents.

The notice for the fifth credit however stated that IOB would not return the documents but hold pending further instructions from Fortis. In this case 16(e) will apply and in theory, as the bank is allowed to return the documents "at any time" the three month delay would not constitute a breach of Article 16. However, as stated above, the intention of the ICC with sub-article 16(e) was to give the bank a right to return where no instructions were received from the presenter. In this case, IOB did receive instructions from Fortis and they were to return the documents. No matter the intention of the ICC however, the sub-article reads as though it gives the bank a right to return at any time when holding *irrespective* of instructions. Thus IOB could have argued that not only is there no obligation on them to return at a specific time within Article 16, but there is an express provision that they can do so at any time. Unfortunately IOB did not argue this point, nor did the court consider 16(e) in its analysis. It is submitted that the effect of 16(e) should have been thoroughly discussed as it related so directly to the facts of the case. The court instead concluded that as the presenter did provide instructions, which were to return the documents, IOB should have done so without delay because it had an obligation to act in accordance with those instructions. This conclusion agrees with the ICC notion that 16(e) is for banks which receive no instructions and thus those that do should follow them, but this notion does not actually form part of the rules. It is merely in the Commentary[60]. Moreover, as the court tied the bank's obligation to return to the fact that it received instructions to do so, theoretically, when it does not receive instructions to return it has no obligation to return immediately. This would then follow ICC's notion that 16(e) gives a bank with no instructions the right to return at any time. Hence:

[60] At pg 74

Proposal 3

In light of the above, I submit that sub-article 16(e) should be amended to read:

"A nominated…confirming…or issuing bank may, after providing notice required by sub-article 16(c)(iii) (a) or (b), return the documents to the presenter at any time *if it has not received instructions from the presenter*".

If the ICC wish to make it even clearer that documents must be returned promptly, then it would be worthwhile adding a provision to Article 16 stating that:

Proposal 4

'*Where the bank gives notice that it will return documents or receives instructions from the presenter to return documents under sub-articles 16(c)(iii)(a) and (c) it must return those documents without delay*'.

If this is the practice followed and a requirement so that further damage is not suffered by the presenter, then it should be an express provision in the UCP.

E. Conclusion

In this Chapter we have talked about refusing to honour or negotiate a credit on the basis that the presentation has failed to meet the requirements of the credit and the UCP i.e. the discrepancies. We have also discussed the process which the bank must follow to communicate its decision to the beneficiary and it cannot be too often stressed that the rules on this point must be followed precisely, or the bank may end up having to honour a non-complying presentation because of the preclusion provision. In general, Article 16 is a marked improvement on the equivalent Article in the UCP 500. It sets clear instructions for the bank to follow and will result in a fair conclusion of the credit when the presenter has not met the requirements. The purpose of a letter of credit in the sale of goods sphere is to give the seller a trustworthy institution that will guarantee payment for goods that have left his control, if the documents are up to scratch. The stability and strength of the letter of credit therefore, is based on its independence of the sale transaction and any disputes outside the credit itself. This basis would therefore mean that the only thing banks are concerned with are the credit and the UCP and any discrepancies that will mean refusal of payment, are those which do not meet the standard of the credit or the UCP. Is there anything else which could deny payment? Yes there is. Does it threaten the security letters of credit offer? Yes it does. But, it is a vital reason. I use the umbrella term of 'Illegal documents' to describe it. What I mean, is anything that will bring into question the legality of the documents i.e. the legal validity of the documents. Now, the bank is not a court; it has no speciality in knowing if a document is not legally valid. However, if it is so obvious that there is something wrong with the documents, without them on the face being discrepant, it would be grossly unfair to have to accept them, honour them, and then suffer the loss. So, how do fraud, illegality and nullity come into play? That is our next question.

Before we continue, a reminder of my proposals in this chapter are:

Proposal 1:

Amendment to 16(f)

'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*'.

Proposal 2:

Amendment to 16(b)

'When an issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies. This does not, however, extend the period mentioned in sub-article 14 (b) *or relieve the bank of its obligations under sub-articles 16 (c) and 16 (d).*'

Proposal 3:

Amendment to Article 16(e)

"A nominated…confirming…or issuing bank may, after providing notice required by sub-article 16(c)(iii) (a) or (b), return the documents to the presenter at any time *if it has not received instructions from the presenter*".

If the ICC wish to make it even clearer that documents must be returned promptly, then it would be worthwhile adding a provision to Article 16 stating that:

Proposal 4

'*Where the bank gives notice that it will return documents or receives instructions from the presenter to return documents under sub-articles 16(c)(iii)(a) and (c) it must return those documents without delay*'.

CHAPTER 8

Article 34 and the Exceptions to Autonomy

A. Introduction

In the previous Chapter our letter of credit transaction came to an end. Compliant presentations must be honoured, non compliant may be refused. The issue in this Chapter is: are there any overriding circumstances in which a bank can avoid honouring a *compliant* presentation? I.e. is there any leniency for the "must" in Article 15(a)? The answer is yes. The rule is: compliant presentations *must* be honoured. The exception is: unless they fall under the circumstances listed in the bank's disclaimer. Article 34 of the UCP 600 is the "Disclaimer on Effectiveness of Documents". Essentially, it lists the circumstances in which the bank will not take up the documents, even if they comply on their face. It concurrently denies the beneficiary the right to make a claim for wrongful refusal. The immediate question is of course, what circumstances are these? If they were simply defects evident in the documents, Article 34 would not be necessary. The presentation would simply be denied under Article 16(a) as non compliant. The defects listed in Article 34 must therefore be defects outside the documents. If Article 34 allows a base for rejection outside of the documents, it must necessarily mean that it is an exception to autonomy. To remind the reader[1], the combined effect of Articles 4, 5 and 14(a) is that when the bank determines compliance, it does so on the basis of the presentation alone, independently of issues in the underlying sale contract. I.e. the letter of credit determination is independent of the sale contract and thus autonomous. If we are looking for overriding reasons to reject an otherwise compliant presentation, we must be looking for reasons outside of the credit, for if they were inside, it would be rejected under Article 16(a). This Chapter therefore argues that not only is Article 34 a means of denying payment for a complying presentation, it is also the location of the exceptions to the autonomy principle.

[1] See further Chapter 2 Section C.1.

We shall be looking at what circumstances Article 34 covers (and thus what exceptions to autonomy it provides for) whilst simultaneously looking at the corresponding exceptions in national law. A point that must be stressed at the outset is that as far as the writer is aware, the proposition that Article 34 contains the exceptions to autonomy has never been made[2]. It is only Gutteridge who acknowledges that one of those exceptions, fraud, "follows from article 15 (now Article 34)"[3]. He neither goes on to analyse Article 34 nor discuss any other exceptions which it may contain. On the other hand, even the ICC itself has stated that the UCP do not attempt to deal with the situation of fraud (and by analogy any other exceptions)[4] as have numerous academics[5]. On what basis therefore do I make the

[2] Article 34 is seldom mentioned in any text concerning documentary credits and when it is, only as a passing note. For example, in Ellinger, P. and Neo, D. The Law and Practice of Documentary Letters of Credit Hart Publishing, 2010, ISBN: 978-1841136738 at pg 91 only one paragraph is devoted to the Article. It states that it is a disclaimer which has two precautionary measures. Firstly, it prevents the implication of any terms to the opposite effect which may be detrimental to the bank. Interestingly, the second measure mentioned is that it protects the bank against allegations that by presenting to the applicant it is making a false representation relating to the goods, documents or any other person. The connection with the fraud exception (discussed at Chapter 6 of the book) is not made however. NB: At footnote 7 the reader will find that a connection between similar wording in the UN Convention on Independent Guarantees and Standby L/Cs and the exceptions to autonomy is made by Enonchong, N.

[3] *Gutteridge*, pg 65-66. Andrle, P. in The "Fraud Exception" and the L/C independence principle DCInsight Volume 15 (1) pg 3 discusses the fraud rule, acknowledges (at pg 4) that it is said the UCP do not deal with fraud but then directs the reader to consider three articles, one of which is 34. He only quotes the article however and does not provide any link to fraud or any further analysis or comment.

[4] See De Busto, C. Documentary Credits: UCP 500 & 400 compared: an article-by-article detailed analysis of the new UCP 500 compared with the UCP 400. ICC Publication No. 511, Paris, 1993. ISBN: 978-9284211579 at pg 49. Article 15 of the UCP 500 is almost identical to Article 34 of the UCP 600 and therefore this is theoretically also the view held for the current version. See also Banking Commission Opinion R202 in Opinions 1995 – 1996 Publication No. 565 ref. 10 where the commission declined to answer a query on fraud stating that "there is an exception [to Articles 3, 4, 10(d) and 14(a) of the UCP 500] in many jurisdictions, namely the abuse of right or fraud [but]…It is up to the courts to fairly protect the interests of all bona fide parties concerned". For comparison with standby letters of credit see also ICC Publication No. 590: International Standby Practices, ISP98 Rule 1.05 which provides that "defences to honour based on fraud, abuse or similar matters…are left to the applicable law".

[5] See *Jack* pg. 247, para. 9.3 "the UCP contain no provision for [a fraud] exception". Connerty, A. Fraud and Documentary Credits: The Approach of the English Courts available at http://www.arc-chambers.co.uk/FRAUD%20AND%20DOCUMENTARY%20CREDITS.pdf at pg. 15 "No mention is made in the UCP of fraud" although he goes on to say that "on the strict construction of UCP… fraud would not be a relevant consideration in relation to the examination and rejection of documents" and bases this opinion on Articles 3 and 4 as opposed to Article 34 which we discuss mostly in this chapter. See also Gao, X. and Buckley, R. P. A Comparative Analysis of the Standard of Fraud Required Under the Fraud Rule in Letter of Credit Law (2003) Oxford U Comparative L Forum 3 at pg 2 of the Conclusion; Monteiro, F. Documentary credits: The Autonomy Principle and the Fraud Exception: A Comparative Analysis of Common Law Approaches and Suggestions for New Zealand 13 Auckland U. L. Rev. 144 2007 at pg 148 "[the] UCP 600 contain no definition of [the fraud exception] or direct reference to it" and Dalhuisen, J. Dalhuisen on International Commercial, Financial and Trade Law, 3rd Edition, 2007, Hart Publishing, ISBN: 978-1841137094 at pg 473. Note a new edition published 22 Sep 2010 with ISBN: 978-1849460620. Lastly, Enonchong, N. in The Independence Principle of Letters of Credit and Demand Guarantees 1st Edition, 2011, Oxford University Press, ISBN: 978-0199239719 at pg 96 states "There is no fraud exception based on UCP 600."

argument that Article 34 does in fact deal with the exceptions? Firstly, it is submitted that if Article 34 denies liability and responsibility for certain circumstances, those circumstances can only be situations outside of the credit for if they were inside, payment could be denied via Article 16(a) rendering Article 34 superfluous. Why would the ICC include Article 34 if it simply does nothing? And if indeed it does do nothing why not remove it entirely during the 2007 revision? Secondly, the exceptions in Article 34 are not entirely without ground in national law. Fraud may be the only established exception in the UK, but other jurisdictions[6] have acknowledge illegality, nullity and unconscionability which all support the Article 34 provisions. Our suggestion is not that Article 34 provides for entirely new grounds of rejection but simply that it provides a platform for those exceptions already being discussed. Thirdly, what the ICC intended Article 34 to do and what it actually does may be two entirely different things[7]. So far, the ICC has stressed[8] that Article 34 "supports and adds further clarity to…article 14(a) and 14(d)…[the bank's duty] to examine a presentation [and determine compliance] on the basis of the documents alone" and that data in a document must not conflict with data in another document or the credit[9]. It goes on to say that the "document checker is responsible for the examination of data appearing in a…document presented…to the extent…[of] sub-article 14(d) and on the basis of that document alone. In so doing the document checker must always bear in mind that such examination is restricted to the data contained in the document and not to the validity of the underlying source, content, statements or acts of any party". So, Article 34 purports to support autonomy; a document checker checks the data, not the validity i.e. he is not liable for the validity. Does this mean that when he takes the documents and they are invalid but the data is correct he can still claim reimbursement? On the ICC's explanation, yes. But Article 34 also forms part of the bank-beneficiary contract. If the bank is not responsible for the invalidity towards the applicant it must also not be responsible for the invalidity towards the beneficiary.

[6] See further Sections B. 3.3. and 3.4 below
[7] Enonchong, N. in The Independence Principle of Letters of Credit and Demand Guarantees 2011, Oxford University Press, ISBN: 978-0-19-923971-9 states at para. 6.20 that the "UN Convention on Independent Guarantees and Standby Letters of Credit contains in Article 19(1)(a) an exception to autonomy based on non-genuine documents under which the bank is entitled, as against the beneficiary, to withhold payment if it is manifest and clear that any document is not genuine or has been falsified". As we shall discover, the same wording is used in the UCP. If Enonchong finds an exception in these words, it must mean that the UCP also contain the same exception, whether intended by the ICC or not.
[8] See Commentary pg 145/146
[9] For further analysis see Chapter 2 Sections C.2 and E.3. respectively.

The only possible way to deny this responsibility towards the beneficiary however is by not taking up the documents in the first place. If the bank denies liability for validity towards the applicant, it must also deny liability towards the beneficiary on the same basis, but in order for the bank to do so, it must be aware of the invalidity, and for it to be aware of this, it must have information from outside the credit. If the information were from inside the credit, we would not need Article 34 to stress that the checker is not liable for the validity of a document, he would simply reject under Article 14(a). If the information is outside of the credit, then it must be an exception to autonomy. It seems to me that the ICC have sought to protect the position of the bank as against the applicant but forgotten that Article 34 also operates in the bank-beneficiary contract. These terms form the basis of both contracts and must be read in context.

The last argument to support the proposition that Article 34 contains exceptions to autonomy is that if we are looking to harmonise letter of credit law and practice, what better place than doing this than in the UCP? As indicated, different jurisdictions at the moment accept different exceptions. If we are looking to harmonising practice in letters of credit, not acknowledging the exceptions in Article 34 will lead to parties picking and choosing where to open a credit according to which jurisdictions allow more exceptions and which do not. Moreover, not harmonising the law in this area will also mean that a confirming bank in England will not be able to deny payment for reasons which the issuing bank in Singapore will be able to deny it reimbursement. Far from enabling letters of credit to enjoy success, we would be limiting and damaging their utilisation. Finding a home for the exceptions in the UCP would, in one sweep, provide a concrete legislative framework for the exceptions, which, most notably from UK law is missing, and simultaneously harmonise the international law so that all banks no matter location take the same stance against exceptions to autonomy. We increase certainty and security for all parties, protect the reputation of letters of credit and maintain the speed needed for the conclusion of the transaction through the provision of clear and coherent rules[10].

[10] For the proposition that the exceptions must strike a balance between the security of the transaction and the speed of the transaction see Todd, P. Maritime Fraud and Piracy 2nd Edition, 2010, Lloyd's List, ISBN: 978-1-84311-884-8 at pg 184. For whether or not the exclusions of Article 34 can be considered reasonable under English see the Unfair Contract Terms Act 1977.

If, following these arguments, we accept that Article 34 provides for the exceptions to autonomy, our next purpose is to analyse and categorise these exceptions. Before we begin this analysis in the main body of this Chapter, let me put Article 34 into context.

1. Bank – applicant contract

In Article 34 the bank denies the applicant the right to claim against it for certain circumstances by denying liability and responsibility for those circumstances. The applicant's most likely claim would be for wrongful acceptance. The bank's response in Article 34 is: "I will accept a presentation which fulfils the conditions of the UCP and the credit. You must reimburse me for this acceptance, even if the documents are invalid on whatever other grounds, because I am not responsible for those grounds." For example, if the bank accepts documents which on their face comply but were in fact forged, it can still demand reimbursement because it is not responsible for the forgery. It is only responsible for compliance according to UCP. The applicant must reimburse it and cannot make a claim against it for wrongful acceptance (unless it was for defects evident in the documents).

2. Bank – beneficiary contract

In this contract the most likely claim by the beneficiary is that the bank wrongly rejected. Article 34 therefore operates to deny such claims when the bank refuses to pay for invalid documents. It is effectively saying to the beneficiary: "I will accept documents that comply with the credit and UCP but only if they are also not invalid. If they are invalid, I will refuse payment and also deny you the right of making a claim for wrongful rejection".

In both situations Article 34 operates much like an exclusion clause in any other commercial contract[11]. There are simply some situations where, even though the essential obligations of the contract have been performed by the other party (i.e. the documents comply) the bank excludes liability i.e. the possibility of making a claim.

[11] We shall not, to any extent, be looking to the validity of Article 34 as an exclusion clause under the Unfair Contract Terms Act 1977 but for reference, if one were to analyse the article in this way, it would most likely fall under the reasonableness test of Section 3 and Schedule 1 of UCTA.

In Article 34 however it also excludes responsibility which means, in the case of the beneficiary, that it is unwilling to take up such documents at all. In the case of the applicant, not only does denying liability mean the bank cannot be sued in the Article 34 circumstances, denying responsibility also means that it can simultaneously demand reimbursement. Essentially, in both cases it keeps its money and protects its legal position.

B. The exceptions to autonomy

Article 34 states:

1) "A bank assumes no liability or responsibility for,
2) the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document…
3) nor…for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods…
4) or for the good faith or act or omissions…of any…person".

I have subdivided Article 34 in this way because it is easier to deal with.

1. Non independent exceptions to autonomy

1.1. Goods

Let me start by saying that sub-section (3) will not be discussed as an independent exception to autonomy as, it is submitted, it simply operates to reiterate the fact that the bank does not have access to the goods and thus cannot certify if their description, quantity, weight etc is in fact that stated in the documents. For example, if the documents state that the quality is X but upon physical inspection quality is Y, this is of no concern to the bank. It will accept the documents knowing the goods are not as stated (upholding autonomy) unless the statement made on the documents that the goods were X was made in bad faith (I.e. sub-section 4) or not genuine and false (i.e. sub-section 2). Essentially, where the statement was innocent, even if this is not what the applicant expected, he will still have to reimburse the bank. To the beneficiary sub-section (3) is saying "any disputes as to description, quantity, weight etc are still your responsibility under the sale contract even if I have paid you."

1.2 Form and sufficiency

Similarly, we shall not be discussing the form and sufficiency of a document as an independent exception to autonomy. The form relates to the type of document presented, its structure and constitution. A good example would be the carriage document. As we discussed in Chapter 3[12], the purpose of the phrase "however named" in Article 20 (a) is to indicate that what is of concern to the bank is the contents of the document rather than its title i.e. if it satisfies the requirements of Article 20 it will be compliant as a bill of lading even if it does not call itself that. In the same light, when a bank accepts a document not called a bill of lading but satisfying the requirements of one, its reimbursement from the applicant cannot be denied on the basis that the document is not called a bill of lading. Similarly, even if it does not look like a bill of lading, the applicant cannot deny payment. The point is that the document the bank presents to the applicant only has to satisfy the requirements of the credit and the UCP, not the expectations of the applicant as to its form (unless of course there is something in the bank's mandate which restricts what it may accept).

Sufficiency relates to the adequacy of the particular document. For example, where the buyer agreed with the seller that the insurance cover would be 120% of the price of the goods, the fact that the bank accepted a document covering 110% of the price (under article 28 (f) (ii); assuming no requirement for 120% was placed in the mandate) would not be grounds for the applicant to refuse reimbursement. Even if the insurance policy is insufficient in terms of cover, this is of no concern to the bank. It has fulfilled its obligations and whether or not the documents it has presented to the applicant satisfy any sufficiency requirements has nothing to do with it.

The bank can therefore demand payment where the documents are not in the anticipated form or at the anticipated sufficiency of the applicant. Moreover, even when the applicant is forced to take up such documents, by virtue of Article 34, it cannot sue the bank for breach of contract. For the bank-beneficiary relationship the bank is always free to reject documents which fall short of the sufficiency level or form stated in the credit. Just like the description of the goods, the form and sufficiency of a document will only be taken into consideration if it is coupled with sub-sections 2 or 4 i.e. it was made in bad faith or false.

[12] See section C.1.

1.3 Accuracy

Accuracy means how exact the information of the document is. Again, to my understanding this can only mean accurate as against the information provided by the goods themselves. For example, if the quantity shipped is X - 1 in reality, but the document states it is X, as does the credit condition, the fact that the applicant received X – 1 is not the bank's responsibility. It will still be reimbursed. It will only question the accuracy if it knows that the statement on the document that the quantity is X was made under sub-section 4 in bad faith or under sub-section 2 as a non-genuine or false statement. As against the beneficiary, the bank will only deny payment where it knows that not only is the quantity actually X – 1 but that that statement was made in bad faith. Otherwise it must follow Article 15(a) and honour.

1.4 Conclusion

Why have I singled out these provisions of Article 34? Because it is difficult to see how to justify the banks' refusal of taking on documents which fail form, or sufficiency or accuracy unless the statements were made with some sort of dishonest conduct. We would extend Article 34 much too far into ruining the autonomy of the credit for trivial matters. After all, if the bank wants to control the form, sufficiency and accuracy of a document it should do so in the corresponding document articles i.e. 19 onwards. That is their purpose. Having attempted to control these it cannot then go on and say it will not accept documents that still do not satisfy its own requirements unless the problem relates directly to another exception.

2. Independent exceptions to autonomy

2.1 Liability and responsibility

The first essential element of Article 34 is the bank denying liability and responsibility. Liability is a legal duty or obligation[13]. The disclaimer therefore states that the bank has no legal obligation towards the beneficiary and the applicant for the

[13] See Oxford Dictionary of Law, 7th Edition, 2009, OUP, ISBN: 978-0199551243

circumstances listed in Article 34. *Ipso facto* those parties cannot make a claim for breach of contract towards the bank for those same circumstances. The key word for interpreting the Article is "assumes". The Article does not say 'the bank is not liable for', it says "the bank a*ssumes* no liability for". This means that not only *is* it not liable but that it does not even *take on* the liability for the circumstances in Article 34. It can therefore be interpreted to mean that the bank is saying to the beneficiary 'I will not take on documents that I know suffer from the circumstances listed in Article 34 and you cannot sue me for rejecting the presentation on this basis even if the documents otherwise comply'. Denying responsibility therefore means that the bank will not pay for such documents. Denying liability in turn means that where it does not pay, it cannot be sued by the beneficiary. For the applicant it means that where the bank has accepted documents and the applicant claims that it should not have done so (because they are invalid due to circumstances 2 and 4) it cannot be sued (denying liability) but must simultaneously be reimbursed (denying responsibility).

At this stage, it is important to note the following. If article 34 allows the bank to look outside the credit and deny payment in certain circumstances where a presentation complies, how is this reconciled with Article 15(a) which requires a bank to honour a complying presentation? Is it that Article 34 is an exception to 15(a) as well as an exception to autonomy? The answer is no. Although Article 14(a) requires the bank to examine the presentation and determine compliance on the basis of the documents alone, Article 2 defines a complying presentation as one that satisfies the conditions of the UCP, the credit and international standard banking practice[14]. Even if the documents pass the 14(a) test i.e. the documents comply, honouring the credit is not automatic under 15(a) as the presentation must also comply with standard banking practice. It is arguable therefore, that documents plagued by the Article 34 defects are those which no bank under any banking practice would accept. The reconciliation is that a presentation which includes defects of Article 34 may comply on its face under Article 14(a), but it does not satisfy the definition of compliance under Article 2[15]. Thus the bank need not follow 15(a) as the presentation in its entirety does not

[14] See Chapter 2 Sections D, E and F.

[15] This idea finds support from *Goode* at pg 1105 who takes the view that a forged document cannot conceivably be treated as a conforming document. It may comply on its face, but overall it is not capable of compliance. In our argument, this is compounded by the fact that such a document would not satisfy banking practice.

comply. By way of example, a forged document may on its face comply (after all, why bother forging if it were not to meet the credit and UCP conditions) but it will none the less fail standard banking practice conditions as no bank would be willing to accept a document known to be forged. In other words, no matter the guarantee in Article 15(a) that the bank *must* pay, determination is against the UCP, credit and standard banking practice and this practice will simply not accept invalid documents. Article 34 is the route to determining invalidity, as this can only be done outside the credit it must be an exception to autonomy, and Article 2 is the basis for denying the right to payment.

3. Documents

We now reach the actual exceptions to autonomy. The first I have grouped together under the title fraud which corresponds to the genuineness and falsification of a document. The second is the legal effect of a document.

3.1 Fraud

The genuineness of a document relates to its characteristic of being authentic. If it is not authentic, it must be counterfeit and if counterfeit, it must be fraudulent[16]. Falsification is the actual act of altering a document fraudulently. In essence, it is the act of forgery. What the bank is therefore saying to the beneficiary is that: "where I know the documents are forged (i.e. have been falsified), or contain statements which are fraudulently made (i.e. not genuine) I will not pay you even if the documents otherwise comply". How does the bank justify this? The documents do not comply with standard banking practice (i.e. Article 2). How does it know they were forged? It must have been alerted from outside the credit (because if alerted from the documents themselves it would reject under 14(a) and 16(a)). How is this justified? It is an exception to autonomy. This is not a novel idea. Fraud is an established exception to autonomy in many jurisdictions[17]. It has essentially evolved from the American case

[16] For relatively recent examples of alleged credit frauds see DCInsight Vol. 14(3) 2008 Scams in Bangladesh, Nigeria and Pakistan at pg 2 (No author).
[17] In the UK see *Discount Records Ltd v. Barclays Bank Ltd* [1975] 1 WLR 315; *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* [1978] QB 159. In Australia see *Contronic Distributors Pty Ltd (Receiver and Manager Appointed) v. Bank of New South Wales* (1984) 3 NSWLR

Sztejn v. J Henry Schroder Banking Corporation[18] where Justice Shientag stated that "where the seller's fraud has been called to the bank's attention before the drafts and documents have been presented for payment, the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller"[19]. In other words, the autonomy of the credit will protect honest beneficiaries. If they act fraudulently, the bank is permitted by law to look outside the credit to establish compliance. In the UK, the leading case is *United City Merchants (Investments) Ltd v. Royal Bank of Canada*[20] where Lord Diplock stated that "to this general statement of principle [autonomy]…there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the bank…documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue"[21].

Our above argument that the UCP deals with the fraud exception runs fairly smoothly but we find no answer as to the standard of proof needed to evidence the forgery. For example, the bank cannot be justified in rejecting documents on the basis that the applicant has simply suggested forgery. It must need hard evidence that the documents are in fact forged, otherwise Article 34 would operate to give the banks the option of refusing payments on a whim. This standard is missing from the UCP and must be filled in by national law. Here the standard differs depending on the nature of the proceedings involved. For the exception to succeed at trial there must be "particularly cogent evidence"[22] or "strong corroborative evidence" upon which the court's "only realistic inference to draw is that of fraud"[23]. For an interim injunction the situation is similar so that it must be seriously arguable that on the material

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110. In Canada see *Bank of Nova Scotia v. Angelica Whitewear* [1987] DLR 161. For a full account of the fraud exception in other jusrisdictions see Gao, X. and Buckley, P.B. A Comparative Analysis of the Standard of Fraud Required Under the Fraud Rule in Letter of Credit Law (2003) Oxford U Comparative L Forum 3 at ouclf.iuscomp.org which covers the US, UK and Australia. For the addition of Singapore and New Zealand see Monteiro, F. Documentary Credits: The Autonomy Principle and the Fraud Exception 13 Auckland U. L. Rev. 2007. For China see Gao, X. The Fraud Rule in Letters of Credit in the P.R.C. 41 Int'l Law 1067, 2007. For Japan see Kozuka, S. Uniform Rules versus Freedom of Contract: Japanese Practice in Letters of Credit Transaction Sing. J. Int'l & Comp. L. 148, 2000.

[18] 31 NYC 2d 631 (1941)

[19] *Ibid* at pg 651

[20] [1983] 1 AC 168, HL

[21] *Ibid* at 184

[22] *Enka Insaat Ve Sanayi AS v. Banca Popolare Dell'Alto Adige SPA* [2009] EWHC 2410 (Comm) at para 25.

[23] Per Lord Justice Ackner in *United Trading Corporation SA v. Allied Arab Bank* [1985] 2 Lloyd's Rep 554 at 561.

available, the only realistic inference is fraud[24] although there are cases which have called for a higher degree of fraud, namely established fraud[25]. At summary judgment, the Civil Procedure Rules Part 24.2(a)(ii) require establishing that the defendant has no real prospect of success at trial i.e. "the criterion is not one of probability but the absence of reality"[26]. In conclusion, the minimum required in all circumstances is strong evidence. Applying this to the actual time the bank is alerted to fraud, it must feel comfortable that the evidence put to it is strong enough to argue at trial that non payment was due to fraud. If in doubt, presumably it would be better to deny payment and let the beneficiary bring a claim, than pay and then face the chance that fraud is proved by the applicant.

The problem with the UCP is that we have no clear definition of the words "genuineness" and "falsification". No doubt they include forged documents[27] and false statements i.e. fraudulent misrepresentations. Do they however include simply false statements? i.e. statements which are misrepresentations because they are false, but were not fraudulently made. It is submitted that as it stands they do not. Genuineness and falsification must be read together. Not only must a document be false, it must also be not genuine. The misrepresentations covered must therefore be only the ones that are fraudulent. Forgery at its heart has the intent to deceive therefore any forged document will be included. Falsity on the other hand may be intended to deceive but just because a statement is false, does not mean it was made with the intent to deceive. It may have been a genuine mistake. By this interpretation,

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[24] *Ibid.* See also *Fletcher Construction Australia Ltd v. Varnsdorf Pty Ltd* [1998] 3 VR 812 for Australian support; *Bank of Nova Scotia v. Angelica-Whitewear Ltd* [1987] 1 SCR 59 for Canadian support; *Chartered Electronics Industries Pte Ltd v. Development Bank of Singapore* [1999] 4 SLR 665 for Singaporean support. In the US for an injunction to be permitted under Article 5-109(b)(4) of the Uniform Commercial Code the court must find that the applicant is "more likely than not to succeed" in its claim of fraud.

[25] See for example, *RD Harbottle v. National Westminster Bank* [1978] 1 QB 146; *Edward Owen Engineering v. Barclays Bank International Ltd* [1978] QB 159 and *Solo Industries v. Canada Bank* [2001] 2 All ER (Comm) 217. There is much disagreement about the standard of proof required. *Jack* at para 9.67 – 9.69 adamantly defends the idea that it is established fraud that is the only benchmark and that *United Trading v. Allied Arab* did not dilute this standard (finding support in *Turkiye Is Banksasi AS v. Bank of China* [1998] 1 Lloyd's Rep 250). Enonchong in The Independence Principle of Letters of Credit and Demand Guarantees 2011, Oxford University Press, ISBN: 978-0-19-923971-9 at para. 5.64-5.86 on the other hand argues that *United Trading* lowered the standard to arguable case and this is the correct benchmark.

[26] Per Lord Hobhouse in *Three Rivers DC v. Bank of England (No 3)* [2001] 2 All ER 513

[27] For a fuller account on forged documents, in particular bills of lading see Todd, P. Delivery against Forged Bills of Lading [1999] LMCLQ 449

it is submitted that this part of Article 34 covers documents which are forged in their entirety or part and documents which contain fraudulent statements. In national law, the meaning is very close to that of the tort of deceit. In *United City Merchants*[28] Lord Diplock stated[29] that the exception applied where the beneficiary fraudulently presents documents that contain material representations of fact that to his knowledge are untrue. The meaning of fraud therefore essentially requires a material misrepresentation. Materiality has not been fully explained as Lord Diplock merely stated that this *did not* mean material to the applicant's right to reject the goods without stating what it *did* mean[30]. It has been suggested however by Jack[31] that this is material to the bank's duty to pay. For example, if the bank knew of the true information, it would have refused payment on the basis of non compliance.

My submission here is that a combination of national law and UCP is required. Forged documents and fraudulent misrepresentations will allow the bank to deny payment where they are material. i.e. we add the materiality requirement to the UCP. False statements will also give rise to the exception when they are material to payment. To this end, national law supports the UCP.

Having confirmed the definition of fraud the immediate question is who must have forged the document or made the fraudulent statement? Article 34 generalises and does not place a requirement on 'the who'. It is not a requirement of the exception that it is the beneficiary who made the false statement. The only requirement is that the documents themselves have been forged (or contain a fraudulent misstatement). This by itself will warrant refusal. Proof of who committed the forgery is not needed. The fact that it is forged is enough. In theory therefore, it is possible for the bank to deny payment on the grounds of fraud, even where the beneficiary himself was unaware of the defect[32]. Again, this is because the genuineness and falsification is not

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[28] *Supra* nt. 20 above
[29] *Ibid* at 185
[30] *Ibid*
[31] At para 9.17
[32] This is in sharp contrast with Lord Diplock's definition which requires the knowledge of the beneficiary specifically. However, it can be argued that the establishment of fraud is determined by the person making the statement i.e. fraud is proved when it is shown that the false representation was made knowingly, without belief in its truth or recklessly (*Derry v Peek* (1889) 14 App Cas 337). Therefore, even if the fraud was committed by a party other than the beneficiary, as long as that person did not believe in its truth, fraud is established in the documents. Fraud in the demand may not be

of the beneficiary, but of the document. His knowledge is immaterial. Of course if the beneficiary is aware of the fraud or perpetrated it not only are the documents forged, but the mere act of presenting is also fraudulent[33]. This can be characterised as fraud in the demand. The beneficiary is asking to be paid for something he knows he is not entitled to[34]. So far therefore, we can say that fraud in the documents alone is covered by Article 34 as is fraud in the demand. The remaining category is fraud in the underlying transaction. To give an example, it is possible that the documents themselves are not fraudulent but a party under the sale contract did act fraudulently. Is this fraud covered? The answer is no, not under sub-section 2. Here we are dealing specifically with fraud in the documents. The actions of parties in the underlying transaction are irrelevant. However, they will be relevant in sub-section 4 when we discuss the bad faith of parties and in that sense, will be an entirely different exception to autonomy.

We have thus far stated what fraud is included and the effect this fraud would have on the bank-beneficiary contract. For the bank-applicant contract, things are a little more complicated. The bank's denial of liability for fraud means that it avails itself of all situations of fraud unless it is itself acting fraudulently. In other words, whereas the beneficiary could not avail himself of other peoples fraud under Article 34, the bank can. In essence it is saying to the applicant: "Where I have paid and presented in good faith, you must reimburse me and cannot make a claim for wrongful acceptance even if the documents are forged or contain fraudulent misstatements". Whereas for the beneficiary knowledge of the fraud was irrelevant here it becomes a key issue. To makes things clearer, we can sub-divide the discovery of fraud in the following way:

1) The bank is aware of the fraud before the beneficiary presents
2) The bank is aware of the fraud after presentation but before paying
3) The bank is aware of the fraud after paying but before itself presenting
4) The bank is aware of the fraud after presenting

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present, as the beneficiary is presenting honestly, but fraud in the documents must necessarily be present. To this end, far from opposing the UCP, national law upholds that fraud in the documents exists when the person making the statement did not believe in its truth.

[33] This is in effect the extent of the UK fraud exception.

[34] See *Standard Bank London Ltd v. Canara Bank* [2002] EWHC 1574 (Comm)

In circumstance 1 although the bank is aware of the fraud even before the beneficiary has presented, it must still make its determination after presentation otherwise it would have breached most of its obligations under the credit contract. At determination, it has the right to deny[35] payment under Article 34 and can also be forced to deny payment by the applicant[36] since if it does take up the documents, presenting to the applicant will mean *its own* fraud in the demand, which will result in non-reimbursement. Under circumstance 2, again the bank has the right to deny payment. Under circumstance 3, it is too late to deny payment but also unable to present as it has become aware of the fraud and presenting to the applicant would mean it is acting fraudulently[37]. Its only recourse in this circumstance would be against the beneficiary (i.e. cause of action would be the tort of deceit). It cannot demand reimbursement from the applicant because presenting to him would mean the bank also actively participating in the fraud. Is there an argument that the bank should nonetheless shift the loss to the applicant? Possibly[38]. After all, the letter of credit is simply a payment mechanism. In agreeing to participate the bank is not becoming a party to the underlying contract, it is simply facilitating it, and on this basis if someone is to suffer from issues outside of the credit contract, it should be the applicant. The risk should therefore shift to him. In fact, the risk should have never been with the bank at all. The counter argument is of course the point at which fraud is discovered, is the point at which all contracts break down. It would be very difficult to legally persuade a buyer to reimburse the bank when both bank and applicant knew the documents were forged prior to presentation. In circumstance 4 however, the bank has both paid and presented in good faith. It has not committed a fraudulent act, and by virtue of Article 34, even if there is fraud in the documents, the bank is not liable for this and thus entitled to reimbursement. Here the risk will shift but has the added argument that the bank was not aware of the fraud. It has completed its performance correctly and should get paid. Whether or not the documents are forged is now

[35] *Mahonia Ltd v. JP Morgan Chase Bank* [2003] EWHC 1927 (Comm)
[36] *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* [1978] QB 159. If the applicant can show that the bank was clearly aware of the fraud before payment, it can restrain it from paying: *GKN Contractors Ltd v. Lloyd's Bank Plc* (1985) 30 BLR 48
[37] Supported by *Czarnikow-Rionda v. Standard Bank* [1999] 2 Lloyd's Rep 187
[38] See for example Justice Shientag's statement in *Sztejn v. J Henry Schroder Banking Corporation supra* nt. 18 at pg 645 who says that "if the issuing bank has already paid the draft before receiving notice of the seller's fraud, it will be protected if it exercised reasonable diligence before making such payment". Justice Shientag made no distinction between payment and presentation. If the bank paid in good faith, it would get reimbursed even if on its own presentation is was aware of the fraudulent defect.

irrelevant. Whereas under circumstance 3 we could argue that the bank-applicant contract cannot be interpreted to include an implied term that the applicant will reimburse even in cases where the bank is aware of the fraud prior to presentation, under circumstance 4 it is perfectly possible to argue that in fact the bank's duties to perform have now ended, it has fulfilled its obligations and the applicant's right to deny reimbursement has passed[39]. He is compelled to pay[40].

3.1.1 Conclusion

To summarise, the first exception to autonomy is fraud. This is fraud in the documents which may or may not be combined with fraud in the demand. It is fraud committed by any party at any time. As the UCP give no standard of proof national law must fill the gap and make it clear and established fraud. This will operate to deny payment to the beneficiary and demand reimbursement from the applicant. If the bank were to discover any other defect in the documents, it would deny payment due to non compliance with the credit and UCP conditions. In cases of fraud, there would be no gain unless the alteration was made to make the documents comply. If so, the bank must have been alerted to the fraud from outside the documents and as 34 gives a right to reject for fraud, it can only mean that it is an exception to autonomy.

3.2 Legal effect

It is submitted that both the applicant and the bank will be concerned with the legal effect of a document if it means the transaction they are participating in is either void, voidable or illegal. For if the document improved their legal rights they would surely not complain. Void means having no legal effect[41] i.e. a document presented which is void means that it has no legal force from the moment of its making. An illegal sale

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[39] Where the credit provides for deferred payment the bank may chose to discount the obligation and pay the beneficiary immediately a reduced amount before maturity. In *Banco Santander SA v. Banque Paribas* [2000] Lloyd's Rep Bank 165 the confirming bank took this option but when fraud was subsequently established, reimbursement from the issued bank was denied on the basis that the discounted payment had not discharged the bank's obligation but merely kept it alive to maturity. i.e. discharge was on maturity. To combat the effect of this case, the 2007 revision of the UCP now includes sub-article 12(b) which expressly allows a nominated bank to continue discounting and by virtue of sub-article 7(c) requires the issuing bank to make reimbursement for the payment of any complying presentation even if discounted.

[40] *Credit Agricole Indosuez v. Genrale Bank* [1999] 2 All ER (Comm) 1009

[41] *Supra* nt. 13 above

contract will therefore be void and so will be the documents attached to that contract. Voidable on the other hand means a contract which was valid when made, but has become capable of being set aside. The easiest examples are the following. Sale of narcotics is illegal and any bill of lading would be void. A sale of arms to China is also illegal due to the embargo[42] but if it were lifted on Day X and a sale was agreed on Day X + 1, the contract would not be void. If on Day X + 2 the embargo was put back in place, the contract would be voidable. Although when made on X + 1 it was not void, it became voidable on X + 2. The bank is therefore trying to limit its exposure to such documents. To the beneficiary it is saying "if I know a document is void, illegal or voidable, I will not pay you"[43]. To the applicant it is saying "if a document is void or illegal without my knowledge, you must still pay me because I presented in good faith. If a document becomes voidable after my presentation, again you must still reimburse me. I deny any responsibility or liability for these circumstances".

The timing of the knowledge is again crucial and operates in the same way as in fraud. If a bank were to present knowing a document is void, it would be acting in bad faith and for this it has not excluded liability. Another similarity with fraud in this case is that again we are talking about the documents themselves. It is the documents that must be void and the documents that must be illegal for sub-section 34 (2) to operate. Although void and illegal documents will most likely also mean the underlying sale contract is illegal, this behaviour is excluded in sub-section (4) not sub-section (2).

By comparison UK law has denied the existence of a nullity exception[44]. A document is null if due to a defect it is void *ab initio*. It may either have been forged (here we do not require the condition of materiality as in sub-section 34(2) above as the forgery is enough to make it null) or simply null from creation without the fraudulent intent. For

[42] http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/whatwedo/europeandtrade/strategic-export-control/sanctions-embargoes/by-country/china/index.html

[43] Similarly in *Sztejn v. J Henry Schroder Banking Corporation* Justice Shientag at page 647 stated that if a bank "knows that a document is, in point of fact false or illegal, he cannot be called upon to recognise such a document as complying with the terms of the letter of credit".

[44] *Montrod v Grundkotter Fleischvertriebs GmbH* [2002] 1 All ER (Comm) 257. For an overview of the law in this area see Todd, P. Non-genuine shipping documents and nullities [2008] LMCLQ 547

it to be null however, the defect must go to the essence of the document[45] so that it is destroyed in its entirety[46]. Singaporean courts on the other hand have recognised a nullity exception, albeit limited. In *Bean Technology (Mfg) Pte Ltd v. Standard Chartered Bank*[47] the court recognised a nullity exception where a material document presented was forged and null and void[48]. The decision is limited as it specifically states nullity due to forgery. Documents which are null but not forged are not included (our example of a voidable document is thus clearly excluded as is a document null but made due to honest error). Moreover, the null document must be one that is material, although the definition of what this means was absent. The most troubling effect of the case however is that the exception will only operate where the bank has not accepted the documents. For example, it if accepted but has not paid, it cannot deny payment. If it has accepted and paid, it has no claim against the beneficiary in court either[49] (i.e. a claim in restitution). If this claim is denied, it would be very difficult to justify requiring the applicant to reimburse the bank merely because it paid without knowledge of nullity.

3.2.2 Conclusion

Our UCP exception therefore does not find much support in national law although Singapore has at least accepted a limited nullity exception. To this end, our proposition is not entirely outrageous. It is perfectly possible to argue that the intent of Article 34 and denial of liability for the legal effect of a document can only mean that null documents can be refused. Under UCP therefore, a nullity exception does exist. It is unlimited as there is no requirement about who must have made the document null or how, simply that any questionable legal effect is outside the hands of the bank. If however it is alerted to a void document (necessarily from outside the credit) then it can deny payment and on this basis, constitute an exception to autonomy.

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[45] *Kwei Tek Chao v. British Traders and Shippers Ltd* [1954] 2 KB 459
[46] See for example *Egyptian International Foreign Trade Co v. Soplex Wholesale Supplies (The Rafaella)* [1984] 1 Lloyd's Rep 102
[47] [2003] 1 SLR 597
[48] For an analysis of the decision and the nullity exception see Chin, L.Y. and Wong, Y.K. Autonomy – A nullity exception at last? [2004] LMCLQ 14
[49] *Mees Pierson NV v. Bay Pacific (S) Pte Ltd* [2000] 4 SLR 393

3.3 Good faith

The last sub-section of Article 34 deals with the "good faith, or acts or omissions of… any *other* person". I emphasise the word other as this will mean the bank is not liable for the act of persons other than itself. It remains liable for its own actions. Notably, the subsection includes the consignor, carrier, forwarder, consignee and insurer. This is important as this upholds our proposition in Section B.3.1. above that the fraud need not be that of the beneficiary himself. It can be of anyone and the bank can deny payment. Notably, this interpretation also upholds our proposition in Section B.3.1. that a bank will not be liable towards the applicant for anyone else's fraud but it is liable if it presents knowing that there is fraud in the presentation. The acts and omissions of parties will not be limited to those in the documents or the credit either. Sub-section 4 is entirely open; it covers *all* acts and omissions of *all* parties involved. This will include those in the underlying sale contract. Therefore, if the sale contract is illegal, the bank can both deny payment, and demand reimbursement if it presented unaware of the defect. Similarly, where it is aware of fraud in the underlying transaction, it can deny payment on the basis of sub-section 4 without needing to prove fraud in the actual documents under sub-section 2. If therefore we make sub-section 4 an independent exception to autonomy the bad faith, acts and omissions of persons cannot be limited to fraud and illegality/nullity. It must mean that apart from that behaviour, the bank can deny payment where there has been questionable conduct other than fraud. Again, we cannot possibly extend this to mean *any* conduct. It must have a degree of bad faith and for this reason again bad faith and acts and omissions should be read together. For example, the bank refuses payment where any party has acted in bad faith. It therefore covers *all* acts or omissions made in bad faith of *any* person. Again, the only possible means for the bank to be alerted to the behaviour is through outside information. How could it possibly tell if a party acted in bad faith from the documents alone? If it looks at information outside the documents, again this must mean sub-section 4 is an exception to autonomy. It is not open-ended; it is actions made in bad faith. The interpretation of bad faith I leave to the courts; no doubt it will depend on the severity of the action but in any case, we need not burden the bank with technical definitions. Its own banking practice is capable of deciding on what behaviour it will accept and what it will consider unacceptable.

In relation to national law we must make a distinction about general bad faith behaviour and clearly illegal behaviour. If a sale contract is entered into with the knowledge that it is illegal, clearly the parties have also acted in bad faith. Sub-section 34(4) therefore operates to give an independent illegality exception (this is the combined effect of legal effect of a document and bad faith). UK law at the moment does not explicitly accept an independent illegality exception[50]. However, there is some support for its recognition[51]. Lord Justice Staughton in *Group Josi Re v. Walbrook Insurance Co Ltd*[52] stated that if the underlying contract is illegal, the letters of credit would be affected by this illegality and the court could restrain the bank from making payment or the beneficiary from demanding it. Illegality was therefore a separate ground of defence.[53] Justice Cooke in *Mahonia Ltd v. JP Morgan Chase Bank*[54] took a similar view but both cases concluded that there was no illegality in the underlying transaction in the specific circumstances. Thus the statements were theoretically made *obiter*[55]. Nonetheless it is submitted that our proposition that illegality is an independent exception to autonomy is supported by case law and when an opportunity presents itself this will be expressly stated.

Other behaviour which is simply made in bad faith but not illegal should not be compared to the illegality exception in national law. It should instead be compared to the possibility of an unconscionability exception. Again, we have no clear indication

[50] The US UCC also does not suggest such an exception. Article 5-109 recognises only fraud and forgery. Similarly, in Canada the courts appear to have rejected the exception: *Morguard Bank id Canada v. Reigate Resources (Canada) Ltd and Canada Trust Company* (1985) 40 Alta LR (2d) 77. France on the other hand has taken a somewhat distorted view. Whereas it accepts the illegality exception as the basis for a claim in restitution by the applicant to the beneficiary when a bank has already paid (*Ste Borie SAE c. Ste Matra Transport* Com. 7 June 1994, Bull. 1994. IV. No. 202) it does not accept it as a defence to payment when a bank has not paid (*Siegfried Dunes Sharjah Leasing Corporation v. Banque de Paris* Cass. Com. 20 December 1982, D. 1983. J. 365)

[51] This is true of the cases discussed in the immediate sentences of the text but also true of the Law Commission's paper on The Illegality Defence Law Com No 320, HC412, 16 March 2010 which states that although it is not possible to lay down strict rules about where an illegality defence should apply (due to the breadth of circumstances and areas of law; contract of course being included) it reached the conclusion that courts should consider policy rationales underlying the defence and apply them to the facts of each case so that they deter illegal conduct or allow the system to be abused. Clearly, illegal underlying sale contracts will thus be included so that forcing the bank to pay a seller in this case cannot be justified (see summary of report at pg vi)

[52] [1996] 1 Lloyd's Rep 345

[53] *Ibid* at 362

[54] [2004] EWHC 1938 (Comm)

[55] In Australia also there is *obiter dictum* that an illegality exception is available: *Fletcher Construction Australia Ltd v. Varnsdorf Pty Ltd*, 24 November 1997.

that such an exception is recognised in English law[56]. Judge Thornton QC in *TTI Team Telecom International Ltd v. Hutchison 3G UK Ltd*[57] expressed the view that a lack of good faith is an established ground on which a beneficiary may be restrained from demanding or receiving payment under a performance bond (by similarity also a letter of credit[58]). However as with illegality, bad faith was not actually proved, thus the view was *obiter*. The court did consider what this exception might include though and in essence concluded that a significant lack of bad faith would be the benchmark[59]. By way of example it listed:

1) the failure by the beneficiary to provide an essential element of the underlying contract,
2) misuse of the [credit] by failing to act in accordance with the purpose for which it was given,
3) total failure of consideration in the underlying contract and
4) lack of honest belief by the beneficiary that the circumstances against which [a credit] had been provided actually exist[60].

Notably, both Australia and Singapore have recognised the unconscionability exception[61]. In the Singaporean case *GHL Pte Ltd v. Unitract Building Construction Pte Ltd*[62] on performance bonds[63] the Court of Appeal granted an injunction restraining the beneficiary from calling on a bond on the grounds of unconscionable

[56] Authorities that seem to support the exception are *Elian and Rabbath (t/a Elian & Rabbath) v. Matsas* [1966] 2 Lloyd's Rep 495; *Cargill International SA v. Bangladesh Sugar and Food Industries Corp* [1996] 4 All ER 563; *Bristol Meci Australia Pty Ltd v. Ericsson Business Networks AB* [1996] EWHC Civ 807 and *Pottom Homes Ltd v. Colman Contractors Ltd* (1984) 28 BLR 19.
[57] [2003] 1 All ER (Comm) 914
[58] See *Jack* at pg 260 para 9.27
[59] "the bad faith must be both significant and clearly established" per Judge Thornton QC *supra* nt. 57 at 928
[60] *Ibid* at para. 43.3
[61] In Australia, this is found in Part IVA of the Australian Trade Practice Act 1974 which prohibits unconscionable conduct in sections 51AA (broad prohibition against unconscionable conduct) and 51AB (unconscionable conduct between businesses and consumers). This has been recognised as grounds for refusal by a bank in *Olex Focas Pty Ltd v. Skodaexport Co Ltd* (1998) 3 VR 380. In Singapore this is found in *GHL Pte Ltd v. Unitract Building Construction Pte Ltd* [1999] 4 SLR 604 and confirmed by *Samwoh Asphalt Premix PTE Ltd v. Sum Cheong Piling PTE Ltd* [2002] BLR 459
[62] *Ibid*
[63] And thus by similarity also including letters of credit.

conduct[64]. The court made it clear[65] that this was a deliberate decision to depart from UK law (i.e. recognising only fraud). It was later confirmed[66] that "In Singapore, unconscionability on the part of a beneficiary in calling for payment on a performance guarantee is a separate and distinct ground from fraud for seeking injunctive relief"[67]. On this basis, we find further support for our proposition that the UCP does and should provide for an unconscionability exception. Again, our proposal is therefore not entirely without support.

In conclusion, sub-section 34 (4) allows for fraud in the underlying transaction, illegality and unconscionability. Bad faith is directly included through sub-section 4. The illegality of the transaction is included through the combined effect of sub-section 2 (legal effect) and subsection 4 (act and omission of any person). Fraud in the transaction is also included as the combined effect of genuineness and falsification of sub-section 2 and bad faith in subsection 4. Our suggestions may not be directly upheld in English case law, but support has been found and thus a suggestion that these are also exceptions to autonomy is not unfounded.

[64] Brief facts of the case: Performance bond in favour of beneficiary was procured to the amount of contract price + 10% as agreed. Price of the contract later went down but the performance bond value remained at the previous higher price. Beneficiary tried to call on the bond after dispute with applicant.
[65] *GHL Pte Ltd v. Unitract Building Construction Pte Ltd* [1999] 4 SLR 604 at para. 16 and 22
[66] In *Samwoh Asphalt Premix PTE Ltd v. Sum Cheong Piling PTE Ltd* [2002] BLR 459
[67] *Ibid* at para. 11 per Judge Advocate Thean

C. Conclusion and Proposal

This Chapter has argued that the purpose of Article 34 can only logically be interpreted to mean that the circumstances for which the bank denies liability and responsibility are circumstances for which its ability to deny claims is rested on information obtained from outside the documents. If so, it must mean that Article 34 provides for the exceptions to autonomy. These follow exceptions discussed in national law (i.e. fraud, illegality, nullity and unconscionability) albeit being broader in scope. The point is, that the UCP is like a statute. It provides the basic right from which the courts can derive the basis of making interpretations. Instead of searching on a case by case basis for the exceptions, accepting the UCP direction will provide a main legislative framework from which the courts can extend, clarify and amplify the requirements. I do not submit that the UCP is the be all and end all; simply that it is a good starting point and most importantly, will result in a unified and coherent approach to all letters of credit no matter the jurisdiction. My proposal is therefore:

That Article 34 is recognised as listing the exceptions to autonomy.

CHAPTER 9

Conclusion

A. The importance of investigating the UCP

The UCP are one of the best contenders when it comes to ‘soft regulation’. They are used almost universally by all letter of credit operations and the preparation and co-operation that takes place before a revision is published is tremendous. They are perhaps one of the few cases in the UK where a sector of the banking, trading and insurance industries have been left to ‘regulate’ themselves. However, I suggest that they form the backbone of any letter of credit law, and indeed many countries such as the US and Russia have both modified articles in their Civil Codes to coincide with the new revision of the UCP. US letter of credit law is encompassed in Article 5 of the Uniform Commercial Code and follows the UCP closely and the Russian Federation has modified Articles 867 – 873 of the Civil Code specifically to include either provisions of the UCP that were absent before, or modify provisions that have changed. Clearly therefore, both saw the importance of the regulation and decided it must be part of their national law.

In Chapter 1 we discussed that one of the objectives of the UCP is to provide a set of standard and uniform rules for all countries, instead of a particular national law prevailing. The examples of the US and Russia show that this objective has been met, and has probably surpassed expectations. It is for this reason that when I analyse the Articles in the paper, it is firstly through the ICC publications, and then, when necessary, through UK common law. Of course, when there is a true dispute between the two, common law will prevail but we must not forget that the UCP are in essence specialised terms of the contract expressly agreed to by the parties. Such terms will take precedence of other standard terms. Moreover, they reflect the position in the current banking community. Such customs and practices must be taken account of as that is the way operations under letters of credit take place. They are even more important when one considers that emerging markets without much experience in the letter of credit arena must follow the processes in other countries in order to facilitate international trade. Trade (in the aspect we consider it here) is by its nature international and can only operate therefore if all the international parties follow the same rules. Hence, the importance of 1) the UCP in the credit arena and 2) understanding the UCP rules.

B. Have we met our objectives?

Now that we have agreed that the UCP are essential, the question is are they adequate? My general conclusion is that they are. They cover all the necessary elements of considering whether the tender of documents between seller and buyer are compliant and they are a much clearer version of previous editions both in their language and in their form. Have we met our objective? Yes I suggest we have. Our question was, when considering the example of an international sale of goods sent by sea, are the rules adequate to determine whether the presentation is compliant or not? We have answered this throughout the thesis by 1) describing the current rules 2) analysing the current rules and 3) in so doing suggesting proposals for areas that are not clear. Through the analysis we have argued that certain provisions may fall short of the intended purpose, either by mistakes and ambiguous drafting or by complete omissions of vital legal rules. We have not stopped there however. Where we have found such provisions, we have provided replacement provisions as proposals for the redrafting of the UCP. They are, I submit, essential because the mistakes and omissions may not only lead to the opposite result of that intended by the ICC (i.e. rejecting the presentation instead of accepting and vice versa) but may also cause considerable conflict with national law and practice. I therefore submit that the following proposals are taken into consideration for interpretation or modification of the UCP:

Proposal 1:[1] *"Place of Expiry" must be removed from the SWIFT form.*
Proposal 2:[2] *If "Place of Expiry" is not removed from SWIFT, then the ISBP should include a provision stating the practice of banks is to ignore the requirement.*
Proposal 3:[3] Article 17 (b): Documents covered by sub-article 17 (b) (with original signatures etc) *are accepted as originals unless they contain express statements that they are not original.*
Proposal 4:[4] Article 17 (c): Documents covered by sub-article 17 (c) (hand written documents etc. or documents on the issuer's original stationary) *are accepted as originals unless they contain express statements that they are not original.*

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[2] Page 20
[3] Page 26

Proposal 5:[5] Sub-article 14 (a) should read 'A…bank…must examine a presentation to determine, on the basis of the documents alone, whether or not they appear to constitute a complying presentation'. *The phrase "on their face" is eliminated*, thus eliminating the possible confusion without losing the autonomy of the credit.

This is perhaps one of the easiest amendments to make as it only takes a deletion. It would serve to remove the confusion of examining documents on their face as I am sure Articles 4, 5 and 14(a) as amended are enough for the bank to realise that it does not look into the detail of the documents or the underlying sale contract.

Proposal 6:[6] ISBP: If the ICC decides the phrase "on the face" is a necessary determination used by banks, *then it should provide its meaning and intention in the ISBP.*

Proposal 7:[7] ISBP: *Banks are to make a due diligent assessment of the presentation to determine its compliance.*

Proposal 8:[8] ISBP paragraph 25 should read 'A misspelling or typing error that does not affect the meaning of the word or the sentence in which it occurs, *determined objectively*, does not make a document discrepant'.

Proposal 9:[9] Linkage: '*Each document presented must refer either to a) the specific letter of credit b) the specific transport document or c) the specific goods.'*

Proposal 10:[10] Combined Documents: '*Documents must be presented separately, with the exception of weight and packing lists, and certifications and declarations'.*

Proposal 11:[11] ISBP: '*Where a bank has completed its assessment of the presentation and concluded whether or not it is compliant before the end of the fifth banking day, it must act on its assessment expeditiously'.*

This is an important amendment as it serves to make sure that banks act quickly or they will be in breach of their contract. That does not mean to say that they cannot

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[5] Page 30
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[8] Page 35
[9] Page 51
[10] Page 53
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examine the documents carefully; they can. It is simply that once it has decided, it should inform the parties so that the letter of credit process and be completed. It is only fair to give a legitimate beneficiary the chance of re-presenting if it is possible.

Proposal 12:[12] Article 20

‘a. A bill of lading, however named, must appear to:

i. *identify the name of the carrier as "carrier"* and by signed by:…’

Proposal 13:[13] Article 20

‘a. A bill of lading, however named, must appear to:

ii. *unambiguously identify* shipment from the port of loading to the port of discharge…’

Both proposals 12 and 13 and are a swift enough change to make it clear to the parties that "indication" of the carrier or "indication" of the port is not enough. Clear identification is required and if so, why not simply state it? That way the Commission would have avoided publishing recommendations papers to reassure banks of the practice they should follow.

Proposal 14:[14]

Article 20: ‘*Bills of lading indicating that they need not be presented to the carrier in order for the applicant to take delivery are acceptable’*

Or:

‘*Bills of lading indicating that they need not be presented to the carrier in order for the applicant to take delivery are not acceptable’.*

Proposal 15:[15]

The transhipment sub-articles should be removed from Article 20

Proposal 16:[16] ISBP paragraph 13:

‘Drafts, transport documents and insurance documents must be dated even if a credit does not expressly so require. *With the exception of documents examined under*

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[13] Page 75
[14] Page 81
[15] Page 84
[16] Page 86

Article 23, transport documents need not indicate an issuance date if they contain a dated on board notation'.

Proposal 17:[17]Article 27

'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'*.

This is perhaps a subtle amendment but one that will with little effort recognise national law and make sure that the beneficiary is not the one who suffers from damage caused to the cargo after he has lost control of the goods and risk has passed.

Proposal 18:[18] The ISBP must be amended to contain corresponding paragraphs covering the entire Article. In particular, it should give guidance as to what is considered a seaway bill in the market. For example:

"*A seaway bill is a document covering port – port shipment to a named consignee. If it states it must be presented for the applicant to take delivery, it is not a seaway bill"*.

This amendment would go some way in helping document checkers decide whether the document in front of them is a seaway-bill or a bill of lading. The fact that Articles 20 and 21 are almost identical causes enough confusion. The ICC could at the very least give some guidance on what they consider a seaway-bill would look like and what a bill of lading would look like.

Proposal 19:[19] ***Opinion R 647 should be overruled and clarified to state that mere reference to a charter party will not constitute an indication that a bill is subject to a charter party. 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

[17] Page 89
[18] Page 113
[19] Page 121

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

Proposal 20:[20] Article 19 (a) (ii) should include:

"Where the transport document indicates sea carriage as the first mode of transport, then it must contain a dated on board notation indicating that the goods have been shipped on board a named vessel at the port of loading."

Proposal 21:[21] Article 22 (a) (i) should read:

"A [charter-party] bill of lading…must appear to be signed by:

- *the master or a named agent for or on behalf of the master, or*
- *the owner or a named agent for or on behalf of the owner."*

The rest of the Article should thus also me amended to remove the references to charterer.

Proposal 22:[22] Article 28 (d) should be redrafted to:

"An insurance policy is acceptable in lieu of a…certificate…or a declaration *but not vice versa*".

This is again a subtle amendment that would make a vast difference. Short and clear, it would take the ICC no effort to amend and serve the purpose intended. Clearly, a bank would not be happy with just a certificate so why not make it clear?

Proposal 23:[23] Article 28 (a)

'Any signature by the insurance company, underwriter, agent or proxy must be identified as that of the insurance company, underwriter, agent or proxy.'

Proposal 24:[24] Article 28 (a)

'Any signature by an underwriter must indicate whether the underwriter has signed for on behalf of the insurance company or the underwriter itself'.

Proposal 25:[25] Commission Opinion in connection to Article 28 (b):

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[21] Page 149
[22] Page 155
[23] Page 158
[24] Page 159
[25] Page 161

Where the credit expressly calls for one original insurance document, only one need be presented.

Proposal 26:[26]

Clarifications of the term "Partial cover" in ISBP paragraph 174

Proposal 27:[27] Article 28 (h)

"When a credit requires insurance against "all risks" and an insurance document is presented containing any "all risks" notation or clause…[it] will be accepted without regard to any risks stated to be excluded, *unless those excluded risks render the document as not "all risks" according to international standard banking practice*".

Proposal 28:[28] Article 18 (b)

'A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may accept a commercial invoice issued for an amount in excess of the amount permitted by the credit, and its decision will be binding on all parties, provided the bank in question *does not honour or negotiate* for an amount in excess of that permitted by the credit'.

Proposal 29:[29] ISBP paragraph 66 (Insert):

'Where a credit indicates a tolerance to the total number of goods, the same tolerance is permitted to any individual categories that make up the total.

Proposal 30:[30] Article 16(f) should be amended to read:

'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*'.

Proposal 31:[31] Article 16 (b) must be amended to read:

'When an issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies. This does not, however, extend the period mentioned in sub-article 14 (b) *or relieve the bank of its obligations under sub-articles 16 (c) and 16 (d).*'

Proposal 32:[32] Amendment to Article 16(e) to read:

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[27] Page 165
[28] Page 172
[29] Page 175
[30] Page 193
[31] Page 195
[32] Page 200

“A nominated…confirming…or issuing bank may, after providing notice required by sub-article 16(c)(iii) (a) or (b), return the documents to the presenter at any time *if it has not received instructions from the presenter*”.

The dangers of this article without the amendment have been outlined in Chapter 7 but, I submit, that Proposal 32 is one of the most important in the thesis. Along with Proposal 33 below, they place an express obligation on the bank to return documents where the presenter has instructed it to do so, or has given notice that it will do so, immediately. It is not fair that they may hold them for extended periods, nor is it enough that UK case-law requires return immediately. It is better advised to put the obligation into the contract and in this thesis, that means amending the UCP.

Proposal 33:[33] Additional provision to Article 16:

‘*Where the bank gives notice that it will return documents or receives instructions from the presenter to return documents under sub-articles 16(c)(iii)(a) and (c) it must return those documents without delay*’.

Proposal 34:[34] Article 34 (Interpretation)

Article 34 should be interpreted to provide for the exceptions to the principle of autonomy and be recognised at the legislative backdrop to fraud, illegality, nullity and unconscionability.

Proposal 34 is perhaps the most ground-breaking of all the proposals. It is submitted that the vast majority of academics and professionals have thus far overlooked both its significance and its contents. If nothing else, its purpose should at least be recognised and once that is done, it will be easier to acknowledge that it provides a platform and uniform, comprehensive list of exceptions to autonomy. In any case, Article 34 gives the bank a method of excluding liability and what better point to argue in court than having an express clause saying you will not be liable, rather than looking for common law exceptions that at the moment in the UK do not exist.

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[34] Page 227

C. Further Investigation

There are of course areas outstanding and these have been mentioned throughout the thesis. Clearly, the future of the UCP will be in electronic transactions but that seems quite a few years away. Once we have mastered hard copy documents, perhaps then will be the time to discuss the eUCP. At the moment, the ICC is preparing a new version of the International Standard Banking Practice, which will no doubt bring its own questions as well as, hopefully, it own clarifications. The next piece of research that would complement this thesis would therefore be when the new ISBP is released.

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