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Document Examination and Rejection Under UCP 600

by

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Thesis for the degree of Doctor of Philosophy

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ABSTRACT

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Letters of credit, which are a well-recognised payment instrument, have bridged international trade between different countries. The UCP, which is often regarded as "soft regulation" has provided a solid backing for the operation of documentary credits and nowadays the latest revision, UCP600 is universally incorporated into nearly all letters of credit. This thesis focuses on two vital but controversial parts in a documentary credit operation, i.e. document examination and rejection under UCP600.

The central research question addressed by this thesis is: Has the UCP600 provided a sufficient framework for banks to fulfil their obligations concerning document examination and rejection under documentary credits? This question can be divided into three separate issues. Firstly, what requirements should a bank fulfil during document examination and rejection as judged by the law of documentary credits and market expectations? Secondly, what requirements have been expressly or implicitly set out in the UCP600 regime? Finally, has the current UCP system provided a proper and sufficient framework to the addressed areas? If not, what should and can be done next?

In order to answer the above questions, this thesis draws upon other ICC sources, such as the ISBP, the ICC Opinions and DOCDEX decisions, which are frequently missed in other academic works. The novelty of this thesis lies in a below-the-surface analysis of the controversial areas of UCP600 by using the experience gained from recent case law before suggesting ways to move forward. The merits of this thesis are not limited to observing the current loopholes in the UCP system, but also in endeavouring to solve current problems by providing feasible suggestions for improvement for the next UCP revision.

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DECLARATION OF AUTHORSHIP

I, JINGBO ZHANG

declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

DOCUMENT EXAMINATION AND REJECTION UNDER UCP 600

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. Parts of this work have been published as:

   Jingbo Zhang, 'Banks' Post-notice Obligations in the Documentary Credits under UCP600' (2013) 6(2) International Journal of Private Law 193-205

Signed: .....

Date: .....

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Chapter 1 General Introduction

1.1 Research background

Letters of Credit, also named documentary credits, are described as the "life-blood of international commerce"[1]. As one of the most popular financial instruments, they have played a crucial role in the international payment mechanism for overseas transactions. A documentary credit stands for an unconditional payment promise made by an issuing bank to the beneficiary (normally the seller) according to the buyer's instructions. As long as the beneficiary presents the satisfactory documents specified by a documentary credit, the bank will be obliged to provide an appointed payment without hesitation.[2] As a durable payment tool, documentary credits have survived for nearly one hundred years. With its self-contained system and particular principles, it is predicted that the system will continue to operate smoothly and persistently in future international transactions.[3] Meanwhile, as a brilliant financial instrument, letters of credit have been universally recognised by the world and widely applied to overseas trading transactions.

With a gradually increasing market share, the International Chamber of Commerce (ICC) has spared no effort to summarise and unify international practices and usages in relation to documentary credits transactions since 1920.[4] The most recent public version, Uniform Customs and Practice for Documentary Credits No.600 (UCP600)[5], has reached a new height compared with those previous versions. Although UCP600 is not a mandatory regulation, it has been chosen by parties to apply to most international

[1] *Harbottle (RD) (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB146 (QB) 155 (Kerr J)
[2] In essence, documentary credits not only provide security for each party by requiring specific documents, but also facilitate trade financing by means of negotiation and transfer. However, this thesis aims to deal with its traditional role as a security of payment, rather than its second role of trade financing. Details of trade financing can be found in Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) ch 7 and ch 10
[3] The -self-contained system of documentary credits and its particular principles will be analysed in Chapter 2 of this thesis.
[4] Dan Taylor, 'How the UCP Has Evolved Since the 1920s' (2008) 14(2) DCInsight 8, 8
[5] ICC, *Uniform Customs and Practice for Documentary Credits* (ICC Publication No.600, ICC 2007)

transactions relating to letters of credit.[6] In addition, some of the largest trading countries in the world, such as the U.S. and China, have established their own regulations on the basis of UCP.[7] It is obvious that the development of documentary credits system is a common goal of all over the world.

1.1.1 The economic basis

Since the documentary credit is a kind of financial product in nature, it is necessary to review the economic base, which fundamentally affect its fate and future developments. From an economic perspective, there are several reasons that illustrate why documentary credits are in a dominant position in the international payment system and why it is possible for documentary credits to accomplish the goal of economic globalisation. Firstly, the banking credit rather than the business credit has been involved into the documentary credits system. As illustrated in the background, the essence of a documentary credit is a promise made by the bank to pay against the specified documents. Hence, the issuing bank involved into a documentary credit bears the primary, independent and irrevocable obligation to pay the beneficiary.[8] In other words, the issuing bank participating into a documentary credit actually uses its own credit to act as an independent third party to guarantee the payment. The risk is largely decreased compared to business credit in a long-distance trade. Secondly, a documentary credit is deemed to be a self-contained document which clearly lists all the requirements. Only if the beneficiary satisfies the conditions specified in the documentary credit, is he entitled to get payment as negotiated. Thirdly, transactions in relation to documentary credits are purely documentary, so that the banks will ignore the underlying facts, basic contracts and other incidental events, even if the actual cargo has been lost or damaged. As a result, the beneficiary (normally the seller) will

[6] UCP600, Article 1 states: '…UCP are rules that apply to any documentary credit when the text of the credit expressly indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded by the credit.'

[7] The US Uniform Commercial Code (UCC) Revised Article 5 in 1995 dealt with rights and obligations under documentary credits. China also promulgated 'Rules of the Supreme People's Court on Hearing Letter of Credit Dispute Cases' in 2006.

[8] It may have the revocable documentary credits in practice. However, the UCP600 only regulates the irrevocable type of documentary credits in that it accords with the needs of international transactions. See UCP600 Article 2.

be in a safe position to get payment and the applicant (normally the buyer) will be in a legal position to effectively control the goods. It is obvious that the use of documentary credits can easily achieve a double-win situation in economics.

By contrast, letters of credit also have several disadvantages compared with other payment instruments, such as bills of exchange, collection and international factoring. Firstly, due to the intervention of bank credit, the banking commission charged upon the buyer for opening a letter of credit is significantly higher than for other payment instruments. Secondly, the buyer cannot physically control and check the goods *via* documentary credits. The presented documents symbolise the actual goods, and moreover the rights to accept them will be transferred to the banks. In addition, the banks would not care about disputes between parties arising from the underlying contract, and meanwhile the buyer cannot use them as a defence to the banks. Thirdly, in order to protect its security, the bank will not simply honour a letter of credit until the presented documents constitute a strict complying presentation. If the bank refuses to pay against the documents, the seller will be in a dilemma because he might be in a position of losing the physical control of the goods after shipment. Meanwhile, the seller might be faced with the situation of breaching the sale contract by providing discrepant documents.

Moreover, the recent global economic crisis has brought a huge strike to the documentary credits system. Since a mass of trading companies have met with operational difficulties, the bank has to examine the documents more carefully to guarantee its security of transactions. That inevitably results in a higher rejection rate of presentations, and leads to further business dilemmas. The trading companies, which are nervous by the high rejection rate and massive bank failures in the crisis, gradually turn to the other financial instruments. Therefore, in order to cope with the above difficulties and promote the development of a documentary credits mechanism, it is in a great necessity to increase traders' confidence in the system. With the emergence of other payment instruments, the only way forward for documentary credits is to

strengthen its own system so as to guarantee its healthy operation.

1.1.2 Regulatory superstructure[9]

As the superstructure, the law is able to regulate and direct economic actions. The UCP, which has been incorporated into ninety per cent of documentary credits and granted the contractual force to regulate the credits, could offer enormous help for strengthening the economic system. The core idea is to establish a set of stipulations which can effectively direct the bank's conducts and provide a clear picture to the users. As the Drafting Group stated before publishing of the UCP600, the purpose of reform is to reduce rejections and make payments more smoothly.[10] Apparently, the current UCP system desires to express the above idea and endeavours to consolidate the status of documentary credits as one of the most common payment instruments in international transactions. Nevertheless, there are always some distances between ideals and reality. Although the current UCP system has achieved a vast improvement compared with its previous editions, there are still several vague, problematic and blank areas left. Hence, the existing provisions cannot sufficiently demonstrate that they have exactly reflected the best business expectations and practical market needs. Reform is still urgently demanded so as to get rid of these conservative remains and make the UCP system fit for dynamic developments, with the ultimate purpose of keeping the system of documentary credits running effectively and stably.

Currently, various aspects of the UCP provisions continue to call for discussion and also give rise to litigation, generally including the nature and undertaking concerning each type of bank, the procedures and bank's obligations faced with a documentary presentation, as well as disclaimer rules and exceptions of autonomy etc. Although a number of issues in the current UCP system require resolution , this thesis cannot seek

[9] Although the UCP is only constituted by a set of international banking practice and customs, it will have the force of law to a documentary credit after clear incorporation by the parties, and it has also been given a great weight in terms of documentary credit operations.

[10] Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 1

to cover the entire field, and thus, the author will particularly choose to deal with the most crucial and outstanding controversies in the documentary credits, i.e. provisions revolving around documentary presentation, including document examination and rejection. The reason lies in that these two procedures, as hubs of the operation, will fundamentally decide the money flows so as to affect the fate of each party involved into documentary credits. Regrettably, after continuous reforms, the requirements and bank's obligations relating to these two procedures set in the UCP600 are still far from clear and give rise to a high degree of uncertainty. More importantly, to date, neither academic literature nor past ICC works have been able to set aside or clarify this in a definitive manner. Needless to say, interpretation and clarification for these areas is of the utmost importance as money turns on this, and so breach of such requirements will inevitably cause serious financial implications.

1.2 Aims and contributions

This thesis will be devoted to clarifying the requirements on document examination and rejection in documentary credits, and afterwards putting forward feasible suggestions in light of the current UCP600 regime for the next revision. The general objective of this thesis is to establish a more user-friendly UCP regime than the current UCP600 in terms of document examination and rejection for documentary credits.

The questions regarding document conformity and the standards for constituting a valid rejection have been proved to be by far the most fertile source of litigation in connection with documentary credit transactions. Questions relating to the documents also arise in connection with the bank's duty to the traders, and bank's security to get reimbursement. Different from most academic work, this thesis puts the UCP600 into the system built by the ICC and interprets the UCP600 with the assistance of the ICC publications, including the latest International Standard Banking Practice (ISBP) released in 2013.[11] By virtue of systematically expositing the current UCP regime, the

[11] As will be demonstrated in Part 2.3, the UCP system is consisted of the UCP itself, the ISBP rules, the ICC Banking Commission recommendation papers, the ICC Banking Commission Opinions and the

thesis seeks to clarify the requirements for documents presented under a documentary credit transaction. Moreover, this thesis aims to perceive ambiguous statements in the UCP600 system which are inconsistent with the goal of certainty, and detect the historical residuals left in the current UCP regime which would deter the smooth operation of documentary credits.

Through describing the current rules and examining their practical performance, loopholes and uncertainties in the current regime can be observed. Nevertheless, the original merits of the thesis are not only limited in finding the problems, but also in endeavouring to solve the problems through providing feasible suggestions. Some of the suggestions remain minor, which only refer to wording clarifications or interpretations, while the others may involve fundamental changes for the ICC to consider in the future reform. All in all, this thesis will contribute to proposing a clear and certain regulatory framework for what is currently an ambiguous area of law, so as to increase business efficiency and transaction security. The analysis in this thesis will not only be of benefit for traders by drawing a clear picture of what they should do and how to use their rights in the process of document transactions, but also tentatively offer banks a handy guidance in terms of fulfilling their obligations under document examination and rejection.

More importantly, the thesis will attempt to go beyond the appearance of problematic issues and identify the reasoning behind the scene. The UCP, as a compromising product between the civil law system and the common law system, shares the feature of codified terms and needs to be regularly reviewed for updates. Experience from the case law, which reflects dynamic legal practice and market expectations, can be effectively borrowed for revising the current UCP system. The novelty of this thesis is to step back from the exterior problems and to explore the underlying barriers. Therefore, the thesis intends to abstract the practical problems into a set of theoretical suggestions to complete the main part of the UCP as well as contribute to encouraging

DOCDEX expert decisions. Among them, the latest ISBP No.745 was published in 2013.

documentary credits transactions as a long-term sight financial instrument. The ultimate purpose of this thesis is to establish a more user-friendly and transparent UCP regime for documentary credit transactions.

1.3 Main issues and methodology

Reviewing and revising all the UCP600 rules is a tremendous task and unrealistic to achieve within one thesis. As a well-recognised means of settlement, it is clear that the most important role for documentary credits is to provide payment assurance for international commercial sales. Document examination and rejection, as two vital but controversial parts in a documentary credit operation, not only directly influence cash flow but also closely link with bank's obligations under the credit. Hence, this thesis particularly concentrates on the issues of document examination and rejection under documentary credits, and further examines whether the provisions of UCP600 regarding these two parts are satisfactory and sufficient.

The central research question addressed by this thesis is: Has the UCP600 provided a sufficient framework for banks to fulfil their obligations concerning document examination and refusal under documentary credits? More specifically, the question should be resolved into three pieces. Firstly, what requirements should a bank fulfil during document examination and rejection judging by the law of documentary credits and market expectations? Secondly, what requirements have been expressly or implicitly set out in the UCP600 regime? Thirdly, has the current UCP system provided a proper and sufficient framework to the addressed areas? If not, what should and can be done next?

In order to solve the above questions, this thesis adopts various research methodologies. The traditional "black letter law"[12] method is primarily used for describing the requirements of document examination and rejection, as well as for clarifying

[12] Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 29

ambiguities within the UCP provisions. The doctrinal research method present in the thesis aims not only to collate the UCP600 rules, but also to provide commentary on the emergence of the authoritative sources in which such rules are considered, in particular, the latest ISBP revision and the recent case law.[13] Different scholastic arguments and the ICC opinions are also involved in the process of interpreting an "open texture" of the UCP600.[14]

However, the doctrinal research method in this thesis is not an isolated category of scholarship and the analysis will be assisted by a number of techniques.[15] Deductive reasoning is used for explaining the abstract rules and envisaging the challenges stumbled upon in real practice. Meanwhile, inductive reasoning is of particular assistance when a specific factual situation does not appear to be addressed directly by the UCP framework. The rationale extracting from the case law and the recent ICC Banking Commission Opinions would become necessary to fill the left gap.

The comparative analysis approach is also applied in this thesis. Firstly, the thesis endeavours to review the performance of the UCP under the background of English law. Experience from case law, particularly English case law, is borrowed to compare with the existing UCP framework. Secondly, in order to evaluate the underlying purpose of the draftsmen and review the status of the current provisions, changes between the UCP600 and its predecessors are frequently compared. A striking example for the application of this method can be found in analysis of the time for document examination and determination.

As an uncertain or ambiguous provision can often be more easily interpreted when

[13] It should be noted that "doctrinal research" is not well-defined. In this thesis, the author adopts a two-part process doctrinal method stated in Nigel Duncan and Terry Hutchinson, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) Deakin L Rev 83, 110, which involves locating the sources of the law and then analysing the text.

[14] "Open texture" means that the legal rules expressed in general terms are capable of being interpreted in more than one sense. See Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 32

[15] Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 31-34

viewed in its proper historical or social context, the investigation in this thesis also considers the understanding of the trading and shipping industry in addition to the banking community. The study is not limited into the internal enquiry as to the literal meaning of the UCP provisions, but extended to evaluate them within the commercial and shipping context.[16] Following the socio-legal research, the thesis aims to analyse how a specific UCP provision can impact on the parties involved and puts forward a future change with the purpose of achieving business efficiency and transaction security.

1.4 Structure and connections

This thesis consists of seven chapters to analyse document examination and rejection in documentary credits under UCP600. Chapter 1 (this chapter) provides a general background of documentary credits and the UCP framework. It gives a brief introduction as to why the subject of the thesis has been chosen, what the objectives of the research are, which methodology has been used and how the structure of the thesis has been organised.

Chapter 2 constitutes an academic introduction in respect of documentary credits and the UCP600. As the contractual relationship and fundamental principles in a documentary credit operation will significantly affect the bank's position in the process of document examination and rejection, it is necessary to briefly review the basics before jumping to the practical applications in the main issue dealt with by this thesis. Moreover, it is of great necessity to firstly illustrate the sources used for interpretation of UCP600 and reveal the relationship between the UCP and English common law, before discussing reform of the current UCP system.

Chapter 3, 4 and 5 of this thesis aims to answer the first part of the research question:

[16] The method of placing the law into a proper social and economic context is also regarded as an interdisciplinary exercise. See Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 30; Brian Cheffins, 'Using Theory to Study Law: A Company Law Perspective' (1999) 58(1) CJL 197, 198-201; Richard Posner, 'Legal Scholarship Today' (2001-2002) 115 Harv L Rev 1314, 1317

On what standards should a bank examine the presented documents so as to make a right decision? Chapter 3 will starts from the overall requirements for document examination under letters of credit and analysing what should be regarded as a complying presentation under UCP600 Article 14. Historical elements, such as doctrine of strict compliance and requirement of reasonable care will be reviewed in this chapter. In addition, the time requirement for document examination under a letter of credit stipulated in the UCP600 Article 14 (b) will be addressed at the end of the chapter.

On the basis of different treatments provided by the UCP, the thesis has divided the presented documents into two categories, namely, generic documents mainly regulated by UCP600 Article 14 and special documents specifically listed in other provisions. Chapter 4 concentrates on how to examine a generic document. Requirements concerning “no conflict” and “fulfilment of function” will be analysed in this chapter. Moreover, the occurrence of mismatch in the number of presented documents, particularly with the situation of non-documentary conditions, will be addressed in details in this chapter.

Chapter 5 deals with the requirements of examining special documents categorised by the UCP600.The discussion is limited to transport documents which are wholly or partly involving sea carriage under the UCP600 Articles 19 to 22. The chapter will begin by discussing bill of lading requirements, and then comparing the other variant documents with the traditional bill of lading. Since the transport documents are highly relevant with the bank’s security under documentary credits in obtaining the right of control and disposal, this chapter will also scrutinise the security provided by the UCP requirements and the documents themselves.

After building a proper framework to examine the presented documents, the attention is turned to the next step after examination, i.e. how to deal with the discrepant documents and how to make a valid rejection under documentary credits? Chapter 6

examines the requirements of document rejection under UCP600 and further investigates whether the UCP600 has provided a sufficient illustration for this area. Each requirement listed in the UCP600 Article 16 regarding to document rejection will be scrutinised in this chapter. Moreover, recent decisions in the English court will be considered together with the UCP provisions.

Chapter 7 summarises the whole thesis. It will firstly provide an overview to the entire work and a subsequent summary of each chapter. In the meantime, the suggestions scattered in each chapter will be collected and author's view of the way forward for UCP is described. At the end of this thesis, brief concluding remarks concerning document examination and rejection in the current state and the need for future reform are provided.

Chapter 2 Documentary Credits and UCP600

2.1 Introduction

In international commercial sales, the seller may be unwilling to despatch goods overseas unless he is assured of payment, preferably in his own country, by a "reliable and solvent paymaster". It is also important that the payment obligation does not depend on the wishes or the solvency of the buyer, or is interrupted by any disputes under the sale contract. On the other hand, the buyer wants to hold a certain level of security regarding the documents and the goods before releasing the money. Ideally, the buyer would also like to be able to pledge or re-sell the goods first and use the proceeds to reimburse the seller, rather than provide direct cash settlement. The use of a documentary credit as a means of providing payment can reconcile the paradoxical interests between the seller and the buyer. In essence, a documentary credit represents a promise of payment by a bank against specified documents on terms that the bank will be reimbursed by the buyer.

The intervention of the bank as the third party thus resolves many of the worries experienced by sellers losing control of the goods before being paid, while at the same time financing the transaction and resolving buyers' cash flow difficulties. Clearly, a letter of credit can not only provide transaction security, but also facilitate financing of the sale. Banks, acting as payment and reimbursement channels, can offer mutual benefits to both parties.[17] The bank thus takes over the risk of the buyer's insolvency and failure of payment, but as we will see in Chapter 6 of this thesis, the risks to the bank can be to some degree reduced by the shipping documents which are retained by the bank as security for its reimbursement.[18]

[17] One consequence of this mutuality is that it is not generally open to either party unilaterally to withdraw from the credit, which is a feature we will not specifically discuss in this thesis. Further discussion of this topic can been found in Paul Todd, *Bills of Lading and Bankers Documentary Credits* (4th edn, Informa Publishing 2007) para 4.46

[18] Sometimes, the bank may release the presented documents to its customer (the buyer) and rely on

The object of this chapter is to describe documentary credits, their functions and how they are operated in the real world.[19] The author first outlines the generation of a documentary credit, and reviews the contractual relationship regarding a documentary credit transaction. The chapter then introduces the Uniform Customs and Practice for Documentary Credits (referred to in this thesis as the "UCP") and other sources that may govern the documentary credit transactions. Moreover, as a preface for the following discussion in this thesis, the author briefly reveals the interactions between English common law and the UCP regime, as well as how to construe the UCP in the English courts. Last but not least, in combination with the UCP provisions, the chapter analyses two fundamental principles in the operation of documentary credits, i.e. principle of autonomy and principle of irrevocability. These two cardinal principles have laid the foundation for the banks' obligations in the documentary credits and they are also closely linked with the subsequent discussions in this thesis.

2.2 Documentary credits in outline

'The basic idea of a documentary credit can be stated simply: a bank commits itself to a financial undertaking that it will fulfil against presentation of stipulated documents.'[20] In the following several paragraphs, the author will outline the typical lifecycle of a documentary credit and reveal the relationship between different parties involved in a documentary credit transaction.

Firstly, the underlying basis of any documentary credit is the sale contract, in which it is agreed that payment will be made through a documentary credit. The buyer is

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alternative financial arrangement to secure its right of reimbursement, such as using a trust receipt, which is not the content we are going to deal with in this thesis. Regarding arrangement of trust receipt, see Richard King, *Guttidge & Megrah's Law of Bankers' Commercial Credit* (8th edn, Europa Publications 2001) para 8.20; Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 11.11; Paul Todd, *Bills of Lading and Bankers Documentary Credits* (4th edn, Informa Publishing 2007) para 6.39

[19] The terms "documentary credit" and "letter of credit" are both in current use and no distinction need be made between them.

[20] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-004

therefore obliged as the "applicant", to procure the opening of a credit in the seller's favour pursuant to the terms of the sale contract. The bank which agrees to open a letter of credit according to the buyer's request is referred to as the "issuing bank" and the application form will constitute the basis of the contract between the buyer and the bank.[21]

As demonstrated in Figure 1 below, once the letter of credit is opened, the bank may directly notify the seller who is as the "beneficiary" under the credit and advise him of the terms of the credit. In the meantime, the issuing bank undertakes a primary obligation to honour the credit when the beneficiary requires. However, in most cases, it will inform a correspondent bank in the seller's country which is involved in the documentary credit transaction. If the role of this correspondent bank is only limited to the transmission of communications between the issuing bank and the beneficiary, it is known as the "advising bank".[22] The beneficiary, however, sometimes may want a bank from its own country to add another financial guarantee and specifically asks for a "confirmed credit".[23] In those circumstances, the issuing bank, acting on its mandate, will require the correspondent bank to act as the "confirming bank", i.e. not only to transmit the information to the beneficiary but also to add its own confirmation. By adding an independent undertaking to the beneficiary, a separate contract is created between the confirming bank the beneficiary, which gives the seller recourse directly against a bank in his own country.

[21] It should be noted that this contract is not part of the credit itself. It is only the mandate that authorises the bank to open the credit.
[22] The credit may also provide for the possibility of presentation to an "advising bank", but it will be under no obligation to the beneficiary under the credit. Such banks are referred as "nominated banks" in the UCP.
[23] An additional commission will be involved for asking the second bank to make an independent guarantee as a confirming bank.

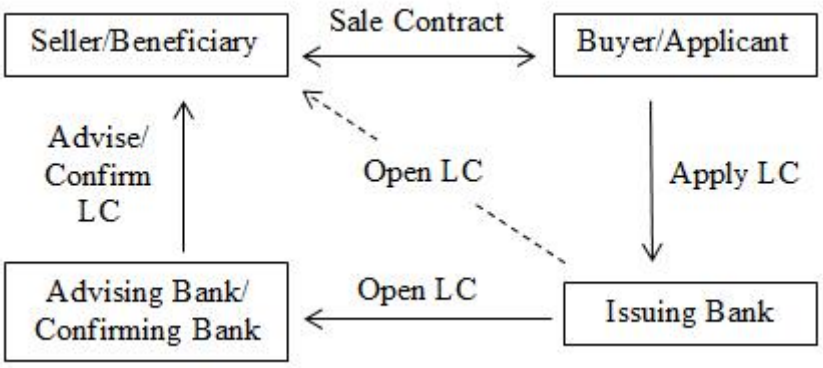

Figure 1

After the seller ships the goods and obtains the required documents, he will present the documents to the bank for payment. As illustrated in Figure 2 below, the issuing bank, which has made an express undertaking directly to the beneficiary, needs to examine the documents and pay for a complying presentation. Under a confirmed credit, the confirming bank will take over the issuing bank's role and make payment for the documents first. The confirming bank will then remit the documents to the issuing bank and claim reimbursement from it. The issuing bank will independently examine the documents again and make its own judgement for accepting the documents or not. Since the confirming bank has undertaken the independent responsibility of paying the seller by itself, its position would not change even if it cannot obtain reimbursement from the issuing bank later. The same rule applies to the issuing bank. Having reimbursed the confirming bank, the issuing bank will then turn to the applicant for reimbursement according to the terms of the application contract; however, its undertaking under a letter of credit will not change even if the applicant refuses to pay for the documents.

Clearly, when the documents are tendered under the letter of credit, the bank to which they are presented is under a duty to examine them so as to decide whether they are compliant or not. However, the major disputes which arise in connection with credits are whether the documents comply with the credit. The subject-matter of this thesis just concerns the last but most essential stage of documentary credit operations, i.e.

realisation of payment, which includes examination of documents and determination of payment or rejection.

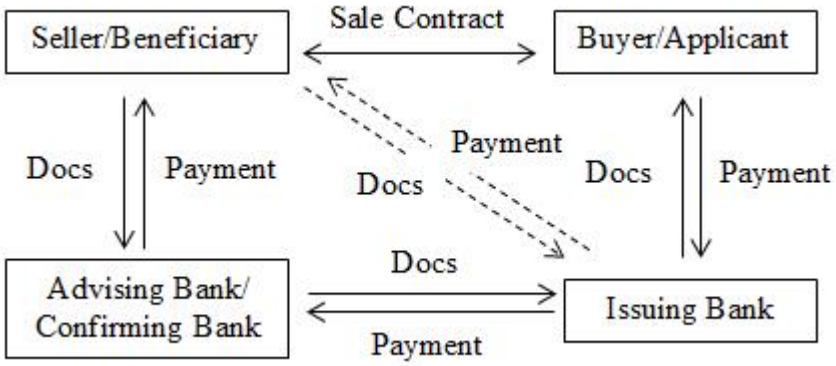

Figure 2

The credit appears to regulate three distinct relationships: between the issuing bank and the beneficiary, between the confirming bank and the beneficiary, and between the issuing bank and the confirming bank. Each of those relationships may be regarded as part of the credit; however, of cardinal commercial and legal importance, these contracts are entirely independent according to their terms and insulated from the underlying sale contract and the application form in which they are originally generated. As we will see in the next section concerning principle of autonomy, payment under letters of credit solely depends on the acceptance of the presented documents rather than the actual performance under the sale contract or the solvency of the buyer. Further, the undertaking under a documentary credit is legally enforceable and contractual in nature.

2.3 A series of contractual relationships

2.3.1 The contracts

The contractual relationships between parties involved in a documentary credit transaction, demonstrated by Figure 3 at the end of this part, have been wonderfully

illustrated in *United City Merchants v Royal Bank of Canada*.[24] As a leading House of Lords authority on the juristic basis of documentary credits, it demonstrated four contractual relationships involved in terms of an irrevocable confirmed credit. It is worth quoting the classic and well-known passage from this judgment in full:[25]

> '*It is trite law that there are four* ***autonomous though interconnected contractual relationships*** *involved: (1) the underlying contract for the sale of goods, to which the only parties are the buyer and the seller; (2) the contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to or to the order of the seller (or to pay, accept or negotiate bills of exchange drawn by the seller) against presentation of stipulated documents; and the buyer agrees to reimburse the issuing bank for payments made under the credit. For such reimbursement the stipulated documents, if they include a document of title such as a bill of lading, constitute a security available to the issuing bank; (3) if payment is to be made through a confirming bank, the contract between the issuing bank and the confirming bank authorising and requiring the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit; (4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents.*'

[24] *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] 1 AC 168 (HL)

[25] *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] 1 AC 168 (HL) 182-183 The case itself actually concerned an action brought by the seller against the confirming bank, i.e. contract (4) relationship.

It is clear from this passage that contracts (3) and (4) arise only where the credit is confirmed. If there is no confirming bank, it will create only three contractual relationships, i.e. the contract of sale, the contract between buyer and issuing bank, and the contract between issuing bank and beneficiary.[26] Nevertheless, it should be noted here that one contractual relationship is missing from the above quotation. Since the confirming bank's undertaking is additional to that of the issuing bank, there must remain a contract (5) between beneficiary and issuing bank, even where the credit is confirmed. The relationship in contract (4) and contract (5) co-exists, giving a beneficiary two banks which he may hold responsible for payment.[27] Normally contract (5) will be of theoretical interest only, but the issuing bank would step in and provide the beneficiary with additional recourse when it is appropriate, for example, in the event of the insolvency of the confirming bank.[28]

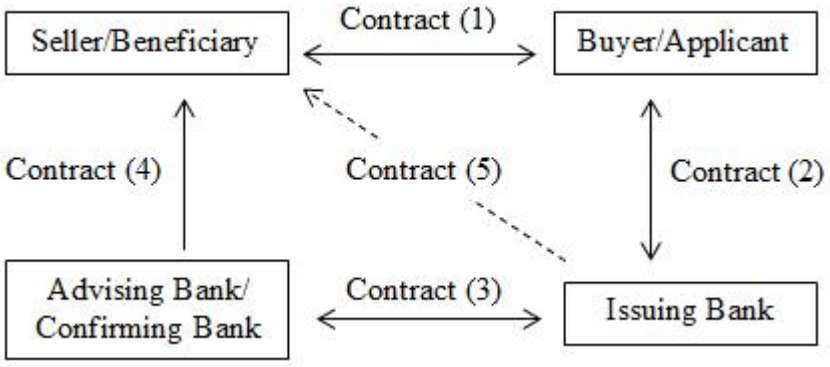

Figure 3

2.3.2 Contracts autonomous but interconnected

According to Lord Diplock, all the contracts above are "autonomous though interconnected".[29] It follows that the obligation of the confirming bank to pay the

[26] If the credit is confirmed, contract (4) is the letter of credit. If the credit is unconfirmed, contract (5) in the following diagram is the letter of credit.
[27] *Bank of Baroda* v *Vysya Bank Ltd* [1994] 2 Lloyd's Rep 87 (QB) 90-93
[28] Paul Todd, *Bills of Lading and Bankers Documentary Credits* (4th edn, Informa Publishing 2007) para 1.55 In this circumstance, the terms in contract (4) and contract (5) must be identical, since they are originated in the same documentary credit.
[29] *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] 1

beneficiary on tender of documents in contract (4), the obligation of the issuing bank to reimburse the confirming bank in contract (3) and the obligation of the applicant to pay the issuing bank in contract (2) should all be autonomous and independent of disputes between the trading parties under contract (1). In principle, it is not even necessary to have the same terms in contract (2), (3) and (4) since the performance of each contract will be judged by its own terms. As we will see later, the principle of autonomy is fundamental to the operation of documentary credits.

In respect to the point of "interconnected", two issues need to be considered. Firstly, it should be noted that there is a connection between the contracts involving the banks and the sale contract, since the former are generated from the terms provided in the underlying sale contract. The buyer who has failed to procure a documentary credit in accordance with the requirements of the sale contract would be in breach of the sale contract.[30] On the other hand, if the seller accepts the credit which contains the different terms from the sale contract, the sale contract is arguably varied by the credit terms or at least the seller would be estopped from claiming payment under the sale contract terms.[31] In either scenario, however, the credit remains autonomous. Consequently, the bank will only pay against tender of the documents required by the documentary credit, irrespective of any different terms in the underlying sale contract.
Secondly, it is sensible to consider contracts (2), (3) and (4) to be interconnected, in that a bank would expect its liability to pay to be tied in with its right to be reimbursed. It would be strange and undesirable from a commercial point of view, if the contractual duty owed by the bank to the seller under the credit was not matched with the contractual liability in the bank-to-bank reimbursement contract or in the application form, so that the bank which has paid the beneficiary could not claim reimbursement from the upstream bank or its customer.[32] As summarised by Megaw LJ in *Bankers*

AC 168 (HL) 182-183
[30] *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 (CA)
[31] *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 (CA)
[32] *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] 1 AC 168 (HL) 184-185

Trust Co. v. State Bank of India,[33]

> '*The metaphor "autonomous" means only that one does not read into any one of the four contracts the terms of any one of the other three contracts. But the "genesis and the aim of the transaction" ... are not to be ignored where they may be relevant to assist in the interpretation of the terms of the contract.*'

In reality, therefore, the obligations of the bank towards the beneficiary should tie in with the obligations of the customer towards the bank. As we will see later in this thesis regarding documentary examination, the mismatch between the requirements under the documentary credit and the mandate received from the applicant will generate a very unpleasant picture for the bank.

2.4 UCP and other sources for documentary credits

2.4.1 UCP600 and its development

In order to encourage a uniformity of banking practice and reduce the differences emerging from national laws in relation to documentary credits, the International Chamber of Commerce (ICC) initiated the first version of UCP in 1933. Revisions have therefore averaged about once a decade, and have usually been in response to changing trade and banking practices.[34] The UCP was revised in 1951, 1962, 1974 (UCP 290), 1983 (UCP 400), 1993 (UCP 500) and most recently in 2006 (UCP 600), as a result of the deliberations of the ICC Banking Commission.[35] The English banking society did not adopt the UCP until the 1962 revision, but since then, the UCP has predominated and nearly all credits issued today are on its terms. It is of no doubt that the UCP, as a private set of rules, has obtained a remarkable achievement in the course

[33] *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA) 456

[34] For example, as we will see in Chapter 6 of this thesis, the UCP has responded to new forms of documentation, particularly for combined transport operations in 1974 revision and sea waybills in UCP500.

[35] UCP 600 did not come into force until July 2007.

of economic globalisation.

Compared with its predecessors, the UCP600 should probably still be regarded as evolutionary, rather than revolutionary, since there are no substantial changes relating to the documentation with respect to previous revisions.[36] Apart from radically removing the application of revocable credits,[37] the UCP600 in part is a tidying up exercise. It consists of only 39 articles, which is less repetitive and more simplified than the UCP500. The newly created UCP600 Article 2 regarding definitions has effectively laid the foundation for the general orientation of UCP600, which also acts to avoid unnecessary repetition in the following main content.[38] UCP600 Article 3 in respect of interpretations reflects a desire for achieving certainty and removing vague meaning. In addition, the UCP600 has reacted to changes in trade practice, and perhaps to developments in case law.[39] Overall, UCP 600 is a conservative and moderate document, since it does not substantially change the rules in relation to examination and rejection of documents. As we will see in the next several chapters of this thesis, there are several disappointing aspects in the UCP which are far from being clear and certain.

2.4.2 Nature and application of UCP

Although the coverage of UCP is growing more comprehensive with each revision, the UCP still falls far short of constituting a complete code. The UCP does not purport to be a code setting out the law governing documentary credits. On the contrary, the ICC had rightly recognised that 'legal issues [as to the jurisdiction of the UCP] cannot be addressed in the rules and the UCP cannot legislate national laws.'[40] Although some

[36] Paul Todd, *Bills of Lading and Bankers Documentary Credits* (4th edn, Informa Publishing 2007) para 1.77
[37] See UCP600 Article 3
[38] This process might have been taken further. As we will see in Chapter 6, there remains considerable inappropriate repetition, for example, in the provisions on transport documents, Article 19-22, which could certainly have been avoided, had those responsible for drafting the new code been so inclined.
[39] For example, decision covering the determination of an original document has been incorporated into the text of UCP600 Article 17. Another example is the negotiation issue dealt with in *Banco Santander SA v Bayfern Ltd* [2000] 1 All ER (Comm) 776 (CA)
[40] Charles del Busto, *UCP500 & UCP400 Compared* (ICC Publication No.511, ICC 1993) 2

parts of UCP have defined the parties' rights and obligations, they are not set out in legal language. Moreover, the UCP has left issues which cannot be resolved by contractual provisions alone, such as property issues, remedies for non-performance and fraud. All these issues remain firmly within the province of the national courts. In addition, the UCP does not govern sale or carriage contracts, and the courts have been reluctant to give the UCP any weight beyond their ambit of being banking practice.[41]

It is essential to know that the UCP as a set of standard terms and conditions is usually applicable only when incorporated into the relevant contracts.[42] The UCP does not have the force of law in the English courts.[43] The UCP must rely upon contract to give it binding effect in each documentary credit where they are incorporated. The contractual nature is fundamental to the understanding of its provisions. In fact, the ICC cannot, and does not purport to, legislate. In Article 1 of UCP600, it stipulates that the UCP rules apply to any documentary credit when the text of the credit expressly indicates that it is subject to these rules.[44] Once incorporated, the UCP rules are binding on all parties thereto on a contractual basis unless expressly modified or excluded by the credit.

2.4.3 Other sources for documentary credits

2.4.3.1 International Standard Banking Practice

A more general source for regulating letters of credit is international banking practice[45] and the usages of international trade. From 2003, during the currency of UCP500, the ICC issued the first version of International Standard Banking Practice for the

[41] E.g. definition of a clean bill of lading in *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc (The Galatia)* [1980] 1 WLR 495 (CA)

[42] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 45

[43] *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc (The Galatia)* [1980] 1 WLR 495 (CA) 509

[44] It is not necessary for the wording to be incorporated into the text of the credit. See *Forestal Mimosa Ltd v Oriental Credit Ltd* [1986] 1 WLR 631 (CA), in which an insertion in appropriate words in the left-hand margin of the document was held by the Court of Appeal to be sufficient to incorporate the provisions of the UCP.

[45] It is necessary to distinguish between the internal practices, used by banks in their letter of credit operations, and practices which have been adopted on a broad, often universal basis.

Examination of Documents under Documentary Credits (ISBP).[46] The ISBP Publication No.681 (referred as ISBP No.681)[47] has been updated simultaneously with the birth of UCP600 in 2007 and the most recent revision is the ISBP Publication No.745 (referred as ISBP No.745) in 2013.[48] The status of the ISBP was doubted during the UCP500, since there is no reference in the UCP500 (which has been implemented 8 years previous) to the ISBP No.645. The problem has been solved by the introduction of UCP600, which states in its preface that "the Publication [ISBP] has evolved into a necessary companion to the UCP for determining compliance of documents with the terms of letter of credit."[49]

The practices described in the ISBP aim to highlight how the articles of UCP600 are to be interpreted and applied.[50] It is suggested that the ISBP is not intended to amend or modify UCP600 and it should be read in conjunction with UCP600 rather than in isolation. There is no need to incorporate the ISBP rules into the documentary credit separately, as the requirement to follow agreed practices is implicit in UCP600.[51] Clearly, although the ISBP is not formally referred by the main content of UCP600, it is intended to be integrated with the UCP 600 as a set of authoritative statements.[52] Therefore, it should be noted that any term in a documentary credit that modifies or excludes the applicability of a provision of UCP600 may have an impact on the ISBP.

As we will see in Chapter 3, the UCP600 Article 2 refers to international standard banking practice in determining a complying presentation. A specific reference to the

[46] ICC, *International Standard Banking Practice for the Examination of Documents under Documentary Credits 2007 Revision for UCP500* (ICC Publication No.645, ICC 2003) Referred in this thesis as the ISBP No.645
[47] ICC, *International Standard Banking Practice for the Examination of Documents under Documentary Credits 2007 Revision for UCP600* (ICC Publication No.681, ICC 2007)
[48] ICC, *International Standard Banking Practice for the Examination of Documents under Documentary Credits 2007 Revision for UCP600* (ICC Publication No.745, ICC 2013)
[49] UCP600 Introduction
[50] ISBP No.745, Preliminary Consideration para ii
[51] ISBP No.745, introduction
[52] 'As can be seen by comparing ISBP (2003) and ISBP (2007), many of the provisions of the previous version have been elevated to UCP status in UCP600 and some provisions have been downgraded from UCP status to ISBP status.' Cited in James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 136

ISBP has been avoided. It is suggested that issues respecting banking practice remain issue of fact and can be referred to a non-exhaustive list. Nevertheless, there are clear practical advantages in having an authoritative list of relevant practice. Despite the statement in the UCP introductory texts, without a firm statement in the UCP, there remains a question as to whether the ISBP practices should be regarded to be decisive and whether the other banking practice is also admissible by the court. Reading from the introductory texts of ISBP No.745, it seems possible for the ICC to recognise a different practice other than those stated in the ISBP.

2.4.3.2 Other ICC publications and expert evidence

The ICC Commission on Banking Technique and Practice (referred to as "ICC Banking Commission") from time to time publishes their official opinions on questions and interpretations concerning the UCP.[53] Moreover, the ICC also publishes some selected DOCDOX (Documentary Credit Dispute Resolution Expertise) decisions made by the ICC experts on day-to-day documentary credit disputes.[54] Those ICC opinions and decisions represent the views of considerable experts, and are given substantial weight by the court with the merits of the particular case.[55] Assistance may be also derived from some other publication of the ICC, such as commentary on each periodic UCP revision, [56] which offers historical background and drafting interpretation of the various articles in UCP600. Commentary is often cited in the courts and has persuasive value to some degree. However, as the comments and views expressed in the commentary are made in the writer's personal capacity and do not

[53] Recent examples include: Gary Collyer and Ron Katz (eds), *ICC Banking Commission Collected Opinions 1995-2001* (ICC Publication No.632, ICC 2002); Gary Collyer and Ron Katz (eds), *Unpublished Opinions of the ICC Banking Commission 1995-2004* (ICC Publication No.660, ICC 2005); Gary Collyer and Ron Katz (eds), *ICC Banking Commission Opinions 2005-2008* (ICC Publication No.697, ICC 2008); Gary Collyer and Ron Katz (eds), *ICC Banking Commission Opinions 2009-2011* (ICC Publication No.732, ICC 2012)

[54] Three collections have been published so far: Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 1997-2003* (ICC Publication No.665, ICC 2004); Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 2004-2008* (ICC Publication No.696, ICC 2008); Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 2009-2012* (ICC Publication No.739, ICC 2012)

[55] *Credit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm) and *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA)

[56] For UCP600, Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007)

necessarily reflect those of the ICC Banking Commission, the English court will treat them no more than the same value as those of any other commentator of comparable wisdom and experience.[57]

In most cases, the relevant banking practice has to be proven by expert evidence. For example, expert views on what constituted a reasonable time to inspect documents were accorded considerable weight in *Bankers Trust Co v State Bank of India*,[58] as also were their views on the desirability of the bank consulting the applicant. The above ICC publications are undoubtedly of great assistance in dealing with issues that actually arise and represent as the expert's opinions, but they are probably of limited value in the actual interpretation of terms which will ultimately be incorporated into contractual documents. As Staughton L.J. held in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*,[59] '*it is no part of the function of an expert witness, or for that matter of any other witness, to state his views on the meaning of ordinary English words in a written contract, unless it is sought to prove some custom which is pleaded and can be supported by appropriate evidence.*'

2.4.4 UCP and Case Law

It is acknowledged the first revision of UCP to be generally accepted by the English banks was the 1962 revision. In cases decided by an English court prior to 1962, no concern has been addressed to the UCP. It is suggested that many of them remain good law, since the same result will often be reached today through applying the UCP.[60] In many areas, there is little difference between the English case law and the UCP. The provisions of the UCP do not in general operate in opposition to the common law, but rather elaborate upon it. Where the credit incorporates the UCP, the approach in nowadays must be to examine the UCP to find a direct answer to the point at issue. The case law reflecting the same point may help to show the principle and illustrate how it

[57] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA) 39
[58] *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA)
[59] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA) 39
[60] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 1.30

is to be applied. However, it is improper to apply the previous cases which would achieve a result contrary to the current UCP provisions, since the UCP has deviated from the established requirements under the case law in some respects. A typical example can be found in Chapter 3 of this thesis regarding the standard of strict compliance. As we will see in Chapter 3, the case law has established the doctrine of strict compliance with respect to documentary examinations in documentary credits, while the UCP has endeavoured to relax this doctrine in many ways.

As illustrated in the above parts, the UCP is intended to regulate the operation of documentary credits, but it falls far short of constituting a complete code. There remain a number of areas which continue to be resolved by common law, on which the UCP is silent. Apart from the legal issues intentionally left by the UCP regime, such as choice of law, legal remedies and fraud exceptions, some of the UCP provisions still need to be clarified and polished. In the absence of an express contractual term, it is likely that the courts will fill out the necessary details with the contractual interpretations, and a term may be implied into the UCP in accordance with orthodox contract law principles.[61] As we will see in Chapter 6, in the recent case, *Fortis Bank v Indian Overseas Bank*,[62] the English Court of Appeal has extended the bank's obligation under UCP600 Article 16 to the post-notice stage by virtue of contractual interpretations. Clearly, the common law can effectively interpret and supplement gaps left by the UCP regime when it is necessary.

It is acknowledged that the UCP as a global product has to make compromises between the civil law jurisdiction and the common law jurisdiction. It is not possible for the UCP to satisfy all the national laws of a particular state, nor does it have power to change the local law. Donaldson J. in *The Galatia*[63] was unimpressed with the argument regarding interpreting a clean bill of lading according to the UCP definition, observing that the rules did not have the force of law. He recognised that if there was

[61] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA) 39
[62] *Fortis Bank v Indian Overseas Bank* [2011] EWCA Civ 58, [2011] 2 All ER (Comm) 288
[63] *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc (The Galatia)* [1980] 1 WLR 495 (CA)

an ambiguity in interpreting the terms, it should be resolved in a way which could reflect the position under general maritime and commercial law.[64] English case law, which has developed continuously in accordance with real commercial practice, retains its leading position in the world, especially in the commercial and maritime area. The established English case law and its development can actually contribute to revealing the loopholes in the UCP regime and provide references to the UCP for its future reform. Therefore, it is not difficult to observe that in this thesis, especially in Chapter 4 regarding standards of documentary examination and in Chapter 5 concerning transport documents, the author is endeavouring to compare the different positions between the UCP and the relevant case law, so as to bring the merits of English case law into the UCP reform.[65]

2.4.5 Construction of UCP within a documentary credit

An irrevocable credit or a confirmed credit, which constitutes the bargain between the banks and the beneficiary, is treated for all practical purposes as a binding contract.[66] It follows that documentary credits subject to English law should be interpreted in compliance with the ordinary rules of contractual construction. Prima facie the parties entering into a documentary credit contract are free to make any arrangements and to include any specific terms as they desire. In the UK, the UCP is regarded as a set of standard contractual terms. Consistent with its contractual status, the provisions of the UCP fall to be construed according to the normal approach in interpreting standard terms which are incorporated into contracts and the courts are ultimately concerned to ascertain the intentions of those particular parties to the contract. Although Article 1 of the UCP600 requires an express indication in the credit that the UCP applies, it is still possible for a court to give effect to the UCP terms on the basis of the clear intention of

[64] *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc (The Galatia)* [1980] 1 WLR 495 (CA) 509

[65] For example, as the way treated linkage issue and non-documentary conditions issue in Chapter 4 and the requirement for justifying a clean bill of lading and carrier's liability in Chapter 5.

[66] Although contract is the jurisprudential foundation for the obligations contained in the credit, it is difficult to analyse them satisfactorily without recognising that documentary credits are to some extent of a special nature. See detailed controversies in Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 5.8 and Paul Todd, *Bills of Lading and Bankers Documentary Credits* (4th edn, Informa Publishing 2007) para 1.70

the parties even without an express incorporation.[67]

At the end of UCP600 Article 1, it stipulates where included, the terms are binding on all the parties thereto "unless expressly modified or excluded by the credit". This recognises that the parties are free to exclude some of the UCP provisions while incorporating the remainder. Clearly, the UCP terms which are incorporated in a letter of credit should be read together with the express terms set out in the document. No issue will arise if the parties have expressly and unequivocally excluded or modified a specific UCP provision. A difficulty does arise where there is a conflict between a UCP provision which has not been expressly excluded or modified and an express term of the credit. It is then a question of interpretation whether a particular term of the credit overrides a contrary provision of the UCP. It is suggested that if possible, an English court will first try to give effect to both terms without violating the language of either.[68]

If the conflict cannot be resolved, the general position in English law is that an express term of a contract normally prevails over a standard term which is incorporated into the contract by reference. However, given the international recognition of the UCP, a court may feel reluctant to conclude that the parties intended to depart from the UCP provision without a clear specification, unless there is an "irreconcilable inconsistency".[69] Obviously, in the event of an irreconcilable inconsistency, the situation faced by an English court will be extremely difficult and the result is hardly predictable. It is suggested that the more that an express term of the credit is fundamental to the commercial operation of a documentary credit, the more likely that such a term will reflect the intentions of the parties and override the standard UCP term.[70] As discussed later in Chapter 4, the issue of non-documentary conditions is a typical example for this point. Another example can be found in Chapter 5 when the

[67] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-008
[68] *Forestal Mimosa Ltd v Oriental Credit Ltd* [1986] 1 WLR 631 (CA)
[69] *Forestal Mimosa Ltd v Oriental Credit Ltd* [1986] 1 WLR 631 (CA)
[70] *Kumagai-Zenecon Construction Pte Ltd v Arab Bank Plc* [1997] SGHC 31, [1997] 1 SLR (R) 277, affd [1997] SGCA 41, [1997] 2 SLR (R) 1020

credit expressly requires the transport document to meet a specific carriage requirement, which is usually shown in the carriage terms and conditions. By contrast, the UCP provides that the content of carriage terms and conditions will not be examined. It is difficult to tell who will defeat whom and the final say would remain with the court by addressing the parties' intention.

2.5 Two fundamental principles

Two cardinal features, irrevocability and autonomy, fundamentally contribute to the operation of documentary credits and provide the confidence to the beneficiary as holding the equivalent of cash in hand. The principle of irrevocability imposes an absolute obligation on the bank to pay against compliant documents under documentary credit, while the principle of autonomy underpins the continuance of the documentary system as the primary means of payment in international trade. Those two principles, as the precedent condition for the operation of documentary credits, were not only established at common law, but also reiterated in the UCP. As we will see in the following chapters, these two principles run through the discussion in the whole thesis, since they have penetrated into the bank's obligations in documentary examination and rejection all the time.

2.5.1 Principle of irrevocability

The documentary credits can be divided into irrevocable credits and revocable credits. A revocable credit can be revoked by the issuing bank at any time, while an irrevocable credit cannot be revoked once issued. Clearly, only an irrevocable documentary credit which presents an absolute undertaking from a reliable and solvent paymaster can provide financial assurance to the beneficiary. In essence, it constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an irrevocable obligation to pay against presentation of the documents stipulated in the credit, regardless of any dispute between the parties in the underlying contract.[71]

[71] *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127 (CA) 129

Since revocable credits have become obsolete and always constitute a poor assurance of payment, they have been excluded from the ambit of UCP600. In the UCP600 Article 2, it expressly states that "credit" means any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation. Under Article 3, the UCP reiterates that a credit is irrevocable even if there is no indication to that effect. In consequence, once opened, the credit can be neither amended nor cancelled without the consent of the issuing bank, the confirming bank, if any, and the beneficiary.[72] The issuing and confirming bank, if any, are also legally bound as against the beneficiary to honour or negotiate in accordance with the terms of the credit, and in the same vein, the issuing bank is bound to reimburse any nominated bank that honours or negotiates a complying presentation.

Although there is no doubt that the beneficiary obtains contractual rights against the issuing bank or confirming bank under the irrevocable credit, the issue of when the letter of credit becomes irrevocable gives rise to conceptual difficulties under the common law. As stated above, in principle, letters of credit are governed by the legal principles of contract law, so an obligation to be irrevocably bound can only arise once the contract has been made, i.e. there has been an offer and acceptance, and consideration. By tendering the required documents, there is a clear intention that the seller accepts the unilateral offer and provides consideration.[73] Therefore, the time of being irrevocable does not really bother the subject-matter discussed in this thesis, which concerns the procedure after tending the documents, i.e. documents examination and rejection.

The problem respecting the exact moment at which the bank's undertaking becomes

[72] UCP600 Article 10 (a)

[73] In *Urquhart Lindsay & Co v Eastern Bank Ltd* [1922] 1 KB 318, Rowlatt J had no doubt that upon the plaintiff's acting upon the undertaking contained in the letter of credit, consideration moved from the seller.

irrevocable only arises if the bank revokes its offer at an earlier stage, i.e. before the beneficiary acts on it. UCP600 attempts to settle this thorny problem by providing that the issuing bank is irrevocably bound as of the time it issues the credit[74] or any amendment.[75] Equivalently, the confirming bank is irrevocably bound as of the time it adds its confirmation to the credit[76] and from the time it advises the amendment.[77] However, the UCP provisions have not fundamentally resolved the problem, since the UCP operates in the UK by incorporation into a contract, and the problem here is precisely that there is no binding contract before the beneficiary accepts the offer and provides consideration. Therefore, the problem still lies in how to define the nature of the contract created by issuance of the credit and how to surmount the obstacle regarding lack of consideration for the bank's promise to the beneficiary.

It is suggested that the English courts have never resolved this incompatibility with the principles of orthodox contract law in terms. On the contrary, it appears that irrevocable letters of credit which are governed by English law constitute a *sui generis* exception to the rule of English law as to consideration.[78] Since international banking practice considers the simple sending or transmitting of an advice of issuance, confirmation or amendment of a credit to constitute a legally binding, irrevocable unilateral offer, the English court is not intended to interfere with "mercantile usage" in such an elaborate commercial system.[79] Therefore, an irrevocable credit becomes binding as soon as it has been issued or confirmed by the bank, or more precisely, the beneficiary will be able to enforce it as soon as it reaches the beneficiary's hands.

[74] UCP600 Article 7 (b)
[75] UCP600 Article 10 (b)
[76] UCP600 Article 8 (b)
[77] UCP600 Article 10 (b) In the UCP, "advise" simply means to send or transmit an advice. See Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 2004-2008* (ICC Publication No.696, ICC 2008) No.264
[78] Hugh Beale (ed), *Chitty on Contracts*, vol 1(30th edn, Sweet and Maxwell 2008) para 2-082; Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-069
[79] *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127 (CA) 129

2.5.2 Principle of autonomy

As Lord Diplock stated in *The American Accord* [80] which has been cited above, it is trite law that there are four autonomous contractual relationships involved in the letter of credit transactions. The credit is autonomous from the underlying transaction and other contract on which it may be based. As a fundamental principle of documentary credits, the principle of autonomy is designed to ensure that disputes extraneous to the credit do not impair the realisation of the credit. The independence of the credit from the underlying transaction also reflects an application of the privity of contract doctrine, as the bank has no awareness of the original terms of the sale by the trading parties. Moreover, the principle of autonomy further underpins the doctrine that a documentary credit is a transaction in documents and in documents alone.

The principle of autonomy can be dated back to the original version of the UCP, promulgated in 1933.[81] It is still encapsulated in the current UCP 600, Article 4 and Article 5. Article 4 (a) stipulates: "A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary".[82] Therefore, an issuing or confirming bank is obliged to honour a complying presentation even if the bank has knowledge at the time of presentation that the seller has committed a repudiatory breach of the underlying contract, which would have entitled the buyer to treat the contract of sale as rescinded and to refuse to pay the seller the purchase price.[83] The result actually interacts with the principle of

[80] *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] 1 AC 168 (HL) 182

[81] Peter Ellinger, 'The UCP 500: Considering a New Revision' [2004] LMCLQ 30, 31

[82] UCP 600 Article 4(a) also emphasises the independence between the credit and other contracts involved with banks making up the credit by stating that 'a beneficiary can in no case avail himself of the contractual relationship existing between the banks or between the applicant and the issuing bank.'

[83] *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] 1

irrevocability, in which the bank cannot withdraw its unilateral promise once the credit has been issued, notwithstanding any dispute occurring on the underlying contract.

The isolation from any disputes that may arise on the underlying contract is essential for the operation of documentary credits which aims to provide financial reassurance to the beneficiary. In *The American Accord*,[84] it was held that the document which was apparently compliant but contained an inaccurate material statement of fact was not a ground for rejection, even if the person (not being the beneficiary) who prepared the document knew of the inaccuracy. The principal of autonomy is primarily intended to deter applicants or banks from claiming that payment should be stopped because of the beneficiary's breach of his contractual obligations to the applicant. It follows that, in the event that the applicant has a genuine grievance against the beneficiary on the underlying contract, he may seek redress outside the credit by receiving the adjustment refund from the beneficiary, rather than by way of retaining payment under a letter of credit.[85] It is suggested that the English court has been reluctant to interfere with the commercial practice by granting an injunction.[86] In *The American Accord*, the House of Lords recognised that there was one established exception to this general overriding principle of autonomy, i.e. the "fraud exception". However, its application has been largely restricted to seller's fraud rather than fraud caused by any third party. The principle of autonomy might also be challenged by illegality and clear credit terms which reflect the parties' intention to disrupt it.[87]

The principle of autonomy has also been demonstrated in the UCP 600 Article 4(b), which states that "an issuing bank should discourage any attempt by the applicant to

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AC 168 (HL) 183; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 (CA) 169 Equally, a waiver of discrepancies in the required documents as between buyer and seller on the underlying contract does not oblige a bank to honour the discrepant documents. See *Uzinterimpex JSC v Standard Bank Plc* [2008] EWCA Civ 819, [2008] 2 Lloyd's Rep 456 [29]

[84] *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] 1 AC 168 (HL)

[85] *Urquhart Lindsay & Co v Eastern Bank Ltd* [1922] 1 KB 318 (KB) 323

[86] *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127 (CA)

[87] The exceptions of autonomy are beyond the scope of this thesis. Detailed discussion can be found in Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-070

include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like". It is suggested that "if the applicant's motive for requiring a copy of the original sale contract to be included in the credit is to protect him or herself from a fraudulent seller, Article 4(b) sends out the message in a subtle way that there are better ways of doing this, such as by requiring a certificate of inspection of the cargo by an independent expert".[88] However, it is difficult to use Article 4(b) as an enforceable contractual term, and it might be argued that the objectives of providing a code of behaviour and sending out signals are not really appropriate to a contractual document. It remains to be seen how the bank can effectively enforce Article 4(b).

The independent nature of the credit is reinforced by virtue of UCP600 Article 5, which emphasises that banks deal with documents rather than goods, services or performance. It is in line with the general standard for documents examination in UCP600 Article 14 (a), which stipulates that the bank must determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation. Banks should not look at the facts behind the documents and take any extraneous matters into account.[89] It also forms no part of the bank's function to speculate or investigate the underlying facts. This exactly justifies the disclaimer on effectiveness of documents in UCP600 Article 34,[90] since the bank does not possess the requisite expertise to investigate or inquire into the truth behind the documents. Therefore, a big dilemma will be faced by the bank if the payment under a credit is rendered conditional on matters of performance or terms which cannot be observed from the stipulated documents, such as non-documentary conditions discussed in Chapter 4.

2.6 Conclusions

The purpose of this chapter is to lay the foundation for the following discussions in this

[88] Janet Ulph, 'The UCP 600: Documentary Credits in the 21st Century' [2007] JBL 355, 368
[89] *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 1 WLR 1234
[90] As stated in Article 34, a bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document.

thesis. The chapter has introduced the workflow of documentary credits and developments of the UCP regime. Furthermore, the chapter has demonstrated the contractual nature of the documentary credits and the UCP terms, as well as overviewed the case law position towards the UCP and letters of credit. In addition, the chapter has illustrated other sources, such as the ICC publications, which may affect the construction for the credit terms and the UCP.

As mentioned, there are five autonomous but interconnected contracts relating to the operation of documentary credits. Among them, the contract between the beneficiary and the bank is regarded as the letter of credit. The letter of credit is independent from the contracts between banks and the underlying sale contract, although it is generated from them. Therefore, banks are obligated to focus on the documents alone and disregard any allegations related to the underlying transaction. As we will see in the following chapters, the principle of autonomy is closely linked with bank's obligations towards document examinations and rejections.

The principle of irrevocability, as the other fundamental principle in the letters of credit operations, might not be obviously linked with the main content of this thesis regarding document examinations. However, as a precedent condition of the bank's undertaking under documentary credits, it has penetrated into the letter of credit system and provided a financial guarantee to the beneficiary and the nominated banks. As we will see in Chapter 6, the irrevocable nature of the bank's promise has extended to the principle of irreversibility in the scenario of serving a rejection notice, since the bank cannot change its mind once it sends its words. Clearly, all the subject-matters in this chapter are intended to pave the way for the subsequent discussions in this thesis regarding a bank's obligations on document examination and rejection under UCP600.

Chapter 3 General Requirements for Document Examination

3.1 Introduction

Documents examination is the utmost important procedure in the circulation of documentary credits, since the decision of examination will control the fate of a presentation so as to affect the release of payment or reimbursement. It is claimed that the majority of the presentations will be rejected by the bank in the first instance, as the presented documents can hardly meet the standards of compliance set out under UCP.[91] However, the underlying reason is that, far from being clear, the UCP standards for document examination are full of ambiguity and uncertainty. Much worse than that, the courts in different areas serve various interpretations, and even in the same jurisdiction, the courts also provide diverse understandings concerning similar issues. Hence, the current legal confusion leads to many significant consequences. Not only will traders suffer loss from the failures of documentary credits, but also the banks will inevitably be involved in subsequent litigations so as to jeopardise their professional reputation. Furthermore, the high rate of rejections and controversies will fundamentally discourage international transactions and inhibit the facilitation of documentary credits.

Although the general requirements for document examination are continuously reformed by different UCP versions, the problems and controversies have never been eliminated. As we will see in the following discussions, the current version, the UCP600, is also hardly achieving its initial expectations due to unclear wording. The existing case law and most scholars tend to solve the difficulties encountered with UCP600 through a case-by-case method instead of interpreting a set of definite rules. However, in the author's opinion, these problems will not be mostly eliminated without

[91] The rejection rate of first time presentation in the UK documentary credits transactions is between 50%-60%. In 2000, about 113 million GBP was estimated to have been lost in the UK market due to non-compliant presentations under letters of credit. See STIPRO, 'Report of the Use of Export Letters of Credit 2001/2002' *SITPRO's Letter of Credit Report* (London, 11 April 2003) 2 <www.gov.uk/government/organisations/sitpro> accessed 10 March 2011

providing a set of systematic and unmistakable standards for examinations. On the one hand, the beneficiary has to know how to constitute a complying presentation and follow the guidance to present the compliant documents to get payment. On the other hand, the banks have to refer to these standards in order to perform their obligations on examination and determination without mistake. Moreover, courts in different jurisdictions also need a set of clear and definite rules to direct their reasoning. Therefore, this chapter aims to analyse the bank's obligations concerning document examination, as well as clarify the ambiguous points in the current UCP system. Meanwhile, the author will endeavour to put forward some suggestions to solve the existing problematic issues and supplement gaps left by the explicit UCP provisions. Through comparison with different revisions of UCP and ISBP,[92] extracting the essence of case law in different jurisdictions and compromising the interpretations of commentators from various areas, the ultimate purpose of this chapter is to contribute a set of feasible examination standards for the international banking system.

This chapter will centre on the general requirements for document examination in UCP600 Article 14 (a)[93] and Article 14 (b)[94], which respectively involves the general standards to judge a complying presentation and the time allowance given for documents examination.[95] The chapter will start from analysing the overall requirement set out in Article 14 (a) and clarifying what constitutes a complying presentation under UCP600 in Part 3.2. Whether the historical element of reasonable care, which has been expressly deleted in Article 14 (a), still takes part in the process

[92] ISBP is short for the International Standard Banking Practice for the Examination of Documents under Documentary Credits. There are three revisions, i.e. ISBP Publication No.745 published in 2013 for UCP600, ISBP Publication No.681 published in 2007 for UCP600 and ISBP Publication No.645 published in 2003 for UCP500.

[93] The UCP600 Article 14 (a) stipulates: 'A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.'

[94] The UCP600 Article 14 (b) stipulates: 'A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.'

[95] Although there are still some trivial issues described in the UCP600 concerning general requirements for examination, such as Article 14 (c) concerning date of presentation, the author endeavours to choose the most important and disputable issues to discuss in this chapter.

of document examination under UCP600, is the problem considered by Part 3.3. Furthermore, the common law doctrine of strict compliance, as a general criterion for the bank to judge a complying presentation during the process of examination, will be elaborately analysed with the aid of different case law authorities in Part 3.4. Finally, Part 3.5 will particularly focus on the time frame settled in Article 14 (b) through comparing its wording with the position under previous UCP revisions.

3.2 General standard for examination—Article 14 (a)

Since the UCP600 Article 14 does not contain an exhaustive list of standards regarding document examination,[96] as a general guidance of examination, it has to be very clear and directive. With continuous development, the general standard for document examination is briefly stipulated in the UCP600 Article 14 (a), which requires 'a nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.'[97] The article has revealed three elements. Firstly, the article expressly points out that all three types of bank are entitled to examine the presented documents and determine whether the documents constitute a complying presentation. Accordingly, the above banks are also bound to perform their obligations in line with the UCP600 Article 14.[98] Secondly, the article reinforces that the principle of autonomy should be followed during the process of document examination. Thirdly, the criterion of payment is whether the documents constitute a complying presentation, which has to be cross-referred to the definition of "complying presentation" in the UCP600 Article 2.[99] In the following paragraphs, the author will elaborate on the

[96] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 131
[97] UCP600 Article 14 (a)
[98] It is worth noting that, according to Article 14 (a) and Article 14 (b) the "bank" mentioned in the following parts will include a nominated bank acting on its nomination, a confirming bank and an issuing bank. Apart from particular circumstances, the author will not specifically stress the type of involved bank in process of document examination.
[99] Definition of complying presentation is the UCP600 Article 2 as follows: 'Complying presentation means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.'

meaning of the last two elements.

3.2.1 Appearance of documents

Article 14 (a) requires that the bank should examine and determine, on the basis of the documents alone, whether the documents appear on their face to constitute a complying presentation. It efficiently links with the fundamental principle in a documentary credit operation, principle of autonomy, which has been analysed in Chapter 2. As mentioned in Chapter 2, the bank bears no responsibility for the accuracy or genuineness of tendered documents, provided that the documents appear on their face to be in conformity with the UCP.[100] In *Gian Singh & Co Ltd v Banque de l'Indochine*, [101] after identifying the controversial signature, Lord Diplock concluded that:[102]

> *'The fact that a document presented by the beneficiary under a documentary credit, which otherwise conforms to the requirements of the credit, is in fact a forgery does not, of itself, prevent the issuing bank from recovering from its customer money paid under the credit. The duty of the issuing bank, which it may perform either by itself, or by its agent, the notifying bank, is to examine documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit.'*

It is suggested that the documentary nature of the transaction determines that a bank should independently examine the pure documents without concerning any extraneous matters, such as the underlying transactions between traders or the facts hidden behind the presented documents.[103] The principle has also been affirmed by common law. In *J*

[100] Also see the disclaimer rule in UCP600 Article 34: 'A bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document…'
[101] *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 1 WLR 1234, see also *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 (HL) 183
[102] *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 1 WLR 1234, 1238
[103] For example, in *Westpac Banking Corp v South Carolina National Bank* [1986] 1 Lloyd's Rep 311, 315, the Privy Council corrected that the Court of Appeal "went beyond the terms of the document itself and sought to draw inferences of fact as to what had occurred at the time when the document was

H Rayner v Hambro's Bank Ltd,[104] the Court of Appeal held that the trade usage was irrelevant for determining a complying presentation even if the "Coromandel groundnuts" were the same as "machine shelled groundnut kernels" in the trade market. The bank had no duty to know the trade customs and trade terms of its customers, because it was impossible to suggest that a banker was to be affected with knowledge of the customary terms of every one of the thousands of trades for whose dealings he might issue letters of credit.[105]

Similarly, the bank is also not concerned with "why" in its customer's mind. In *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd*,[106] Lord Diplock stated that '*the banker is not concerned as to whether the documents for which the buyer has stipulated serve any useful commercial purpose or as to why the customer called for tender of a document of a particular description.*'[107] However, the judgement in *Kredietbank Antwerp v Midland Bank plc*[108] seemed to be inconsistent with this rationale, in which Evans J inferred that, the disputable "draft surveyor report" was compliant, as the commercial purpose of the beneficiary for requiring such a document has been satisfied. More controversially, the commercial approach has been repeatedly referred by the courts to defeat the mechanical and literal examination.

In the author's opinion, the commercial approach should only be applicable for the purpose of interpreting the contractual terms, rather than judging the acceptability of a presented document. Without doubt, analysing the commercial purpose behind a document will jeopardise the principle of autonomy, which is regarded as a golden rule underpinning the operation of a documentary credit. The bank is obliged and restricted to assess the documents on their appearance, irrespective of any underlying facts and extraneous matters. As we will see in the next chapter, a possible challenge against this

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issued."

[104] *JH Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37 (CA)

[105] *JH Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37 (CA) 41

[106] *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279

[107] *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279, 286

[108] *Kredietbank Antwerp v Midland Bank plc* [1999] CLC 1108 (CA) 1122

statement may arise from UCP600 Article 14 (f), in which the standard of examining a document without specific designations lies in whether the content of the document appears to fulfil its function.[109] It might be possible to argue that a document has not fulfilled its function since it did not achieve an expected commercial purpose.[110] However, distinction should be drawn between analysing the commercial purpose behind the scene and holding a general common sense approach based on a bank's expertise and experience. It is true that in some cases the line might be easy to draw, while in the others it might be less clear-cut, and therefore the residual controversies may still remain in the courts.

Nevertheless, the English common law has developed a straightforward method to identify whether a tendered document should be accepted by the bank. It is suggested that *'a tender of documents which, properly read and understood, calls for further inquiry or are such as to invite litigation is clearly a bad tender.'*[111] Due to the time limit set up for documentary examination, the bank has to decide the acceptance or rejection of the document promptly and without prolonged inquiry. It is clear that the bank is entitled to reject the presented documents which raise uncertainty on their face and cannot be readily resolved.[112]

The expression "on their face" in Article 14 (a) not only reinforces the documentary nature of the transaction, but also delimits the extent of the consideration regarding the presented documents. The scope of "on their face" has been well defined in many ways. The phrase should not be literally interpreted as only examining the front of any document so as to exclude other subsequent pages. Similarly, it cannot be misled as

[109] UCP600 Article 14 (f): 'If a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, banks will accept the document as presented if its content appears to fulfil the function of the required document and otherwise complied with sub-article 14 (d).'

[110] Since Article 14 (f) only requires that the content of a document "appears to fulfil its function", the author suggests that the article has not asked the bank to consider the commercial purpose of the document beyond its appearance.

[111] *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc (The Galatia)* [1980] 1 WLR 495 (CA) 510, applied the rationale in *Hansson v Hamel & Horley* [1922] 2 AC 36 (HL) 46

[112] *National Bank of South Africa v Banca Italiana di Sconto* (1922) 10 Ll L Rep 531 (CA) 535-536

overlooking the back of a document.[113] On the other hand, the bank is not entitled to examine the documents beyond their appearance and the issue of discrepancy should not depend upon the degree of inquisitiveness within the bank.[114] Neither does the bank need to check the detailed mathematical calculations in documents,[115] nor investigates the issuing authority for a specific document.[116] Moreover, as we will see in Chapter 5, the requirement of checking on the face does not extend to the scrutiny of the small print in transport documents.[117]

3.2.2 References for a "complying presentation"

The general standard for taking up or refusing the tendered documents in the UCP600 Article 14 (a) is whether they constitute a "complying presentation". In particular, the phrase has been expressly defined in the UCP600 Article 2, which stipulates 'a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.' Among these three elements, the most confusing concept should be the "international standard banking practice"; since the lack of capitalisation of the phase might indicate that the ISBP (International Standard Banking Practice) is not the only exhaustive source for reference.[118]

As we have seen in Chapter 2, the ISBP is devoted to explaining "how the practices

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[113] Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 62

[114] *Credit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm) [30]

[115] ISBP No.745, section A22, ISBP No.681, para 24; also see *Credit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm); Gary Collyer and Ron Katz (eds), *ICC Banking Commission Collected Opinions 1995-2001* (ICC Publication No.632, ICC 2002) R391

[116] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Collected Opinions 1995-2001* (ICC Publication No.632, ICC 2002) R403, R405

[117] See the UCP600 Article 19-23 concerning small print, also see the case law position in *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542 (QB) 551. However, there is no clear authority on whether the bank is bound to check small prints merged in other documents apart from transport documents. The author boldly suggests, according to the same spirit, all the small print should be ignored.

[118] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-091 UCP500 Article 13 (a), which stated that the compliance 'shall be determined by international standard banking practice *as reflected in these articles*', was be criticised as an ambiguous and narrow definition.

articulated in UCP600 are applied by documentary practitioners",[119] and it has evolved into a necessary companion to the UCP600 for determining compliance of documents with the term of letters of credit.[120] The role of ISBP can be divided into two aspects. Firstly, it effectively clarifies and interprets the misleading points in the UCP provisions. Secondly, it provides a set of authoritative statements and an informative checklist for bankers. Even though it has not been expressly incorporated into a documentary credit, the courts still give it a prevailing status as the most authoritative international standard banking practice in determining the regularity of presented documents.[121]

However, whether the ISBP should be regarded as either a definitive or exhaustive banking practice is still unclear.[122] The ISBP itself, in the introductory part, has recognised that 'the law in some countries may compel a different practice than those stated here.'[123] Moreover, it has conceded that 'no single publication can anticipate all the terms or the documents that may be used in connection with documentary credits or their interpretation under UCP600 and the standard practice it reflects.'[124] Therefore, the ISBP has just endeavoured to cover "terms commonly seen on a day-to-day basis and the documents most often presented under documentary credits".[125] That may be why a specific reference to the ISPB in the UCP600 Article 2 has been avoided, and thus plenty of room has been left for other variants to international banking practice. Nonetheless, apart from the ISBP, what sources can be qualified as a part of "international standard banking practice" within the concept of UCP?

It is submitted that banking practices published by the regional association may well

[119] ISBP No.745, introduction
[120] UCP600, introduction
[121] In *Credit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm), the construction of banking practice by the ICC is to be given considerable weight.
[122] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.14
[123] ISBP No.745, introduction
[124] ISBP No.745, introduction. It is also argued by scholars that the banking practices formulated in the ISBP were not based on a comprehensive survey of the prevailing practices in a substantial number of jurisdictions.
[125] ISBP No.745, introduction

satisfy the needs of local market and efficiently supplement the gaps left by the ICC.[126] Nevertheless, the local practice may be inconsistent with the provisions in the ISBP. At this time, the expert opinions, which can reflect the dynamic commercial development and represent the best regional banking practice, might be given paramount consideration by courts. Although the ISBP is given considerable weight in determining compliance of documents, it will not be regarded as a decisive and ultimate statement of banking practice. Other decisions and opinions from the ICC Banking Commission, regional standard practice and expert evidence will remain relevant to determine whether the documents constitute a complying presentation, and in the meantime, 'may be used to cast doubts on points of practice stated in the ISBP'.[127]

3.3 Requirement of reasonable care

Before further analysing the criteria to constitute a complying presentation, it is necessary to retrospect the requirement of reasonable care, which has been historically used both at common law and in the previous UCP versions, to judge whether the bank has fulfilled its obligations regarding document examination. Although there is no express reference concerning the requirement of reasonable care in the current UCP600 system, its residual effect should not be overlooked. Due to various circumstances involved in document examinations, it is impossible for a bank to invent a clear-cut method and the aid of reasonable care becomes necessary. In this part, how the requirement of reasonable care fits into the UCP regime and in what aspects it affects the bank's duty in the process of examination, will be scrutinised.

3.3.1 Historical controversies and current status

The UCP600 Article 14 (a) deletes the reference to "reasonable care", which had

[126] For example, Standard Banking Practices for the Examination of Letter of Credit Documents (SBPED) published in 1996 by the IFSA (The International Financial Services Association) in the US.
[127] Peter Ellinger, 'Use of Some ICC Guidelines' [2004] JBL 704, 709

emerged from the beginning of the UCP revisions until the recent UCP500.[128] The UCP500 Article 13 (a) stipulated that the bank's duty was to "examine all documents stipulated in the Credit *with reasonable care* to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit…"[129] Regrettably, the scope of "reasonable care" had not been well-defined. It would be argued that, since the documents were not compliant on their face, any reasonable examination should detect them. Thus, fulfilment of the reasonable care could not be used as a justification to take up a non-compliant presentation. If justification regarding fulfilment of reasonable care was permitted, it would conflict with the UCP500 Article 14 (a), which mentioned reimbursement for taking up a presentation should solely rely on compliance on the face of documents. Moreover, involving the exercise of reasonable care as a test to decide whether the bank must accept or reject the documents would conflict with the spirit of case law. As Lord Sumner held in *Equitable Trust Co of New York v Dawson Partners Ltd*:[130]

> *'there is really no question here of waiver or of estoppel or of diligence or of negligence or of breach of a contract of employment to use reasonable care and skill… the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the manner of accompanying documents strictly observed.'*

Consequently, the only decisive component for accepting or rejecting a presentation is whether the tendered documents appear to be compliant, rather than whether the bank has duly exercised reasonable care to examine the documents. A bank which has honoured or negotiated a non-compliant presentation will not be entitled to get reimbursement, even though it claims that reasonable care has been exercised in the

[128] Dating back to UCP83 (1933), it was declared that banks had considerable discretion in determining the compliance of documents but were required to act reasonably in exercising it. Then the formula appeared in UCP151 (1951) Article 9. See James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 132

[129] UCP500 Article 13 (a)

[130] *Equitable Trust Co of New York v Dawson Partners Ltd* (1927) 27 Ll L Rep 49 (HL) 52

process of document examination.

The above conflicts and confusion urged the ICC Banking Commission to boldly leave out the phrase of reasonable care in the UCP600, since it was never very clear what was precisely added by this qualification.[131] Nevertheless, the bank's duty of reasonable care has not been eliminated despite the absence of the express words. Generally speaking, this omission will not lead to any substantial difference in the way of performance,[132] and arguably the duty is just transferred from explicit to implicit. 'Whilst the content of that practice will no doubt reflect what a reasonable and careful bank would do, there is no longer a separate express obligation for a bank to exercise reasonable care in examining documents. The omission of any reference to reasonable care should be regarded as intended to clarify, rather than amend, the duties of a bank.'[133] The omission is unlikely to defeat the common law position where by the bank should fulfil its obligations in a professional and diligent manner.[134] Meanwhile, the deletion of express words in Article 14 (a) aims to clarify that, '"reasonable care" is simply the degree of care that would be exercised in particular circumstances by a bank in handling the presented documents,[135] rather than an effective defence that would excuse the bank's liability for accepting a non-compliant document.

3.3.2 Applications of reasonable care under UCP600

Subsequently, the tricky question turns to how can the implicit duty of care play a role under UCP600? Put in another way, in which aspects does the bank needs to perform its examination function with reasonable care, and to whom is the duty owed? It is

[131] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.3
[132] See James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 132; Charles Debattista, 'The New UCP 600 - Changes to the Tender of the Sellers's Shipping Documents under Letters of Credit' [2007] JBL 329, 337; Janet Ulph, 'The UCP 600: Documentary Credits in the 21st Century' [2007] JBL 355, 362
[133] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.4
[134] The common position rooted from *Basse v Bank of Australasia* (1904) 20 TLR 431, cited in Ebenezer Adodo, 'A Presentee Bank's Duty When Examining a Tender of Documents under the Uniform Customs and Practice for Documentary Credits 600' (2009) 24(11) JIBLR 566, 567
[135] Michael Isaacs and Michael Barnett, 'International Trade Finance - Letters of Credit, UCP 600 and Examination of Documents' (2007) 22(12) JIBLR 660, 662

undoubted that the examining bank owes a duty of reasonable care to its customers, which may occur between the issuing bank *vis-a-vis* its applicant or between the nominated bank *vis-a-vis* the issuing bank. The first application can be illustrated in construing an ambiguous instruction of the credit. In *Midland Bank Ltd v Seymour*,[136] Devlin J held '*when an agent acts upon ambiguous instructions he is not in default if he can show that he adopted what was a reasonable meaning.*'[137] Arguably, if the examining bank does not act reasonably to interpret the mandate, it will breach the duty of reasonable care and may not be entitled to get reimbursement.

The second situation occurs when the examining bank negligently or inadvertently ignores any "sufficiently suspicious features" on the face of the documents. These sufficiently suspicious features have served as red flag, permitting an examining bank acting with reasonable care to detect the truth of documents in spite of the appearance of good order.[138] In *Gian Singh & Co Ltd v Banque de l'Indochine*,[139] Lord Diplock affirmed that the application of reasonable care in document examination was a restatement of the bank's duty at common law. The judge further analysed that, although the bank was under no duty to take any further steps to investigate the genuineness of a signature, it still needed to take reasonable care to call evidence for the non-documentary requirement and see whether the signature appeared to be compliant.[140] However, the onus of proving lack of reasonable care would lie upon the customer who makes such a claim.[141] Obviously, if the customer was able to prove

[136] *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147 (QB), also see *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279, 283. In *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] 1 All ER (Comm) 172 (CA), the principle of reasonable construction also applied to the confirming bank.

[137] *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147 (QB) 153

[138] Ebenezer Adodo, 'A Presentee Bank's Duty When Examining a Tender of Documents under the Uniform Customs and Practice for Documentary Credits 600' (2009) 24(11) JIBLR 566, 568 It is necessary to notice that there is a significant difference between the above situation and the pure fraud which is separated from the appearance of documents. In the later consideration, the principle of autonomy and the declaimer rule in Article 35 will apply. The phrase of "sufficiently suspicious features" on the face of documents delimits the current situation into the scope of reasonable care, even though the practical possibility may be very rarely.

[139] *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 1 WLR 1234, 1238-1239 The case was subject to the UCP 1962 version.

[140] The non-documentary conditions will be ignored in the UCP600 Article 14 (h), which will be elaborately discussed in the next chapter.

[141] In *Gian Singh*, the applicant failed to prove that the issuing bank was negligent in honouring a forged

that the examining bank had negligently performed its duty in this case, the bank would not claim reimbursement from it. Due to no fundamental changes in meanings under UCP600, the author supports that the same result would be borne out, provided that reasonable care has been admitted as an implicit duty for banks.

Thirdly, reasonable care will be called for when the bank needs to exercise its professional judgment to decide an ambiguous or indefinite point in the presented documents. In *Kredistbank Antwerp v Midland Bank plc*,[142] Evans LJ explained that '*the professional expertise of a trading bank includes knowledge of the UCP rules and of their practical application. This necessarily involves a degree of judgment...*' Clearly, the examining bank has to make its own judgment with sufficient reasonable care upon the tendered documents, especially for some grey area or suspicious disparities.[143] Since the UCP is not described as an exhaustive list and the bank is ought not to require the rigid meticulous fulfilment of precise wording in all cases, it is clearly necessary for the bank to reasonably examine the presented documents with its professional knowledge.

However, does an examining bank owe the beneficiary a duty to process the tendered documents with reasonable care? Concerning the English case law, the issue had been slightly touched upon. In *Chailease Finance Corp v Credit Agricole Indosuez*,[144] Potter LJ mentioned that:[145]

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certificate. Conversely, in *Bank of America National Trust & Savings Association v Liberty National Bank & Trust Co of Oklahoma*, 116 F Supp 233, 240 (W D Ok 1953), affirmed 218 F 2d 831 (10th Cir 1955), where the claimant issuing bank succeeded in establishing a nominated negotiating bank's negligence in taking up a defective railway certificate. Cited in Ebenezer Adodo, 'A Presentee Bank's Duty When Examining a Tender of Documents under the Uniform Customs and Practice for Documentary Credits 600' (2009) 24(11) JIBLR 566, fn 12

142 *Kredietbank Antwerp v Midland Bank plc* [1999] CLC 1108 (CA) 1110

143 Although Donaldson J. in *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc (The Galatia)* [1980] 1 WLR 495 (CA) 510 pointed out that 'a tender of documents which, properly read and understood, calls for further inquiry or are such as to invite litigation is clearly a bad tender', the precedent condition of this requirement is to fulfil the proper reading and understanding with reasonable care. Moreover, in practice, there are plenty of grey areas existing in the presented documents. Due to sustaining the banking reputation and market benefits, the bank will be extremely cautious to determine non-compliance.

144 *Chailease Finance Corp v Credit Agricole Indosuez* [2000] 1 All ER (Comm) 399 (CA)

145 *Chailease Finance Corp v Credit Agricole Indosuez* [2000] 1 All ER (Comm) 399 (CA) [25]

*'insofar as this provision [UCP500 Article 13 (a)] imposes an obligation, it seems to me that it is at least primarily an obligation owed to and protective of the issuing bank's customer rather than the beneficiary (c.f. the view of Parker J in "*The Lena*" [1981] 1 Lloyd's Rep 68 at 78). Even if it be right to regard it also as an obligation owed to the beneficiary, it is yet one in respect of which the remedy is a claim for payment in accordance with the issuing bank's undertaking rather than a claim for damages for breach of the obligation properly to examine the documents.'*

Let alone the issue of remedy, it is arguable that the judgement did not give a certain answer regarding whether the examining bank should owe the duty of reasonable care to the beneficiary. Comparatively, the American cases have efficiently affirmed this point. In *Flagship Cruises Ltd v New England Merchants*,[146] the court decided that the nominated bank, which had negligently delayed forwarding the presented documents to the issuing bank, was obliged to pay the beneficiary for the result of negligence in his part. In *General Cable Ceat SA v Futura Trading Inc*,[147] the nominated bank had to pay the sum claimed by the beneficiary since it did not diligently examine the presented documents within a reasonable time before the issuance of a political freezing order. The significance of the above cases is to recognise that an examining bank owes a duty of reasonable care to a beneficiary concerning handling the presented documents.

Under the frame of UCP600 Article 14 (a), if the duty of reasonable care is implicit as the commenter analysed, it can be inferred from the U.S. cases that the bank will owe this duty to its beneficiary, regardless of whether it is a nominated bank acting on its nomination or a confirming bank or an issuing bank.[148] The duty might be manifested

[146] *Flagship Cruises Ltd v New England Merchants* 569 F 2d 699 (1st Cir 1978) 705
[147] *General Cable Ceat SA v Futura Trading Inc* 1983 US Dist LEXIS 19956 [5]
[148] For one thing, if the duty of reasonable care as an implied term of UCP600, it should be incorporated into the credit together with the explicit UCP provisions. Thus, it will be a part of contractual terms and

in various aspects. As the *Kredistbank Antwerp* case proposed,[149] the bank should reasonably examine the presented documents with its professional knowledge. If a bank intentionally or literally picked up an obvious typo mistake such as "Smithh" as the only discrepancy to reject the presentation, it is arguable that the bank will breach its duty of care to the beneficiary.[150] Another circumstance of breaching the duty will be negligently handling the presented documents, such as mistakenly forwarding the presented documents to an upper bank or wantonly disposing the superfluous tendered documents.[151] In addition, a bank's duty of reasonable care to a beneficiary may be triggered when there is unreasonable delay merged into an expiring credit. Provided that the time limit allowed for examination in the UCP600 Article 14 (b) is a fixed five-banking-day period, it is doubtful whether a bank causing unreasonable delay in document examination will be liable for breaching the duty of care, even handing in all the documents in the end of fifth banking day.

In conclusion, as far as the duty of reasonable care under UCP600 is concerned, the omission of express words is not absolutely equal to modification. In the author's opinion, it merely represents an intention of clarification, which means the obligation of reasonable care will be in an implicit status to remove the previous misconceptions. On the one hand, the examining bank cannot rely on fulfilling the duty of reasonable care to justify non-compliance in the presented documents. On the other hand, the implied requirement of reasonable care forces the bank to diligently exercise its obligations in the process of examination. The author also tentatively proposes that the duty of reasonable care on an examining bank benefits not only the customers, but also the beneficiaries.

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the duty will be regulated by contractual relationship as other express terms. For another, even if the duty of care will not be regulated by contract law, it has been suggested that the party can sue in tort. The elements of consideration and requirements are beyond the discussion of this part. See Ebenezer Adodo, 'A Presentee Bank's Duty When Examining a Tender of Documents under the Uniform Customs and Practice for Documentary Credits 600' (2009) 24(11) JIBLR 566, 568-570

[149] *Kredietbank Antwerp v Midland Bank plc* [1999] CLC 1108 (CA) 1110

[150] See the illustration of obvious typo mistakes in the ISBP No.681, para.25

[151] How to deal with the superfluous tendered documents, which are not required by a documentary credit, will be discussed in Chapter 4.

3.4 Doctrine of strict compliance

In contrast to the duty of reasonable care discussed above, which as a historical requirement was formally deleted from the appearance of Article 14 (a), the other traditional standard – doctrine of strict compliance has never been expressly involved into the wording of UCP. However, it does not mean that the UCP has discarded the doctrine of strict compliance as being the most general requirement for documentary examination. The UCP system has continuously applied this requirement in an implied way. According to the UCP600 Article 14 (a), the general criterion for taking up the tendered documents is whether they have constituted a complying presentation. The UCP600 Article 2, which provides the concept for a "complying presentation", has considerably reflected the original doctrine of strict compliance.[152]

The doctrine of strict compliance has been traditionally articulated by common law to govern the law of letters of credit since the beginning of the twentieth century. The doctrine is not only applicable to test the compliance between the presented documents and the terms in a documentary credit, but also appropriate to verify the compliance with the initial mandate from the customer. Since the nature of a letter of credit transaction is purely documentary, the application of strict compliance will bring vast benefits for the commercial security. Meanwhile, following the doctrine of strict compliance, the bank will efficiently proceed with its examination, as well as refrain from being dragged into the underlying contracts or facts. To some degree, the application of strict compliance can effectively support and supplement the fundamental principle of autonomy. That is why the doctrine of strict compliance at common law remains intact after the development of UCP.[153] Moreover, the UCP

[152] UCP600 Article 2: 'Complying presentation means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.'

[153] The following examples can illustrate the application of strict compliance under the UCP system. *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA) is under UCP 1974 version; *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA) is under UCP500; *Fortis Bank v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 All ER (Comm) 28 is under UCP600.

system has absorbed the essence of strict compliance and developed it in its own regime as the most important criterion to judge a complying presentation. Nevertheless, due to no express reference in the UCP system and no precise definition inherited from history, different courts may have some divergences in interpreting the degree of strictness, even existing in the same court with respect to different cases.

Since the doctrine of strict compliance, as an invisible hand, has played a dominant role in determining a complying presentation, it is essential to clarify the doctrine itself and its application, especially within the UCP600 framework. It is obvious to see that this part of research will have a determinative influence on bank's attitude to take document examinations as well as the fate of document presentation. Through analysing and comparing the case law, the author aims to reconcile the existing conflicts both in theory and in practice. Furthermore, the author will endeavour to clarify that in what degree the strictness should be applied under UCP600, so as to satisfy the needs of commercial market. The whole part will be divided into three sections. Firstly, the history and development concerning the doctrine of strict compliance will be briefly reviewed. Secondly, comparing cases under the common law and the UCP, the doctrine of strict compliance will be tested in various aspects of practical applications, including technicalities, the *de minimis* rule and the most annoying typographical errors. Thirdly, through learning from the practical experience and judging different theories, the best line of strictness will be drawn.

3.4.1 Development of strict compliance

The doctrine of strict compliance was originated in *Basse and Selve v Bank of Australasia*.[154] Then it was explained in *English, Scottish and Australian Bank Ltd v Bank of South Africa*,[155] before concluding whether the substituted ship was compliant with the terms of credit, Bailhache J stated:[156]

[154] In which concerned a certificate of quality. *Basse v Bank of Australasia* (1904) 20 TLR 431, following *Re an Arbitration between Reinhold & Co and Hansloh* (1896) 12 TLR 422
[155] *English, Scottish and Australian Bank Ltd v Bank of South Africa* (1922) 13 Ll L Rep 21 (KB)
[156] *English, Scottish and Australian Bank Ltd v Bank of South Africa* (1922) 13 Ll L Rep 21 (KB) 24

'It is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with the credit as opened.'

Subsequently, the leading House of Lords case, *Equitable Trust Company of New York v Dawson Partners Ltd.*,[157] ascertained the application of strict compliance into document examination under documentary credits governed by English law. The issue of this case was whether a requirement of "a certificate of quality to be issued by experts who are sworn brokers" can be satisfied by a certificate signed by only one broker. The House of Lords served a negative answer. As Viscount Sumner pointed out:[158]

'It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk.'

The above classic passage is oft-cited[159] and "has been never or improved upon".[160]

[157] *Equitable Trust Co of New York v Dawson Partners Ltd* (1927) 27 Ll L Rep 49 (HL)
[158] *Equitable Trust Co of New York v Dawson Partners Ltd* (1927) 27 Ll L Rep 49 (HL) 52
[159] Cited by following classic non-UCP cases: *JH Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37 (CA) 40; *Bank Melli Iran v Barclays Bank* [1951] 2 Lloyd's Rep 367 (KB) 374; *Moralice (London) Ltd*

Meanwhile, the established doctrine has also been frequently applied in the cases incorporated the UCP provisions. In *The Lena*,[161] a case incorporated the UCP 1974 revision, Parker J. stated that '*unless otherwise specified in the credit, the beneficiary must follow the words of the credit…*'[162] In *Seaconsar Far East Ltd. v Bank Markazi Jomhouri Islami Iran*,[163] a case under the UCP400, following the doctrine of strict compliance, Lloyd J held that the rejection was justifiable due to the absence of the letter of credit number and the buyer's name, which have been specifically required by the credits. In *Glencore International AG v Bank of China*,[164] a case judged under UCP500, the Court of Appeal was reluctant to follow the doctrine of strict compliance to judge a very technical discrepancy, although they admitted that a rule of strict compliance would give little scope for recognising the merits. Even in *Societe Generale SA v Saad Trading, Maan Abdulwahid Abduljmajeed Al-Sanea*,[165] the most recently case under the UCP600, Teare J still referred to the doctrine of strict compliance to measure whether the confirming bank had acted properly under the mandate of the issuing bank.

Nonetheless, the doctrine of strict compliance has not been completely applied to all the cases. Sometimes the courts would adopt a circuitous interpretation concerning loosening the strict compliance, so as to avoid the harsh legal effect. In particular, this trend can be exemplified by several cases under the UCP system. The first most notable case is *Banque de l'Indochine v J H Rayner (Mincing Lane) Ltd*,[166] in which Parker J proposed that '*Lord Sumner's statement cannot be taken as requiring rigid*

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v E D & F Man [1954] 2 Lloyd's Rep 526 (QB) 532; *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147 (QB) 151

160 *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 1 WLR 1234, 1239-1240

161 *Kydon Compania Naviera Co v National Westminster Bank Ltd (The Lena)* [1981] 1 Lloyd's Rep 68 (QB), also see *Astro Exito Navegacion SA v Chase Manhattan Bank NA (The Messiniaki Tolmi)* [1986] 1 Lloyd's Rep 455 (QB)

162 *Kydon Compania Naviera Co v National Westminster Bank Ltd (The Lena)* [1981] 1 Lloyd's Rep 68 (QB) 76

163 *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 1 Lloyd's Rep 236 (CA) 240

164 *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA) 153

165 *Societe Generale SA v Saad Trading, Maan Abdulwahid Abduljmajeed Al-Sanea* [2011] EWHC 2424 (Comm), also see *Fortis Bank v Indian Overseas Bank* [2009] EWHC 2303 (Comm), which was held under UCP600 concerning compliance of documents.

166 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA)

meticulous fulfilment of precise wording in all cases. Some margin must and can be allowed…'[167] Furthermore, in *Kredietbank Antwerp v Midland Bank plc*,[168] the Court of Appeal concluded that '*the requirement of strict compliance is not equivalent to a test of exact literal compliance in all circumstances and as regards all documents. To some extent, therefore, the banker must exercise his own judgment whether the requirement is satisfied by the documents presented to him.*'[169] Therefore, the main question is under which circumstances and to what extent the bank should take document examination with strict compliance? In order to properly answer this question, the author will first investigate the application of strict compliance in various practical aspects whether under common law and the UCP system.

3.4.2 Practical applications concerning strict compliance

3.4.2.1 Technicalities

A technical discrepancy is a kind of discrepancy that will not affect the value or merchantability of the goods.[170] In most cases, the reason for a party to refuse the documents only with technical discrepancies is based on the desire of defeating the payment, rather than the discrepancies themselves. However, the issuing bank, which is not obliged to concern "why" and the materiality of discrepancies, will cautiously follow the mandate from the applicant without deviation. Since the bank has to bear the risk for any departures from applicant's instructions, an advisable bank will mechanically follow the doctrine of strict compliance to reject the presentation with technical discrepancies. A typical example is the case of *Glencore International AG v Bank of China*,[171] in which the issuing bank rejected the factual original certificate on the basis of no express original mark as stipulated by UCP500 Article 20 (b).[172]

[167] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA) 722
[168] *Kredietbank Antwerp v Midland Bank plc* [1999] CLC 1108 (CA)
[169] *Kredietbank Antwerp v Midland Bank plc* [1999] CLC 1108 (CA) 1112
[170] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.32
[171] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA) The identification of originality has been changed in the UCP600 Article 17, so the technical issue would not be risen under UCP600.
[172] UCP500 Article 20 (b) stipulated: 'Unless otherwise stipulated in the Credit, banks will also accept as an original document(s), a document(s) produced or appearing to have been produced…provided that

Although the courts described this discrepancy as a very technical one and lacking in merit, they were reluctant to justify the rejection. Meanwhile, Sir Thomas Bingham pointed out '*a rule of strict compliance gives little scope for recognising the merits.*'[173]

Since a technical discrepancy can be easily found in a bundle of presented documents, the beneficiary or the issuing bank always makes use of its availability as a best chance to avoid payment. Therefore, the result in the *Glencore* case seems to be practically unfair to the presenter. For solving a similar issue with regard to an original mark, the courts in *Kredietbank Antwerp v Midland Bank plc* [174] adopted a different interpretation from the reasoning in *Glencore* to balance the detrimental impact of technicalities. The court observed that the UCP500 Article 20 (b) was not a rule to entitle the bank to reject an obvious original document, so the issuing bank was obliged to accept the documents. Clearly, the robotic approach to apply the doctrine of strict compliance concerning technical discrepancies has been set off by the courts; however, the bank which accepts these discrepancies will be obliged to bear the perils of deviation from the mandate of credit.

3.4.2.2 No application of the *de minimis* rule

In *Moralice (London) Ltd v E D & F Man,*[175] the court rejected the presented documents covered the quantity of 499,700 kilos instead of 500,000 kilos, even though the difference was merely 0.06%. Based on the established doctrine of strict compliance in documentary credits, the English court in the first time clarified '*though the* de minimis *rule would have applied to such short shipment as between buyer and seller under a normal contract of sale, that rule could not be prayed in aid where payment was to be made against documents in accordance with a letter of credit.*'[176]

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it is marked as original and, where necessary, appears to be signed.'

[173] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA) Both the Rix J in the first instance (p.148) and the judges in the Court of Appeal (p.153) admitted the technicality of this discrepancy.

[174] *Kredietbank Antwerp v Midland Bank plc* [1999] CLC 1108 (CA) 1118

[175] *Moralice (London) Ltd v E D & F Man* [1954] 2 Lloyd's Rep 526 (QB)

[176] *Moralice (London) Ltd v E D & F Man* [1954] 2 Lloyd's Rep 526 (QB) 527

Several years later, the court in *Soproma SpA v Marine and Animal By-Products Corp*,[177] which followed the *Moralice* spirit, held that the *de minimis* rule did not apply in the letters of credit. In this case, the controversial difference was a matter of 0.5º F. The credit called for the temperature no more than 37.12 ºC, whereas the bill of lading stated that the temperature was not exceed 100 ºF. McNair J., who had also decided the *Moralice* case, regrettably stated that '*I suppose in strict law I should give effect to this objection, but I confess that I should be reluctant to do so if it stood alone.*'[178] Jack straightforwardly comments that 'the case indicates the reluctance of judges to take the principle of strict compliance to absurd lengths.'[179]

Although the common law has illustrated the strong desirability of following the terms of the credit precisely, it may infer from the above statements that the judge would like to find a way around the strict compliance if the small numerical difference is the only discrepancy in the documents. In *The Messiniaki Tolmi*,[180] the court accepted the debatable survey report which described the vessel as being 51,412.58 gross tonnes instead of a figure of 51,412.18 gross tonnes appearing in the credit. Leggatt J. distinguished the current difference of 1/285th of one per cent with the fact in the *Moralice* case, in which McNair J. declined to apply the *de minimis* rule to a difference of 1/15th of one per cent. Meanwhile, Leggatt J. concluded that '*it is as though a scarcely perceptible part had been left off the dot of one of the i's in the name of the vessel. As a venial imperfection in rendition I would ignore it.*'[181] Obviously, the judge in *The Messiniaki Tolmi* has boldly adopted a reasonable interpretation to eliminate the detrimental impact of unduly strict compliance.

Following this trend, the UCP system has publicly inserted the provisions to allow

[177] *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep 367 (QB)
[178] *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep 367 (QB) 390
[179] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.33
[180] *Astro Exito Navegacion SA v Chase Manhattan Bank NA (The Messiniaki Tolmi)* [1986] 1 Lloyd's Rep 455 (QB)
[181] *Astro Exito Navegacion SA v Chase Manhattan Bank NA (The Messiniaki Tolmi)* [1986] 1 Lloyd's Rep 455 (QB) 461

certain tolerances concerning the credit amount, quantity and unit prices.[182] Therefore, under the UCP600 Article 30 (b)[183], the difference of 0.06% in the *Moralice* case would be justifiable. Nonetheless, apart from these express terms, it is arguable that the maxim of *de minimis non curat lex* still cannot apply in the other aspects of a credit, such as the situation regarding temperature description in the *Soproma SpA* case. In practice, the application of no *de minimis rule* may cause the troubles and even nonsenses sometimes. Nevertheless, in the author's opinion, based on the nature of documentary sale in international trade, the doctrine of strict compliance should not be loosened as far as allowing the *de minimis* rule. Since the documents act as the only guarantee for the seller's physical performance regarding the actual goods, and the discrepancy on the documents necessarily affects the buyer's resale position in an international chain sale, opening *de minimis* exceptions within the doctrine of strict compliance will inevitably cause uncertainty to the daily transactions and undermine the foundation of document examination. Therefore, the UCP and the court should endeavour to protect the doctrine of strict compliance rather than trample it with too many exceptions.

3.4.2.3 Typographical errors

Typographical errors, as the most frequently occurring kind of discrepancies, are inevitably hidden in the presented documents and threaten the authority of strict compliance. Surprisingly, the UCP system did not regulate this area until the emergence of the ISBP No.645 in 2003. In the new ISBP 2013 revision, it persistently provides that 'a misspelling or typing error that does not affect the meaning of a word or the sentence in which it occurs does not make a document discrepant.'[184]

[182] See UCP500 Article 39 and UCP600 Article 30. It will be further discussed in the part regarding descriptions in documents.

[183] UCP600 Article 30 (b) stipulates: 'A tolerance not to exceed 5% more or 5% less than the quantity of the goods is allowed, provided the credit does not state the quantity in terms of a stipulated number of packing units or individual items and the total amount of the drawings does not exceed the amount of the credit.'

[184] ISBP No.745, section A23, same as in the ISBP No.645 2007 revision, para.25 The judicial application can be found in a Chinese case—*South Korean Hyosung Corp v China Everbright Bank (Xiamen Branch)* Civil Judgement (2003) Min Jing Zhong Zi Bo 069, Fujian High People's Court, PRC. In this case, the court adopted approach in the ISBP held that the typo of "INC" in a manufacturer's

Meanwhile, the ISBP tentatively rather than exhaustively illustrates a few tolerable and intolerable circumstances.[185] However, until the publication of the ISBP, the typing error was completely left in the discretion of courts to decide whether it would constitute a discrepancy. Even after the emergence of the ISBP, the limited number of examples within still cannot solve the various problems in practice. Unfortunately, the courts, which play a crucial role in judging typing errors, always develop their own standards and deliver inconsistent rulings concerning similar typing mistakes. Therefore, typographical errors, as the most troublesome discrepancies under the transactions of documentary credits, continuously challenge the line of strictness.

Different courts in the world have developed their own standards with respect to justifying typing errors in their leading cases. Among them, the typical standards put forward by the US court in *Beyene v Irving*[186] have been consistently followed by several cases.[187] In that case, the court rejected the bill of lading with "Mohammed Soran" as a notifying party instead of "Mohammed Sofan" required by the credit. The first test used by the court was whether the misspelling was unmistakably clear so that it was too obvious to a reasonable bank. Secondly, the court would detect whether the misspelling was inconsequential. Thus, the court reject this material misspelling since neither would "Soran" be obvious to recognise as "Sofan" in the Middle East, nor the notifying name in a bill of lading would be inconsequential. By contrast, a leading case in the Hong Kong court accepted the documents containing a typographical error in a draftee name. In *Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd*,[188] Kaplan J. agreed with the opinion in *Gutteridge*[189] that:

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name would lead to another meaning compared with stipulating "CO. LTD".

[185] See ISBP No.745, section A23 and ISBP 2007, para.25

[186] *Dessaleng Beyene and Jean M Hanson v Irving Trust Co* 762 F 2d 4 (2nd Cir, 1985)

[187] The second test has been followed by *Bank of Cochin Ltd v Manufacturers Hanover Trust Co* 612 F Supp 1533 (DCNY 1985), in which held that the typo of insurance number was not inconsequential. The test has also been applied into *Pasir Gudang Edible Olis Sdn Bhd v The Bank of New York* Index No 603531/99 (NY Sup Ct 1999), which held that the deviation in the name of destination port was material.

[188] *Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd* [1991] 2 HKLR 35 The case was subject to the UCP 1974 version.

[189] Maurice Megrah, *Gutteridge & Megrah's Law of Bankers' Commercial Credit* (7th edn, Europa Publications 1984) 120, quoted by *Hing Hip Hing Fat Co Ltd v Daiwa Bank Ltd* [1991] 2 HKLR 35, 44

'Strict compliance does not extend to the dotting of i's and crossing of t's or to obvious typographical errors either in the credit or the documents. Because of the wide variations in language to be found in both, it is impossible to be dogmatic or even to generalise. Each case is to be considered on its merits, and the bank's obligation may obviously be most difficult to fulfil.'

Meanwhile, Kaplan J. put forward the three following points which would affect the fate of discrepancy. Firstly, the typographical error was minor and could easily occur in a non-English society. Secondly, the bank was not misled by this error.[190] Thirdly, the bank was also vulnerable to repeat the error. On the basis of above points, the court held that the word of "Industrial" was an obvious typographical error compared with the word of "Industries", so that the bank would not be entitled to rely on this discrepancy. In the author's opinion, despite the different interpretations, naturally the methods used by *Hing Hip Hing* are the same as the tests established by *Beyene v Irving*, since all the concerns have been focused on "obviousness" and "materiality". The trivial difference is that the court in *Hing Hip Hing* has adopted a more commercial approach with the aid of factual analysis. Nonetheless, application of materiality as the test for typographical errors would potentially threaten the principle of autonomy, and furthermore testing the materiality of particulars required by the credit would be full of uncertainty.

Nonetheless, a corresponding case held by the Singaporean court provided a different reasoning concerning typographical errors. In *United Bank Ltd v Banque Nationale de Paris,*[191] the court held that the bank was entitled to reject the documents with the additional "Pte" in its company name compared with the requirement in the credits. Even though the evidence was adduced to show that it was impossible in Singapore to

[190] This method was been applied into *E&H Partners v Broadway National Bank* 39 F Supp 2d 275 (SDNY 1998)

[191] *United Bank Ltd v Banque Nationale de Paris* [1991] SGHC 78, [1992] 2 SLR 64 The case was subject to the UCP 1974 version.

co-exist with such a similar name for two companies, the judge still insisted that '*any discrepancy, other than obviously typographical errors, will entitle either the negotiating or the issuing bank to reject.*'[192] Furthermore, the judge emphasised that the compliance of a presented document should not depend on whether the banker was aware of this position in law. In a letters of credit transaction, the parties only need to concern themselves with documents rather than the commercial insignificance. In other words, although the test of "obviousness" was still affirmed, the attitude of the court has changed to support the objective compliance based on the analysis of documents instead of the subjective test of "materiality". The principle was likewise adopted in *Hanil Bank v PT Bank Negara Indonesia (Persero)*[193] under the UCP500. The court concluded that, if the bank merely examined the appearance of documents following the requirement of the UCP500 Article 13(a)[194], the misspelling of the beneficiary's name as "Sun Jin" could not be obviously recognised as the right style of "Sun Jun". However, the *Hanil* decision has been criticized by commenters as "a formalistic mirror-image application of the strict compliance standard"[195] because it failed to distinguish the different standards concerning compliance between commercial invoices and general documents.

In stark contrast to the *Hanil* case, *Voest-Alpine Trading USA Co v Bank of China*,[196] a US case delivered in the same month, had adopted a completely different approach dealing with typographical errors. There were three typing errors in the tendered documents, including the inversion of beneficiary's name, wrong number of documentary credit in a fax copy and a misspelled destination port in the certificate of origin. Surprisingly, the court rejected the nit-picking approach and concluded that all

[192] *United Bank Ltd v Banque Nationale de Paris* [1991] SGHC 78, [1992] 2 SLR 64, para.36
[193] *Hanil Bank v PT Bank Negara Indonesia (Persero)* 2000 WL 254007 (SDNY 2000) The case was subject to the UCP 500.
[194] UCP500 Article 13 (a) states: 'Banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit…'
[195] Kyle Roane, '*Hanil Bank v PT Bank Negara Indonesia (Persero)*: Continuing the Quandary of Documentary Compliance under International Letters of Credit' (2004-2005) 41 Houston Law Review 1053, 1078
[196] *Voest-Alpine Trading USA Co v Bank of China* 167 F Supp 2d 940 (SD Tex 2000), affirmed in 288 F 3d 262 (CA 5 Tex 2002) The case was subject to the UCP 500.

the typographical errors should be accepted by the bank. In the process of reasoning, the court discarded the preceding test of materiality which would undermine the principle of autonomy. Instead of it, the court proposed:[197]

> '*a common sense, case-by-case approach would permit minor deviations of a typographical nature because such a letter-for-letter correspondence between the letter of credit and the presentation documents is virtually impossible. While the end result of such an analysis may bear a strong resemblance to the relaxed strict compliance standard, the actual calculus used by the issuing bank is not the risk it or the applicant faces but rather, whether the documents bear a rational link to one another. In this way, the issuing bank is required to examine a particular document in light of all documents presented and use common sense but is not required to evaluate risks or go beyond the face of the documents.*'

Comparing with the overly formalistic method in the *Hanil* case, the common sense approach developed by the *Voest-Alpine* case would be much more favoured by the documentary credit community.[198] Essentially, the approach illustrated by the *Voest-Alpine* case is in accordance with the development of the UCP600 provisions. While the UCP500 Article 13 (a) required the bank to examine *all* the documents so as to ascertain whether they appear to be compliant, the UCP600 Article 14 (a) only focuses on whether the documents constitute a complying presentation as a whole. Moreover, the UCP600 Article 14 (d)[199] points out that data in a document need not be identical but must not conflict with each other. Therefore, the test under the UCP600 might be inferred as a decision on whether the documents with typographical errors will obviously relate to the transaction on their face. However, this test may still suffer

[197] *Voest-Alpine Trading USA Co v. Bank of China* 167 F Supp 2d 940 (SD Tex 2000) 947

[198] Kyle Roane, '*Hanil Bank v PT Bank Negara Indonesia (Persero)*: Continuing the Quandary of Documentary Compliance under International Letters of Credit' (2004-2005) 41 Houston Law Review 1053, 1079

[199] UCP600 Article 14 (d) provides: 'Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.'

a potential difficulty, because in principle a deficiency in one document could not be simply cured by reference to another.[200] Meanwhile, the subjective test concerning the meaning of words in the ISBP cannot drastically make up for this theoretical imperfection. Observing from the above cases, practically the courts prefer relying on the materiality of particulars in a specific document to judge whether the typographical error could affect the meaning of the word. The most evident example should be that the misspelling regarding the beneficiary's name in a transport document will be treated much more seriously than if the same misspelling happened in other general documents.

In respect of the existing tests developed by different courts, the author believes that the test in the *Voest-Alpine* case should be the most practice-oriented approach; however, it would not be the safest approach for the bank. Under the current UCP system, the safest approach for the bank is to reject the documents containing typographical errors unless the nature of the error is too unmistakable to be misunderstood as a different particular from the one specified in the credit.[201] Due to the principle of autonomy, it is not proper to impose on the bank a burden to measure the commercial significance of a typing error or to judge the facts of the underlying transaction. The bank is merely obliged to reasonably assess the typing errors on the appearance of documents within the whole context.

3.4.3 The line of strictness

Through the above analysis in practical applications, it is evident that the fundamental debate was triggered by recognising the level of strict compliance. Since, in practice, the applicant or the issuing bank may intentionally take advantage of strict compliance to pick up a very technical discrepancy with the aim of defeating a rightful claim from the beneficiary or the negotiating bank, the courts have to justify that the strict

[200] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 1 Lloyd's Rep 236 (CA) 240 The issue of linkage will be elaborately analysed in the following parts.
[201] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.38

compliance is not equal to a mirror image or duplication. While, on the other hand, as the stronghold of documentary credits, the relaxation of strict compliance will cause insecurity and uncertainty. Furthermore, it is unfair to impose on the bank an obligation to evaluate the materiality of discrepancies or consider the facts of underlying transactions. Therefore, in order to solve this practical paradox, it is of great importance to draw a line for strictness, which will be precisely fit for the spirit of the UCP as well as being suitable for the reasonable expectations of commercial markets.

Reviewing the existing theories, there are three types of standards concerning the level of strictness: "literal compliance", "substantial compliance" and "wider strict compliance". Obviously, the reaction of commercial markets is the fundamental reason to direct the legal attitude. The literal compliance, which will cause the high rate of rejection and lead to undeserved interruptions for documentary credit operations, cannot satisfy the needs of practical markets nor benefit the wide application of documentary credits. Even in the leading case defining the doctrine of strict compliance, *Equitable Trust Company of New York v Dawson Partners Ltd*,[202] the court still took a less rigid measure to treat the alleged discrepancy regarding an inspector's name in the certificate as an invalid ground for rejection. It is clear that the court did not interpret "strict compliance" as "literal compliance", which required replicating the credit by verbatim.

Since the literal application of strict compliance favours formalism over reasonably commercial expectations, the subsequent cases under the UCP system consistently clarify the distinctions between literal compliance and the strict compliance. In *Banque de l'Indochine v J H Rayner (Mincing Lane) Ltd*,[203] Parker J restated that '*Lord Sumner's statement cannot be taken as requiring rigid meticulous fulfilment of precise wording in all cases. Some margin must and can be allowed…*'[204] In *Kredietbank*

[202] *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 25 Ll L Rep 90 (CA) This point was delivered by the Court of Appeal.
[203] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA)
[204] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA) 721

Antwerp v Midland Bank plc,[205] Evan J stressed that '*the requirement of strict compliance is not equivalent to a test of exact literal compliance in all circumstances and as regards all documents.*'[206] Therefore, the doctrine of strict compliance should not be applied in a literal or robotic manner and the bank should not fulfil its examination by mechanical duplication of the relevant parts in the credit. Consequently, although the tenets of strict compliance remained sacrosanct, English law has never required the level of strictness to an absolute degree, to achieve duplication or mirror image.

The second type of standard is substantial compliance, which has been judicially created by the US court in order to promote equity for the beneficiary in a letter of credit transaction.[207] As a less stringent standard, the rule of substantial compliance merely focuses on whether the presented document would achieve its commercial object.[208] Thus, a tendered document with insignificant departures from a commercial point of view should be acceptable. Take a typical US case *Flagship* as an example.[209] In this case, regardless of the express requirement, the court accepted a discrepant statement on the presented draft, which substituted the word of "draft" by the phrase "letter of credit". The court insisted that the deviation was insignificant and this result would realize the functional equal of documentary credit. Unfortunately, as Professor Dolan analysed, 'some courts that resort to these devices see them as marginal deviations from letter of credit discipline and seem unaware that they are in effect corroding the letter of credit as a commercial device.'[210]

As a chief rival to the doctrine of strict compliance, the application of substantial compliance runs contrary to the fundamental tenets of documentary credits. Since the

[205] *Kredietbank Antwerp v Midland Bank plc* [1999] CLC 1108 (CA)
[206] *Kredietbank Antwerp v Midland Bank plc* [1999] CLC 1108 (CA) 1112
[207] Kyle Roane, '*Hanil Bank v PT Bank Negara Indonesia (Persero)*: Continuing the Quandary of Documentary Compliance under International Letters of Credit' (2004-2005) 41 Houston Law Review 1053, 1065
[208] Peter Ellinger, 'The UCP 500: Considering a New Revision' [2004] LMCLQ 30, 38
[209] *Flagship Cruises Ltd v New England Merchant* 569 F 2d 699 (1st Cir 1978)
[210] John Dolan, *The Law of Letters of Credit: Commercial and Standby Credit*, vol 1 (4th edn, A S Pratt 2007) para 6-4

role of a bank involved in a letter of credit is to examine whether the presented documents are compliant on their face, there is no obligation on the bank to speculate the significance of any deviations in the documents. Moreover, evaluating the commercial significance of alleged discrepancies will be time-consuming so as to reduce the efficiency of credits and violate the basic objective of promptness. Although the original intention of substantial standard is to prevent the bank from abusing the rule of strict compliance, this purpose cannot be perfectly achieved. The application of substantial compliance will accordingly release wider room for the bank to interpret the discrepancy and it contains the danger of abusing this test. Meanwhile, different commercial interpretations would dramatically cause the legal uncertainty and undermine the foundation of documentary credits. Consequently, 'the idea of substantial compliance is thoroughly unworkable.'[211]

'*While the English and Canadian courts have not adopted a rule of substantial documentary compliance there has apparently been recognition that there must be some latitude for minor variations or discrepancies that are not sufficiently material to justify a refusal of payment.*'[212] Rather than rejecting the rule of strict compliance, English courts and the UCP drafters 'have fashioned rules that counterbalance the somewhat harsh results of the strict rule'.[213] Therefore, the optimal standard of wider strict compliance comes out. Wider strict compliance has succeeded the nature of strict compliance, but might tolerate a few trivial and immaterial variations from the requirements of the credit, which would render the documents discrepant in the view of literal compliance. Essentially, the core issue in this test is to establish what kind of discrepancy belongs to the ambit of triviality. It has been admitted by authorities that 'strict compliance does not extend to the dotting of i's and crossing of t's or to obvious typographical errors either in the credit or the documents.'[214] Meanwhile, a slight

[211] John Dolan, *The Law of Letters of Credit: Commercial and Standby Credit*, vol 1 (4th edn, A S Pratt 2007) para 6-15
[212] *Bank of Nova Scotia v Angelica-Witewear* [1987] 1 SCR 59, 67
[213] John Dolan, *The Law of Letters of Credit: Commercial and Standby Credit*, vol 1 (4th edn, A S Pratt 2007) para 6-15
[214] Richard King, *Guttidge & Megrah's Law of Bankers' Commercial Credit* (8th edn, Europa

margin of error for such documents must and can be allowed.[215] Regrettably, there was no definitive test laid down by the courts as to what amounts a trivial difference that can be disregarded. The relative segment can be detected through the judgement of Lloyd LJ in *Seconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*:[216]

> *'I cannot regard as trivial something which, whatever may be the reason, the credit specifically requires. It would not, I think, help to attempt to define the sort of discrepancy which can properly be regarded as trivial. But one might take, by way of example,* Bankers Trust Co v State Bank of India, *[1991] 2 Lloyd's Rep 443 where one of the documents gave the buyer's telex number as 931310 instead of 981310.'*

Since the judge did not define which sort of discrepancies could be regarded as trivial, the division of discrepancies is still full of uncertainty and depends on the discretion of different courts. As Jack doubted, 'if the test, as suggested in *Seaconsar*, is that 'trivial' errors can be ignored, then one has the possibility of the parties arguing over whether a particular error is trifling (*de minimis*: 'mimimus' least, smallest, trifling), when the document must be rejected, or merely trivial, when it must be accepted.'[217]

Several years later, in *Kredietbank Antwerp v Midland Bank plc*,[218] the Court of Appeal recognised that it was difficult to draw the distinction between "trivial" discrepancies and those which require the bank to reject the tendered documents. Subsequently, the court adopted an unexpectedly wide sight to delimit the triviality of discrepancies. The court accepted a "draft surveyor report" signed by "Daniel C. Griffith (Holland) BV… member of the worldwide inspectorate" substituting for a

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[215] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA) 721

[216] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 1 Lloyd's Rep 236 (CA) 240 It should be noted that under UCP600 Article 14 (g), for a generic document, 'contract details (telefax, telephone, email and the like) stated as part of the beneficiary's and the applicant's address will be disregarded.'

[217] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.34, fn.2

[218] *Kredietbank Antwerp v Midland Bank plc* [1999] CLC 1108 (CA) 1111

"draft survey report" issued by "Griffith Inspectorate" required by the credit. Concerning the "draft survey report", the judge held that the implied intention of parties to call for this document was to understand the quantity of loading cargo rather than the vessel measurements themselves. Thus, the controversial "draft surveyor report" would be fit for the functional significance. Although the difference between words seems trivial, it is arguable that the application of wider strict compliance might go too far to loosen the doctrine of strict compliance.[219] In the author's opinion, the functional approach itself, which has been adopted by the court to evaluate the triviality, is feasible. However, with full respect, the court seemed to overdo this approach through analysing the commercial intention of instructions.[220] The trivial discrepancy, however in the author's thoughts, is a kind of discrepancy which can be unmistakably identified by a reasonable banker without the aid of extrinsic factors.

Inferring from the current UCP regime and case law authorities, the author suggests that the UCP600 is looking for a wider strict compliance test. Although the UCP600 aims to reduce the rate of rejection and the case law has tried to create leeway from mechanical examination, it is crystal clear that the threshold is to keep the doctrine of strict compliance, rather than adopt the method of substantial compliance.[221] However, in order to counterbalance the harsh result led by strict compliance, the UCP has adopted a more flexible attitude than the position at common law. Firstly, the UCP has reserved certain margins for quantity of the goods in Article 30. Secondly, references

[219] *Jack* had the same opinion but it was based on a different point regarding the name of inspector. Jack stressed that 'many international firms of professionals have affiliates or subsidiaries which have very similar names but which do not necessarily have the legal identity, reputation or liability insurance. Documents may need to be passed on to sub-buyers, customs authorities or official bodies who require exact compliance. It is not for a bank to speculate or investigate why the certificate was required in that form.' In Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009)8.37

[220] In Elligner's paper (Peter Ellinger, 'The Doctrine of Strict Compliance: Its Development and Current Construction' in Francis Rose (ed), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (LLP 2000) 197), he affirmed that the courts in *Kredietbank Antwerp* did not seek to modify the doctrine of strict compliance, but he roughly referred that the courts just used a reasonable approach to interpret the doctrine. The author shares a doubtful view considering the second part of his statement.

[221] The preclusion rule in the UCP, which will be discussed in Chapter 6 of this thesis, is also regarded as an effective way to control the abuse of strict compliance, because it requires the alleged discrepancies should be written down in a definite form within the stipulated time. See John Dolan, 'Weakening the Letter of Credit Product: the New Uniform Customs and Practice for Documentary Credits' [1994] IBLJ 149, 157

of judging a complying presentation are not restricted. International standard banking practice, as a source being referred, will involve an open mind to prove justice. Finally, the UCP requires a complying presentation as a whole rather than seeking for individual correspondence. As will be seen in Chapter 4, the requirements for general descriptions and data in the documents have been minimised to "no conflict".[222]

Through the above discussion, it is clear that the rule of literal compliance, which requires an overly pedantic and mirror-image examination, cannot satisfy the needs of documentary credit as a commercial device. Conversely, the approach of substantial compliance, which measures the discrepancies by their commercial significance, would be conducive of uncertainty and incompatible with the tenets of documentary credits. Hence, the rule of wider strict compliance will be the most recommendable standard in the process of examination. Although the principle of strict compliance remains intact, both the English courts and the provisions of UCP have recognised that slight margin must and can be allowed. For instance, the following discrepancies should be tolerated by the margin—an obvious typographical error, an imperceptible divergence or a trivial discrepancy which would be unmistakably recognised by a reasonable banker. However, it is regrettable to see that in most cases the bank has to bear at its own risk to make any deviations from strict compliance. Consequently, apart from the above tolerable situations, an advisable bank should cautiously perform the rule of strict compliance in the process of its examination. The mission of courts lies in delivering a reasonable interpretation concerning the level of strictness, as well as leaving the doctrine of strict compliance unscathed,[223] so as to correspond with the compliance spirit in the UCP.

3.5 Time for examination

As an effective financial instrument, documentary credit has to provide an efficient

[222] See UCP600 Article 14 (d) and Article 14 (e), which will be elaborately discussed in Chapter 4.
[223] Peter Ellinger, 'The Doctrine of Strict Compliance: Its Development and Current Construction' in Francis Rose (ed), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (LLP 2000) 198

payment to international traders. Banks involved in a document credit operation, are not only obliged to check the presented documents according to the general standard of compliance, but also need to fulfil this obligation in a timely manner. Hence, after stating the general standard for document examination, the UCP600 lists another general requirement concerning time for examination in its Article 14 (b).[224] It authorises the bank to have "a maximum of five banking days" following the day of presentation to determine whether a presentation is complying.[225] It continues to state that the five-day period is not curtailed or affected by any expiry date on or after the date of presentation. Obviously, it means that the bank is not obliged to expedite its examination so as to create an opportunity of curing discrepancies for the beneficiary, who makes the presentation less than five banking days before expiration.

The stipulation of "a maximum of five banking days"; however, constitutes a major innovation compared with its predecessors. Unexpectedly, the innovative statement in the UCP600 Article 14 (b), which endeavours to solve the previous controversies on the length of examination time, triggers many new debates in academia.[226] The author will firstly illustrate the current leading interpretations, and then tentatively put forward own thoughts with respect to the meaning of Article 14 (b). Nonetheless, as we will see later, different interpretations in theory will inevitably lead to practical difficulties in judging the time allowance regarding document examination. Therefore, until the ICC Banking Commission clarifies the rules, controversies around the time frame in the UCP will remain persistent.

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[224] Article 14 (b) stipulates: 'A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.'

[225] Although not expressly stated in Article 14 (b), it seems clear that each bank mentioned in the article has a separate period of five banking days to take for examination. See Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 5.47

[226] Another persistent controversy under the UCP500, considering the application of preclusion rule to the examination time, was also not solved by the UCP600. However, the author will elaborate on this on the part of preclusion rule in Chapter 6.

3.5.1 Developments and previous controversies

The length of time for examination, which is highly relevant to business efficacy, has been consistently stressed by different UCP revisions. Dating back to the UCP400,[227] it is stipulated that the bank should examine the tendered documents and determine the fate of presentation within a reasonable time. Clearly, the "reasonable time" without any elaboration was the only criterion to measure the time spent on the document examination in the UCP400. Later in the UCP500, the most significant change for the time frame was to establish a seven-banking-day outer limit to restrict the criterion of reasonable time.[228] While, under UCP500, the bank had to perform two separate obligations during the limit of seven banking days,[229] i.e. documents examination and determination in a reasonable time, and sending a refusal notice without delay. Nevertheless, the UCP500 did not state the time division for each obligation and still kept the "reasonable time" as the criterion to measure the time taken for examination.

In English law, "reasonable time" generally means that such a period of time would be spent reasonably under the circumstances of a particular case. In *Hick v Raymond and Reid*,[230] Lord Herschell held that '*…there is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances…the only sound principle is that "reasonable time" should depend on the circumstances which actually exist.*'[231] Therefore the measurement of reasonable time, essentially as a matter of fact, varies from case to case. In a leading case, *Bankers Trust Co v State Bank of India*,[232]

[227] In the UCP 400 Article 16 (c), it states that 'the issuing bank shall have a reasonable time in which to examine the documents and to determine as above whether to take up or to refuse the documents.' See also 1974 Revision Article 8 (d), 1963 Revision Article 8 and 1951 Revision Article 10.

[228] UCP500 Article 13 (b) stipulates: 'The Issuing Bank, the Confirming Bank, if any, or a Nominated Bank acting on their behalf, shall each have a reasonable time, not to exceed seven banking days following the day of receipt of the document, to examine the documents and determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly.'

[229] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA) 42 In this case, the judge concluded that giving a notice of refusal "without delay" was a separate and additional obligation on the bank from that of examining and determining presentation within a reasonable time. Therefore, the bank which has rapidly completed examination cannot get rid of the liability caused by an unreasonable delay in notification.

[230] *Hick v Raymond and Reid* [1893] AC 22 (HL) 29

[231] *Hick v Raymond and Reid* [1893] AC 22 (HL) 32

[232] *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep.443 (CA)

Lloyd LJ supported the argument that the reasonable time '*will depend, not only on the number and complexity of the documents, but also on the level of sophistication in dealing with documents in the particular country.*'[233] Furthermore, although the time spent on consultation with the applicant for seeking a pre-refusal waiver would be allowed,[234] Lloyd LJ firmly clarified that the time spent on delegating the customer to examine for further discrepancies could not be justified as reasonable time.[235] Despite checking more than 900 pages of documents in three days, the bank still did not fulfil its examination within reasonable time, since it had wrongly enabled the applicant to do a further examination.

By contrast, in *Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd*,[236] taking three banking days to check mere 19 pages of documents against a four-page credit was held as reasonable. Kaplan J explained that both the small size and the language skills of the involving bank should be considered in the processing of judging the length of reasonable time. Apart from the points mentioned above, other factors may also be considered in a particular case, such as number and complexity of the presented documents, size and resources of the bank, the volume of work for the bankers to handle at the material time[237] and difficulties to get an upper authority to recheck the alleged discrepancies etc…[238] Clearly, a non-exhaustive list for judging the reasonable time brought great uncertainty and much litigation.[239] With the emergence of continuous controversies, there were considerable thoughts on defining an objective test to judge the time permitted for a bank to do its examination.[240] As a result, the

[233] *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep.443 (CA) 449
[234] The point had been further recognised by the UCP500 Article 13 (c) and UCP600 Article 14 (b).
[235] *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA) 452
[236] *Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd* [1991] 2 HKLR 35
[237] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA) 41-42
[238] See Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 5.50; Richard King, *Guttidge & Megrah's Law of Bankers' Commercial Credit* (8th edn, Europa Publications 2001) 144-145; Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 241; King Tak Fung, *Leading Court Cases on Letters of Credit* (ICC Publication No.658, ICC 2005) 83-84
[239] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 5.49
[240] Under the UCP400, replies to a detailed questionnaire showed approximately equal support for the status quo and for a change. See Bernard Wheble, *UCP 1974/1983 Revisions Compared and Explained* (ICC Publication No.411, ICC 1984) 33. However, the meeting before the publication of UCP600, 36 out of 37 has voted for a fixed period.

UCP600, which replaces the "reasonable time" by a specific period of time, is a welcome development on first reading.

3.5.2 Current situation and existing controversies

Under UCP600, the previous test of "reasonable time" for measuring time of examination has been officially deleted. Instead of it, the new statement of "a maximum of five banking days" is introduced. Meanwhile, it is suggested that the examination time given in the UCP600 Article 14 (b) should be read in tandem with the consultation time stipulated in the UCP600 Article 16 (b)[241] and the notice time expressed in the UCP600 Article 16 (d).[242] The reason is that all these provisions have shared a common subject, i.e. no more than a same five-banking-day period, which means a bank must examine the presented documents, decide whether to take up the presentation, and send a required notice of refusal if it has determined to reject the documents, within a maximum of five banking days or no later than the close of the fifth banking day.[243]

From Figure 4 attached below, it is clear to observe that the bank will be allowed a maximum of five banking days to take its examination and rejection, in case there are further actions to be taken when the bank encounters a non-complying presentation. Unexpectedly, the word "maximum" has triggered fierce controversies concerning whether the time for examination should be based on a fixed period or any reasonable time within the limit of that period.[244] Put in another way, provided that a bank can finish document examination and rejection in a shorter time than five banking days,

[241] The UCP600 Article 16 (b) states: 'When an issuing bank determines that a presentation does not comply, it may in its sole judgment approach the applicant for a waiver of the discrepancies. This does not, however, extend the period mentioned in sub-article 14 (b).'

[242] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 242 The UCP Article 16 (d) provides: 'The notice required in sub-article 16(c) must be given…no later than the close of the fifth banking day following the day of presentation.'

[243] Although the UCP600 Article 16 (d) has omitted the test of "without delay" for sending a refusal notice, it is argued by the scholars that the new statement of "no later than" will not change the nature of this obligation. See Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 119

[244] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 132

can it be immune from the liability by taking the full period of five banking days, even if there involves a deliberate delay?

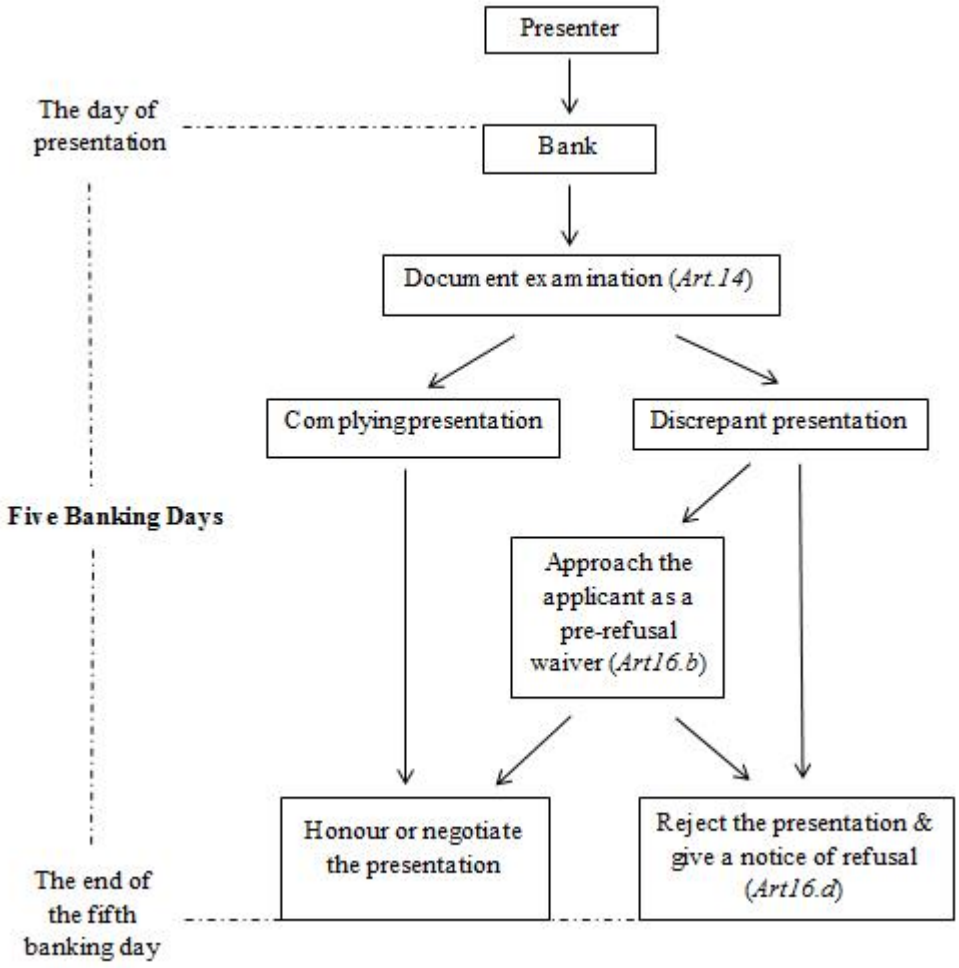

Figure 4

One argument is that 'the use of the word, "maximum" would suggest that five banking days is not a fixed period, within which a bank can in all instances safely reject documents without being penalised with late and consequently invalid rejection.'[245] Therefore, it is suspicious that five banking days is only an outer limit and the real examination time is supposed to be based on the previous criterion of "reasonable time". The commenters continuously argue that, although the UCP600

[245] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 240 Such an interpretation of Article 14 (b) is also applied to the Article 16 (d) which sates sending a rejection notice "no later than the close of the fifth banking day…".

does not contain an express requirement for examination to be done within a reasonable time, it is not clear to prove that these requirements are no longer relevant under UCP600. Moreover, since it is unfair to protect a deliberate delay by aid of the tolerance of five banking days, the continuing application of "reasonable time" would reflect the needs of international standard banking practice. Nevertheless, the previous fundamental difficulties to apply the test of "reasonable time" have not been eliminated. Therefore, as predicted by Professor Ellinger, 'courts will probably be unwilling to reintroduce the requirements of "reasonable time" or "undue delay", given that these terms were deliberately omitted from the text of UCP600.'[246]

The other argument focuses on troubles brought by "reasonable time" and supports a fixed time prescribed by the UCP600 Article 14 (b). Without doubt, this is a simpler rule for bankers and applicants to apply; however, it is suggested that it does not constitute a fairer rule for the other parties because the bank will be immune from any arguments for delay within the period. In the meantime, 'under UCP600, where the issuing bank has a fixed period of five banking days, there is perhaps less risk in involving the applicant, but it cannot be regarded as good practice; it is the job of the bank alone to examine the documents.'[247] Furthermore, from a commercial point of view, such interpretation is open to abuse. Suppose that a credit gets close to its expiry date, bankers might deliberately delay the examination and rejection until the end of the fifth banking day so as to minimise the possibility of re-presentation from the beneficiary. Where there is a significant drop in the price of the contracted goods, delay in the time for examination and rejection would let the beneficiary suffer a significant economic loss due to missing a proper time to rearrange the goods at a higher price. Hence, although the UCP600 has tried to avoid these adverse impacts by virtue of reducing the time limit to five banking days, these risks still cannot be completely eliminated in theory.

[246] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 119
[247] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 5.52

3.5.3 Author's view on time for examination under the UCP600

It is clear that the ICC Banking Commission, which has deliberately discarded the test of "reasonable time" in the UCP600, would be extremely reluctant to recycle this test to interpret the meaning of "maximum" in Article 14 (b).[248] In the author's view, the word "maximum" does not aim to involve the possibility of any shorter time as contested by the above commenters. Some radical commenters might have overly interpreted the actual intention of the UCP600 itself. The UCP600, which endeavours to eliminate the uncertainty in respect of time for examination, merely adopts a way of statement by means of "maximum", to indicate that there are still some other obligations needed to be taken into account by the bank within the allowed five banking days.[249] Therefore, the "maximum" used in the Article 14 (b) seeks to clarify that the bank is entitled to have at most five banking days to examine the presentation, while some leeway for further actions indicated in the Article 16 must be left if the bank decides to reject the presentation.

As far as the above allegations from the opponents against a fixed period are concerned, the author tentatively puts forward two points of argument. Firstly, in order to resist the hidden unfairness brought by introducing a fixed period, the UCP600 has made a great effort to curtail the time limit to five banking days instead of seven banking days as stated in the UCP500. Five banking days, in the author's opinion, is the optimal standard for the time limit in respect of the majority of cases. As evidence shows, a sound market expects the bank to fulfil its examination and determination within three banking days.[250] If the presentation has been rejected, the case law suggests that the bank should send a notice of refusal on the same day or on the following day.[251] Meanwhile, both the case law and the UCP allow the bank to use a reasonable period

[248] The same as using "without delay" to interpret the new rule of "no later than…" In the author's view, the requirement of promptness concerning sending a refusal notice after determination is too obvious to expressly mention in the UCP. Thus, "no later than the close of fifth banking day" in the UCP is enough to restrict the bank's performance.
[249] See the above Figure 4 for the actions might be occurred within the five banking days.
[250] *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA) 448
[251] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA) 42

of time for the purpose of consulting the found discrepancies with the applicant, and normally it will take one or two days.[252] Accordingly, the period of five banking days is suitable for the most cases as a reasonable time limit and leaves less room for deliberate delay than that in seven banking days. Furthermore, 'whatever the theoretical position, practically speaking, since the period of five days is relatively short, if the bank manages to meet this requirement, the delay is unlikely to be serious enough to take the bank outside international standard banking practice.'[253]

Secondly, most opponents allege that there is a high possibility of deliberate delay with a fixed period. Comparatively, the standard of reasonable time will reveal the actual time spent by the bank and effectively control the risk. Nevertheless, a fact should not be ignored is that the party who bears the burden of proof for alleging delay is the beneficiary rather than the bank. The rule seems easy to apply in principle; however, it is extremely difficult for the beneficiary to master the evidence to fulfill the obligation in practice. Since the beneficiary does not have sufficient information regarding when the examination has been completed and the full details concerning the process of making a determination, the probability of success is largely minimised.[254] Even though "reasonable time" is a prior standard to measure the time of examination under UCP500, litigation has been rarely raised on the basis of alleging an unreasonable delay within the seven-banking-days outer limit. Therefore, a fixed period acts not only as a simpler rule for the bank, but also as a simpler rule for the beneficiary. The beneficiary, who has been exempted from a substantial burden of proof with a fixed period, is entitled to claim his rights as long as the time limit in the UCP600 elapsed. Consequently, a fixed period for examination time is not as unfair as has been understood by others, since the beneficiary may also profit from this point.

[252] In *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA), Sir John Megaw agreed that 24 hours for the consultation with the applicant was regarded as being reasonable. In special circumstances, it could be extended to 48 hours.

[253] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 119

[254] In *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA) 42, the plaintiff lost the point concerning the second presentation because he could not prove why the unreasonable delay had occurred.

Although the beneficiary might lose the right to sue the bank for a deliberate delay occurring in a fixed five-banking-day period,[255] in the author's view, it does not mean that the beneficiary will forfeit the rights to claim the delay caused by delegating an applicant to do further examination, even within the ambit of five banking days. A distinction must be drawn between the delay caused by the bank itself and the delay caused by delegation, since the latter will constitute a breach for bank's obligations regarding independent examination.[256] Therefore, in principle, there is nothing to prohibit the beneficiary, who has mastered sufficient evidence on delegation, claiming the bank's breach, even though the examination and determination has been accomplished within five banking days.[257]

The surviving point argued by the supporter of the "reasonable time" standard is that the negative commercial impact caused by bank's deliberate delay in the process of examination. It has been argued that a deliberate delay merged into a full fixed period will largely reduce the possibility of representation with cured discrepancies before the credit expiry, and may cause a significant economic loss to the beneficiary in a fluctuant market. Meanwhile, with development of documentary credits, the bank has maturely mastered the skills for examining the typical documents frequently required by a credit. 'For banks involved in wholesale as opposed to retail banking the market expectation of the time taken to examine documents and make a determination is considerably less than 48 hours and in straightforward cases "same day" turnaround will be required.' [258] Concerning the above analysis, it is regrettable that the introduction of a fixed period will inevitably bring a few negative impacts to particular

[255] Based on the implicit duty of reasonable care, the bank needs to reasonably fulfil its obligations on examination. Thus, the beneficiary will not necessarily lose the right to claim a deliberate delay caused by a negligent bank within the five banking days. See the part in Chapter 3.3.2.

[256] Arguably, it constitutes a breach under UCP600 Article 14 (a) and Article 16 (b), which follows the *ratio decidendi* in *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA)

[257] Therefore, the author doubts Jack's above analysis concerning the hidden risk for delegation in a fixed five banking days. Cf. Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 5.52

[258] Richard King, *Guttidge & Megrah's Law of Bankers' Commercial Credit* (8th edn, Europa Publications 2001) para 6-06, fn 23

cases, although such situations will be a rare occurrence in practice. However, sacrificing the commercial interest of a particular case is not as significant as building the certainty for the whole system. Moreover, the party can still avoid sacrificing its commercial interests by modifying a particular credit. As a set of binding provisions through incorporation, the UCP600 Article 14 (b) is not a compulsory stipulation for all the cases. The parties, involved in a simple and straightforward transaction, are entitled to expressly contract out this provision by negotiation and formulate their satisfactory time limit in their credit, such as three banking days.[259]

From the above illustrations, it is obvious to see that the UCP600 is much more developed than its predecessors, but the meaning of a maximum five-banking-day has given rise to potential controversies. It is suggested that the drafting of Article 14(b) could have been clearer, to avoid 'a serious and potentially troublesome ambiguity as to whether it is a fixed period'.[260] By leaving the application of "reasonable time" in the phantom, different courts in different jurisdictions may interpret Article 14 (b) diversely.[261] Therefore, an official clarification is urgently needed to dismiss the current uncertainty and existing controversies away from the UCP mechanism. The prompt clarification will not only contribute in correcting the theoretical misunderstanding, but also minimise the possibility to reintroduce the discarded conception of "reasonable time". In the author's opinion, the ICC Banking Commission is entitled to boldly recognise that the time frame settled in the UCP600 as a fixed period, because the practical consequences will not be as harsh as predicted by alarmists and the detrimental impact on a particular case also could be prevented by modifying the credit. However, the practical advice and the safe route for banks is still, until the ICC Banking Commission clarifies the position, to adopt a more conservative way of treating the five banking days as the maximum and examining the presented documents without any delay.

[259] *Vice versa*, the bank may negotiate with the applicant to contract out the fixed period and stipulate a new time limit when it faces with an intractable transaction with plenty of details.
[260] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 130
[261] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 133

3.6 Conclusions

This chapter has concerned the issue of general requirements for documents examination under the current UCP system. Although there are still many trivial issues described in the UCP600 concerning general requirements for examination, the author has tentatively chosen the most important and disputable issues to discuss in this chapter. Generally speaking, the discussions have been particularly focused on the UCP600 Article 14 (a) and Article 14 (b), which are full of controversies and uncertainty in practical interpretations. Based on the word "appearance" in the Article 14 (a) and the principle of autonomy, the author has delimited bank's obligations on document examination. Considering the references to judge a complying presentation, the author has clarified that "international standard banking practice" is not limited to the ISBP itself and any proper practice has a chance to be referred. In addition, as far as the omitted duty of reasonable care, the author personally insists that there is still an implicit duty in the UCP600, so that the bank needs to perform its obligations on examination diligently and reasonably.

Subsequently, regarding the general criterion for judging a complying presentation, the author has concluded that the common law doctrine of strict compliance is mainly intact under UCP600. However, through analysing the difficulties occurred in the practical applications and reviewing the case law in different jurisdictions, the author suggests that the level of strictness should be neither too tight nor too loose. The principle of wider strict compliance seems to be the most suitable test for judging a complying presentation and it is also in accordance with the spirit of UCP600, although it is still difficult to draw a precise range of deviation. With respect to the time of document examination, the UCP600 triggers a new round of controversies in academia concerning the word "maximum", while it has been endeavouring to eliminate the uncertainty caused by the old test "reasonable time". Nevertheless, the author is not convinced that introducing a fixed period following Article 14 (b) will cause a significant commercial consequence as predicted by some commenters. The

author suggests that the ICC Banking Commission take an urgent attempt to clarify the intention behind the Article 14 (b) and boldly confirm a fixed timeframe for document examination.

Chapter 4 Standards for Examining Generic Documents

4.1 Introduction

As we discussed in Chapter Three, the general criterion for the banks to examine tendered documents is on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.[262] In this criterion, the classic common law principle – the doctrine of strict compliance is not expressly stated and it has been argued that the UCP system has given up this doctrine. In my opinion, this inference is not absolutely precise. With the development of market needs, the UCP system has discarded literal compliance. Instead, the UCP600 endeavours to build up its own checking system for document examinations which is relaxing but conforming to the spirit of strict compliance. It is fair to say the UCP600 does give a little latitude for the document examination; however, this latitude is pending on how to explain the standards for document checking stipulated in the UCP600 Article 14.[263]

In this chapter, the author will adopt an initiative method to classify the massive provisions in the UCP600 Article 14 and endeavour to present a whole picture in respect of examining generic documents. According to the various elements set out in Article 14 for checking the presented documents, this chapter is divided into four parts, which includes descriptions in a single document, the data content in generic documents, the linkage issue and mismatched quantity of anticipated documents. Considering descriptions in a single document, the criterion of "no conflict" in Article 14 (e) and the "correspondence" test in Article 18 (c) will be elaborately analysed. As far as to the data requirements for the generic documents, Article 14 (d) and Article 14

[262] UCP600 Article 14 (a)

[263] The checking system also includes some pieces scattered in other articles, such as Article 18 (c) concerning commercial invoice, and requirements for examining specific documents, such as transport documents in Article 20-27, which will be discussed in the following chapter.

(f) will be considered. In the third part, the long-lasting controversial "linkage" test will be examined in detail. The last part will deal with the mismatched quantity of required documents, which contains the situation of additional documents as mentioned in Article 14 (g), the emergence of non-documentary conditions set out in Article 14 (h) and the combined documents concerned by the ISBP. Additionally, the common law rules and the previous UCP revisions which have had a significant influence on the current state will be reviewed.

4.2 Descriptions in a single document

The UCP600 Article 14 (e) stipulates that 'in documents other than the commercial invoice, the description of the goods, services or performance, if stated, may be in general terms not conflicting with their description in the credit'. Obviously, the UCP600 has followed its predecessor to set aside the requirements for descriptions in a commercial invoice.[264] In the UCP600 Article 18 (c), it states 'the description of the goods, services or performance in a commercial invoice must correspond with that appearing in the credit.' It is clear to see the UCP600 has adopted a bifurcated criterion to judge the descriptions in presented documents, i.e. "no conflict" and "correspondence", which will be discussed in the following part respectively.

Apart from the description of the goods stipulated in Article 14 (e), the other data in a single document is regulated by UCP600 Article 14 (d) which provides that 'data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document…or the credit.' Apparently, the standard for judging the data in a single document is still "no conflict", which is the same as the criterion for judging descriptions in "generic documents".[265] Therefore, the author will not further stress the

[264] UCP500 Article 37 (c) A commercial invoice is actually treated as a special document in the UCP, since its examination requirement has been separately listed.

[265] In this chapter, "generic documents" means all the presented documents apart from the commercial invoice. However, since the description in a commercial invoice has triggered many controversies in the past and is linked with the description in generic documents, the author will still analyse it in this part.

data requirement concerning a single document in this part, and instead the author will take the description in generic documents as an example to illustrate the meaning of "no conflict". The author prefers to leave the data issue with the interactions between documents in the next part. Nevertheless, how to distinguish the descriptions with the other data in a commercial invoice will be another aspect of problem considered in the following paragraphs.[266]

4.2.1 Correspondence in a commercial invoice

4.2.1.1 Notion of "correspondence"

As stated in the UCP600 Article 18 (c), 'the description of the goods, services or performance in a commercial invoice *must correspond* with that appearing in the credit.' The words "must correspond" aim to stress that the descriptions in a commercial invoice must fully and accurately follow the descriptions in the letter of credit. The test of correspondence can be analogous to the doctrine of strict compliance at common law, since any departure in substance will justify a refusal by the bank. In a pre-UCP case, *Bank Melli Iran v Barclays Bank*,[267] the court followed the classic strict compliance rule to conclude that the description of 100 Chevrolet trucks "in new condition" in the commercial invoice was not be synonymous with the term "100 new Chevrolet trucks" required by the credit. Subsequently, *The Lena*,[268] which was the case subject to UCP1962 version[269], clarified the requirement of correspondence. In this case, the invoices were found discrepant, since they made no reference to the year built, the light displacement tonnage "as built" and the inclusion of the equipment. Additionally, there were differences between the credit and commercial invoices with

[266] The criterion for examining descriptions in a commercial invoice is correspondence; however, the standard for other data apart from descriptions is "no conflict". Hence, different standards will trigger controversies concerning which criterion should be applied to some data which cannot be clearly identified as a part of descriptions or general data. The author will elaborate in part 4.2.1.3.

[267] *Bank Melli Iran v Barclays Bank* [1951] 2 Lloyd's Rep 367 (KB); See also *Courtaulds North America Inc v North Carolina National Bank*, 528 F 2d 802 (4th Cir 1975) which held the "imported acrylic yarn" in the commercial invoice cannot be instead of "100% acrylic yarn" described in the credit.

[268] *Kydon Compania Naviera Co v National Westminster Bank Ltd (The Lena)* [1981] 1 Lloyd's Rep 68 (QB)

[269] The UCP 1962 version Article 30 is similar to the current state, which provides 'the description of the goods in the commercial invoice must correspond with the description in the credit'.

regard to the gross and net register tonnage. Parker J held that the commercial invoices were discrepant and meanwhile he delivered the following explanation for the requirement of correspondence:[270]

> '*Unless otherwise specified in the credit, the beneficiary must follow the words of the credit and this is so even where he uses an expression which, although different from the words of the credit, has, as between buyers and sellers the same meaning as such words. It is important that this principle should be strictly adhered to… If specific items of description are included in the credit they must also be included in the invoice.*'

From the above paragraph, it is obvious to see that the test of correspondence is strict, but it is still a test that values substance rather than demanding a mirror image or duplication.[271] 'For example, details of goods may be stated in a number of areas within the invoice which, when collated together, represent a description of the goods corresponding to that in the credit.'[272] It is not difficult to observe that the test of correspondence is in accordance with the spirit of strict compliance at common law, which does not require exact compliance either. In *The Messiniaki Tolmi*,[273] the judge held in that context, expressions "ex Berger Pilot" and "previous name Berger Pilot" meant the same. As a result, a commercial invoice should be regarded as compliant if it includes all the details, even though it is not in the same format or layout as the description shown in the credit.[274]

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[270] *Kydon Compania Naviera Co v National Westminster Bank Ltd (The Lena)* [1981] 1 Lloyd's Rep 68 (QB)76

[271] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-119, also see ISBP No.745, section C3; ISBP No.681, para.58

[272] ISBP No.745, section C3; ISBP No.681, para.58

[273] *Astro Exito Navegacion SA v Chase Manhattan Bank NA (The Messiniaki Tolmi)* [1986] 1 Lloyd's Rep 455 (QB)

[274] Gary Collyer and Ron Katz (ed), *ICC Banking Commission Collected Opinions 1995-2001* (ICC Publishing No.565, Paris 2002) R471

4.2.1.2 Additional wording

It is clear to see that the test of correspondence does not request the description in a commercial invoice to be identical with that of the credit.[275] The additional information might be supplied into the description of the merchandise appearing in the commercial invoice. Since there is no requirement that the description in the invoice should be exact or limited to that stated in the credit, the presence of additional information itself does not produce a lack of correspondence. The question of whether a commercial invoice with the additional information would be acceptable, depends on whether this additional information may be considered "detrimental or inconsistent" with the requirements in the credit.[276]

Unsurprisingly, there are massive queries and opinions concerning whether the substance of the additional wording introduces a lack of correspondence. For example, the commercial invoice adding the word "secondhand" before the description of the goods stated in the credit was regarded as a discrepant document.[277] In another query, the additional word "imitation" contained in the commercial invoice to describe the suede fabric in the credit was considered to create a discrepancy.[278] Conversely, the additional information "Eurocab Brand on reels each 85 yards" inserted into the commercial invoice versus the description in the credit was not deemed to constitute a discrepancy.[279]

The classic English case under the UCP500, *Glencore International AG v Bank of*

[275] See Charles del Busto, *UCP500 & UCP400 Compared* (ICC Publication No.511, ICC 1993) 100: 'The Working Group felt that the word "identical" was too restrictive and would place an undue burden on all the parties to the Documentary Credit and increase the number of discrepant invoices presented.'

[276] Charles del Busto, *UCP500 & UCP400 Compared* (ICC Publication No.511, ICC 1993) 100

[277] ICC, *Opinions (1980-1981) of the ICC Banking Commission* (ICC Publication No.399, ICC 1983) R80

[278] Gary Collyer and Ron Katz (eds), *Unpublished Opinions of the ICC Banking Commission 1995-2004* (ICC Publication No.660, ICC 2005) R584

[279] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Collected Opinions 1995-2001* (ICC Publication No.632, ICC 2002) R456; See also ICC, *Opinions (1980-1981) of the ICC Banking Commission* (ICC Publication No.399, ICC 1983) R81

China,[280] also provided an illustration of the difficulties in judging the requirement of correspondence when the additional words in the commercial invoice came out. This case concerned whether the additional words in the invoice "Indonesia (Inalum Brand)" following the original description in the credit "any western brand" would constitute a discrepancy. Although both Rix J at the first instance court and the judges in the Court of Appeal took the view that "correspondence" did not mean that the descriptions must be identical, they reached opposite conclusions. Rix J at the first instance court supported that a reasonable banker would or ought to regard "western" as being used in a geographical, rather than a geo-political or commercial sense to embrace Indonesia. Hence, as well as serving the following judgement, he held these additional qualifying words ruined the correspondence of the commercial invoice:[281]

> '*Even though the terms of Article 37(c)* [current Article 18 (c) in the UCP600] *may fall short of the requirement of complete identity between the language of the credit relating to description and the language of the invoice, it does not seem to me that additional language which is* prima facie *inconsistent with the language of the credit, and at the very least introduces an element of ambiguity and doubt, falls within any latitude which is intended to reflect the distinction between correspondence and identity referred to in the cited passage from "UCP 500& 400 Compared".*'

Nevertheless, the Court of Appeal respectfully disagreed. The Court of Appeal believed that the additional words were to indicate the precise brand of the goods and that brand was implicitly fallen within the broad generic description required by the credit. On any possible reading of the documents, the additional words could not have been intended to indicate that the goods might not fall within "any western brand". Therefore, the Court of Appeal concluded that the additional information was not

[280] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA)
[281] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA) 143

considered as "detrimental" or in any way "inconsistent" with the requirement of the credit and the commercial invoice was acceptable.[282]

From the above judgements, it seems the *Glencore* case did not confer a licence to ignore the additional wording shown in a commercial invoice. The divergent conclusion of the two trials appears to be triggered by "how much knowledge the court was prepared to impute to the reasonable banker".[283] Furthermore, the key point for making a decision seems to lie in how broad or generic the description on the credit is. As Benjamin inferred, 'greater specificity of description in the credit would have commensurately increased the chance of additional wording generating a lack of correspondence.'[284] While, in the author's view, the decisive element concerning the correspondence of the additional wording is whether these words would change the nature of the merchandise required by the credit. If the additional description in a commercial invoice may indicate a different category or classification of the goods, it will constitute a discrepancy.[285] By contrast, if the additional wording only refers to certain specific brand or accurate parameters without conflict to other data in the credit, the commercial invoice will still be acceptable. However, the general rule summarised above from the ICC Opinions cannot be regarded as a perfectly safe route to follow. The beneficiary who normally issues the commercial invoice still needs to exercise extreme caution to make sure the correspondence between descriptions in the commercial invoice and that in the credit, since any gambling may lead to lasting dispute and huge economic losses.

4.2.1.3 Absence of wording

It is obvious to deduce that the correspondence will not be achieved if the commercial

[282] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA) 154

[283] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 249

[284] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-120

[285] ISBP No.745, section C5

invoice omits any part of the credit description. As Parker J in *The Lena*[286] held, '*if specific items of description are included in the credit they must also be included in the invoice*.' [287] Subsequently, Leggatt J in *The Messiniaki Tolmi* [288] noted that '*correspondence in the description requires* all the elements *in the description to the present, although the descriptions need not be the same as that in the credit*.'[289] For example, the trade items related to describing the goods must be specified in the commercial invoice, irrespective of whether the trade term is part of the goods description in the credit or stated in connection with the amount.[290]

Nonetheless, the English courts have drawn a line to distinguish the words in the credit which form part of the description and the words relating to the condition of the goods. In *The Messiniaki Tolmi*[291], although Leggatt J has set up the "all elements test" for correspondence, he took the view that the missing words in the commercial invoice were merely related to the condition of the vessel when the notice of readiness was issued and they did not form part of the description of the particular vessel being sold. As a result, the court concluded that the omitted words in the commercial invoice did not constitute a discrepancy. Similarly, in *Chailease Finance Corporation v Credit Agricole Indosuez,*[292] Potter J found that the delivery date in the credit "for delivery in Taipei during 17-20 August 1998" did not form part of the description of the goods, so that the shortage of words in the commercial invoice was permissible.

[286] *Kydon Compania Naviera Co v National Westminster Bank Ltd (The Lena)* [1981] 1 Lloyd's Rep 68 (QB)
[287] *Kydon Compania Naviera Co v National Westminster Bank Ltd (The Lena)* [1981] 1 Lloyd's Rep 68 (QB)76
[288] *Astro Exito Navegacion SA v Chase Manhattan Bank NA (The Messiniaki Tolmi)* [1986] 1 Lloyd's Rep 455 (QB)
[289] *Astro Exito Navegacion SA v Chase Manhattan Bank NA (The Messiniaki Tolmi)* [1986] 1 Lloyd's Rep 455 (QB) 458
[290] ISBP No.745, section C8; ISBP No.681, para.61; Gary Collyer and Ron Katz (eds), *ICC Banking Commission Collected Opinions 1995-2001* (ICC Publication No.632, ICC 2002) R237; also see R362, where gave a little flexibility for missing the immaterial words in the trade item, provided that the missing words did not affect the meaning of the trade item in that context.
[291] *Astro Exito Navegacion SA v Chase Manhattan Bank NA (The Messiniaki Tolmi)* [1986] 1 Lloyd's Rep 455 (QB)
[292] *Chailease Finance Corp v Credit Agricole Indosuez* [2000] 1 All ER (Comm) 399 (CA), [2000] 1 Lloyd's Rep 348, p.358

It is obvious to see the UCP600 Article 18 (c) has circumscribed its application by the concept of description. Therefore, the most important point is to demonstrate which part of words in the credit belongs to the description of goods regulated by the rule of correspondence in Article 18 (c). The other data apart from descriptions in a commercial invoice, arguably, should belong to the ambit of Article 14 (d) in the UCP600, which only requires a lower standard of "no conflict". Hence, shortage of words in a commercial invoice will still be acceptable as long as these words do not fall into the category of descriptions. However, unless using the SWIFT format with an express "Description of goods and/or services" column, the description of merchandise in a credit may not be clearly identifiable.[293] In the author's opinion, rather than gambling on the judicial result from a shortage of wording, why not follow the "all elements test" to state every element required by the credit into the commercial invoice?

To summarise, the safest route for a beneficiary is to follow the exact words used in the credit to describe the merchandise. Even where he might adopt other expressions apart from the words used in the credit, the particular expression should be understood by each party as having the same meaning. While, all the bankers should do is to apply the test of "correspondence" set aside by the UCP without further investigating the different particulars shown in the commercial invoice. In the author's view, with sufficient care, it should not be so difficult to make the commercial invoice compliant with the credit requirements in practice, for the reason that almost all the commercial invoices are issued by the beneficiary, rather than the third party, in which case the beneficiary will have an effective control on the content of the document.

[293] In Bernard Wheble (ed), *Opinions (1987-1988) of the ICC Banking Commission* (ICC Publication No.469, ICC 1989) R166, the argument concerning the trade terms being a part of descriptions was reinforced by the fact that it had been transmitted in field 45 of MT700, which was designed for the description of the goods.

4.2.2 No conflict description in any other document

4.2.2.1 Notion of "no conflict"

Apart from the description in a commercial invoice, UCP 600 Article 14 (e) requires the description of the goods, services or performance in other documents, "if stated, may be in general terms not conflicting with their description in the credit". Obviously, the new "no conflict" test in UCP600 has superseded the "consistency" test stated in UCP500 Article 37 (c), which says 'in all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the Credit'.[294] Nevertheless, the main point is whether the literal difference between "no conflict" and "not inconsistent" will lead to a different standard to judge the compliance of description in a generic document. The concept of "inconsistent" has been in place since the UCP 1951 revision, and more importantly the term is still used in other articles of UCP600. Therefore, Professor Byrne suspected that the phrase "no conflict" must have a different meaning distinct from the term of "not inconsistent".[295] However, in the absence of any ICC opinions or other direction, it is difficult to determine in what this difference consists.

The ICC Drafting Group believed that the concept of "inconsistency" needed to be changed, because this concept seemed to encompass issues including simple typing and grammatical errors, which had led to a high rate of rejections and misinterpretations of the rule. In order to change this unwarranted situation, the Drafting Group felt "no conflict" would be "a much narrower and more preferable

[294] The notion of consistency was adopted by UCP500 to judge the compliance of description in generic documents under Article 13 (a), which stipulates that 'documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit.' Meanwhile, the notion was applied to the UCP500 Article 37 (c) with respect to description in the general document. However, this notion was deleted by UCP600 Article 14 (a) concerning the standard of compliance, and moreover, it was taken over by the notion of "no conflict" stated in two articles of the UCP600—Article 14 (e) concerning description and Article 14 (d) regarding to data in the document.

[295] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 136

concept" and this would result in a reduction of discrepancies.[296] Based on the above reason, it is suggested that perhaps the best interpretation of the phrase "no conflict" is that it applies only to situations where there is a true and substantive conflict in its impact on the document, rather than an apparent and superficial conflict.[297] Hence, in respect of providing a broader justification of refusals, the notion of "no conflict" 'should simply be taken as meaning that documents which contained contradictions are unacceptable'.[298]

In the author's opinion, it cannot be alleged that the rule of "no conflict" has constituted a significant change compared with the previous "consistency" test, since both of them do not require a linguistic duplication or a mirror image of data, and furthermore both of them cannot tolerate a substantial divergence from the requirements in the credit. For example, even under the UCP600 "no conflict" rule, the delivery order stating "100 new-good, Chevrolet trucks" is still defective compared with the description of "100 new Chevrolet trucks" in the credit.[299] Moreover, the analysis certificate stated "Protein 69.7 per cent" would definitely conflict with the description of "Chilean Fish Fullmeal 70% Protein" in the credit.[300]

However, when the "no conflict" test applies to judge a diverse description in a generic document against that of the credit, the conceptive difference between "no conflict" and "not inconsistent" may cause a slightly dissimilar conclusion. In a recent ICC opinion, the Banking Commission believed that a health certificate stated "Wet Salted Lambskins" was not inconsistent with the credit described "Double-Face Lambskins", for the reason that the difference in wording addressed different aspects of the

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[296] Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 64

[297] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 136

[298] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.42

[299] The example was shown in *Bank Melli Iran v Barclays Bank* [1951] 2 Lloyd's Rep 367 (KB), a pre-UCP case but got the same conclusion.

[300] *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep 367 (QB)

goods.[301] Similarly, based on a narrower notion of "no conflict" rather than "consistency", the bill of lading with the description of "machine-shelled groundnut kernels" is arguably not in conflict with the description of "Coromandel groundnuts" in the credit.[302] Moreover, the description of "Koolyanobbing Lump Iron Ore" shown on the insurance policy against the requirement of "Iron ore concentrate" in the credit might not be grounds for refusal under "no conflict" rule from a reasonable banker's view.[303] Arguably, the report on quantity and weight with the description of "Pakistanese blue (coloured) poppyseed" would be acceptable compared with the credit which required "Pakistanese blue poppyseed" under the UCP600 "no conflict" rule, since it is hard to observe any conflicts caused by the additional word.[304] After reviewing the previous cases, it is clear to see that the test of "no conflict" will be able to achieve the purpose of reducing unnecessary inconsistencies, as well as decreasing the rate of rejection. In a word, the current state played in the UCP600 seems that, the non-compliance of description in a general document can only be approved when a positive conflict in the substance of the description occurred.

4.2.2.2 Requirement of "general terms"

The UCP600 Article 14 (e) requires descriptions of goods in the presented documents apart from the commercial invoice, "if stated, may be in general terms not conflicting with their description in the credit". This phrase "general terms" is inherited from the previous UCP revisions.[305] However, up to now, neither the UCP nor the ISBP has provided any guidance on the limits to the generality of terms that may be employed.

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[301] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Opinions 2005-2008* (ICC Publication No.697, ICC 2008) R669

[302] Under the current circumstance, this result will be different from the conclusion in *JH Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37 (CA) at common law.

[303] Contrary to the decision in Gary Collyer and Ron Katz (ed), *ICC Banking Commission Collected Opinions 1995-2001* (ICC Publishing No.565, Paris 2002) R363 based on the UCP500 Article 37 (c) "consistency" rule. The element of "reasonable care" needs to take a part in the process of examination. See Chapter Three.

[304] Contrary to the decision in Gary Collyer and Ron Katz (eds), *ICC Banking Commission Collected Opinions 1995-2001* (ICC Publication No.632, ICC 2002) R235 based on the UCP500 Article 37 (c) "consistency" rule.

[305] For example, UCP500 Article 37 (c): 'In all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the Credit.' See also UCP 1974 revision, Article 32.

'It is suggested that, in principle, the permissible level of generality in wording is limited by the need for the wording still to function as a description of the goods, services or other performance.'[306] For example, "sugar" as a simpler description in the bill of lading for "200 metric tons up to 5% more or less EEC white crystal sugar category no 2 minimum polarization 99.8 degrees…" should be regarded as no conflict, but the description change as general as "food" will constitute a conflict.[307] Therefore, whether the general terms used for describing the goods can be acceptable is dependent on what an experienced banker thinks with reasonable care.

The wording of "may be in general terms" indicates that there is no implied requirement for general documents other than for the invoice to contain any description of the goods, services or other performance at all. Moreover, 'by using the words "*if stated*", it also emphasises that there is no need for a description of goods to appear on every document.'[308] This position is in accordance with the spirit of UCP500 and the requirement under the common law. In *Midland Bank Ltd v Seymour*,[309] concerning the shortage of descriptions in the bill of lading compared with those in the credit, Devlin J reached a conclusion that:[310]

> '*it is sufficient that the description should be contained in the set of documents as a whole and that the documents should each one be valid in itself and each be consistent with the other; and, accordingly, it would not matter for this purpose whether the description in the bill of lading is or is not negatived by the clause in the bill of lading, since the description is sufficiently contained in the invoice, which is one of the documents.*'

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[306] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-121

[307] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA)

[308] Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 65 In order to clarify the situation, the words "if stated" is a new inclusion into the UCP600.

[309] *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147 (QB)

[310] *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147 (QB) 155

Although this was a case decided under the common law without the aid of the UCP, the court in *Glencore International AG v Bank of China*[311] held that there was nothing in the UCP which contradicted it. Hence, unless the credit particularly required, each generic document listed in the credit was not necessary to contain all the descriptions which were specified in the credit.[312] Comparatively, from the appearance of the UCP600 Article 14 (e), it seems that a bank faced with a generic document with part or even no descriptions of goods, should be satisfied as long as there is no conflict with the description that appears in the credit and other documents.

Nonetheless, this supposition is built on the premise of linkage, which means either the goods with part (or general) descriptions in a single document can be identified as the goods from the same transaction with the credit, or a generic document with no descriptions of the goods bears the other necessary link to the same transaction. The second issue in the linkage test, regarding the data rather than descriptions of the goods, will be discussed in the following part, while the first situation concerning the general terms used in the description will be considered here. In *Banque de L'Indochine et de Suez SA v JH Rayner (Mincing Land) Ltd*,[313] the court illustrated that the "E.E.C. White Crystal Sugar Category No. 2, Minimum Polarisation 99.8 degrees Moisture Maximum 0.08 per cent" in the credit could be described as simplified as "sugar" in a generic document, but the generic document had to identify "the goods" by reference to marks on the bags or by evidencing shipment. Sir John Donaldson held that:[314]

> '*There is, in my judgment, a real distinction between an identification of "the goods", the subject matter of the transaction, and a description of those goods. The second sentence of Article32 (c)* [equivalent to UCP600 Article 14 (e)] *gives latitude in description, but not in identification…But however general the description, the identification must, in my judgment,*

[311] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA)
[312] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA) 154 See the same rule in the *ICC Opinions 1995-2001* R237, R364; *DOCDEX 1997-2003*, No. 204.
[313] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA)
[314] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA) 732

be unequivocal.'

It is clear to see that however the generality of the words used to describe the goods, the description must be unequivocally identified with the goods which are the subject-matter of the transaction. Even *Glencore International AG v Bank of China*,[315] a subsequent case subject to UCP500, in which Rix J was inclined to think that even though the identification test referred by the UCP revisions was intended to be less demanding, the court still supported that "a sufficient link" should be put into the document so as to make the goods identifiable.[316] Although the identification test concerning descriptions of the goods in a generic document is not spoken out in the UCP600 provisions themselves, in the author's view, the ICC Banking Commission still treats it as an international standard banking practice and continues to apply this rule into its opinions. In the ISBP No.745 section L4, it specifically requires that the goods description in a certificate of origin may state in general terms but the statement must indicate a relation to the goods in the transaction.[317] Regarding another recent query, the Banking Commission concluded that a certificate of health absence of the details of goods description was acceptable as long as it has fulfilled the function of being a required document under the credit.[318] However, the author suspects how such a document can be claimed to fulfil the function as a required document under the credit if there is no link between the presented document and the credit at all, in which case, the document would become a master key and can be inserted into all sorts of presentation. .

Clearly from the above analysis, after the *Banque de l'Indochine* case, the test of identification of the goods is gradually replaced by requesting a sufficient link between generic documents and the credit. This requirement however can be achieved by ways

[315] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA)
[316] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA) 145, see also *ICC Opinions 1995-2001*, R237, R364 which required a sufficient link.
[317] See also ISBP No.681, para.183. Gary Collyer and Ron Katz (eds), *ICC Banking Commission Opinions 2009-2011* (ICC Publication No.732, ICC 2012) R727
[318] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Opinions 2009-2011* (ICC Publication No.732, ICC 2012) R728

other than the description itself, such as adding reference data (which will not be a part of goods description). '*Plainly, if there is no linkage at all, and the state of the documents calls for enquiry, there is a strong case for saying that, if the documents are to be acceptable, the identification must be unequivocal.*'[319] The author believes that, without a sufficient link to the credit, the bank is entitled to reject a generic document which is not necessary to identify the goods in the credit drawn from the description on its face. Consequently, UCP600 Article 14 (e) cannot merely be satisfied by "no conflict" descriptions shown on a generic document and the meaning "general terms" has been implicitly restricted by the latitude of descriptions.

The last question concerning the use of "general terms" is whether the additional words put into the goods description in a generic document can be acceptable. There is no reason to reject the additional words in the goods description since the phrase "general terms" has covered any circumstances. The double standard for checking the description of the goods and other data existed in a document is only set up for commercial invoices. Comparatively, for a generic document, both Article 14 (e) and Article 14 (d) of the UCP600 adopts the same requirement of "no conflict". Since the same standard applies, there is no need to distinguish the additional words to become a part of description or other data. Thus, it is obvious to conclude that the additional words which are not in conflict with the description in the credit and any other documents are acceptable.[320] The phrase of "general terms" cannot save any conflict descriptions shown in the description, whether they are superfluous or not.[321]

In light of the above analysis, an acceptable practical rule is that a generic document will be a good presentation if the description of the goods in no way conflicts with that given in a credit and carries certain link as enable the goods unequivocally to be

[319] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA) 145

[320] Although the UCP600 Article 14 (e) only refers the conflict between a document and the credit, according to the UCP600 Article 14 (d), the rule of "no conflict data" between documents should include "no conflict description" between documents, since the description is recognised as part of data in a document.

[321] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA) 722

identified with those specified in the credit.[322] To be safe, inserting additional descriptions which are not stated in the credit should be discouraged, since it might constitute any conflict with the original description in the credit. Obviously, this rule is subject to any particular mandate expressed in the credit.

4.3 Requirements for content in a generic document[323]

Data in a document, apart from the description of goods, is regulated by the UCP600 Article 14 (d). It stipulates 'data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.'[324] Moreover, concerning the data content in a generic document, the UCP600 innovatively creates a new concept in Article 14 (f), which states 'if a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, banks will accept the document as presented if its content appears to fulfil the function of the required document and otherwise complies with sub-article 14 (d).' It is clear to see that the UCP600 expresses two requirements for the data content in a general document, i.e. "no conflict" data and "fulfilling its function", which will be analysed respectively as follows.

4.3.1 No conflict data

The requirement of "no conflict" data in the UCP600 Article 14 (d) has taken the place of the rule in the UCP500 Article 21 which requires that "data content is not inconsistent with any other stipulated document presented". Again, as mentioned above, the current "no conflict" rule seems to be a narrower definition than the previous formulation to judge discrepancies in a presentation, since the rule only applies to the

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[322] Richard King, *Guttidge & Megrah's Law of Bankers' Commercial Credit* (8th edn, Europa Publications 2001) 203

[323] The term of generic document in this part means a document other than a transport document, a insurance document or a commercial invoice.

[324] UCP600 Article 14 (d)

situation where there is a true and substantive conflict with the data in the letter of credit.[325] The reference to "need not be identical" in Article 14 (d) indicates a pure linguistic inconsistency does not justify the rejection. Moreover, the phrase "read in context" in Article 14 (d) provides a clear clue that a *prima facie* conflict between data might be resolved by a proper understanding of that nature combined with the context. For example, the different consignee name shown in the certificate of origin and the bill of lading will not justify a conflict according to Article 14 (d), since the consignee name stated in the certificate of origin normally serves the customs purpose, while the consignee name appeared in the bill of lading is related to financing security and document of title.[326]

However, the "no conflict" rule obviously cannot tolerate a document which contains obvious contradictions compared with the data in itself, the terms of credit and the international banking practice. For example, "minimum 67% protein" in a general document could possibly be acceptable with the requirement of "70% Protein" in the credit, but it would definitely be rejected if it states "Protein 69.7 per cent".[327] Therefore, the "no conflict" rule in Article 14 (d) does not call for the bank to pick up the inconsistent data mechanically, and on the contrary it requires the bank to examine the data in a document with reasonable care.

Sometimes, the additional data might be inserted into a generic document; however, they are not necessary to trigger a conflict. Since Article 14 (d) does not prohibit including the additional data into a generic document, the presence of these data *per se* does not constitute a discrepancy. For instance, inclusion of a disclaimer text in a certificate which aims to separate the content of certificate from the contract of carriage will not make the document discrepant.[328] Nevertheless, the additional data

[325] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 136

[326] ISBP No.745, L5; ISBP No.681, para.184, also see Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 64

[327] Example from *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep 367

[328] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Opinions 2009-2011* (ICC Publication

should not be conflict with any original data required by the credit or any other additional data appearing in the presented documents. A certificated copy of fax quoted with a wrong contract number, which constituted a conflict with the data shown in the invoice and the credit, had to be rejected, even if the contract number in the fax was regarded as the additional data.[329] It is concluded that 'by inserting data on a document, the beneficiary is inviting the bank to examine that data for compliance with the credit and the UCP.'[330] Therefore, in order to fulfil its obligations in accordance with Article 14 (d), the bank inevitably has to examine all the data.

4.3.2 Fulfil the function

The data stated in a general document do not need to be identical with the data contained in a credit as long as there is no conflict; however, according to UCP600 Article 14 (f), the data content in this document has to appear to fulfil the function of the required document. Although this requirement is expressly introduced into the UCP600 for the first time, it actually succeeds the position from the common law and the previous UCP revisions.[331] As Devlin J remarked in *Midland Bank Ltd v Seymour*,[332] '*if the weight note does not contain the weight, it obviously is not a weight note, and therefore it must at least contain the weight.*'[333] Similarly, under UCP500, the ICC Banking Commission concluded that the certificate of origin which only contained the name of "Sudan Raw Cotton" was not sufficient to describe that the goods were of Sudanese origin, so the certificate would not fulfil the function as required by the credit.[334]

No.732, ICC 2012) R725 In this case, neither the action nor the wording of the disclaimer has created a conflict with the required data. See also R724, R732

[329] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Opinions 2009-2011* (ICC Publication No.732, ICC 2012) R740

[330] ibid

[331] See ISBP No.645 para.43, which states 'the content of a document must appear to fulfil the function of the required document.'

[332] *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147 (QB)

[333] *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147 (QB) 152

[334] *ICC Opinions 1995-2001*, R320; this opinion is in accordance with the statement in the ISBP No.681, para.181 concerning the requirement of a certificate of origin.

The requirement of fulfilling the function is, nevertheless, a question of substance rather than form or title of the document. As the ISBP illustrates, the requirement for a packing list should be satisfied by any document containing packing details whether bearing a title such as packing note or packing and weight list or whether untitled.[335] For example, an untitled invoice with a format produced or approved by the U.S. Customs should be acceptable when the credit only calls for a U.S. Customs invoice without other specifications.[336] Following the same rule, the Banking Commission affirmed that, a "Shipment Confirmation" required by the credit without indication as to the content could be satisfied by the presented "Approval of Shipment", as long as it indicated the shipment was agreed upon and confirmed by the issuer. Comparatively, in the same case, the Banking Commission also demonstrated that, a beneficiary's certificate certifying that a fax has been sent cannot fulfil the function of a certified copy of the beneficiary's fax or telex requested by the credit.[337] Therefore, it is obvious to conclude that the title or heading of a document is not of decisive element in determining compliance or not, while the content in the document is what is used to ascertain whether the document has met the credit requirements or not.

Nevertheless, without any specific expressions in the credit, whether a presented document appears to fulfil the function as the required document will depend on the view of a reasonable banker and the attitude of the judge.[338] In *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd*,[339] Lord Diplock held that without special stipulations, the "Certificate of Inspection" requested by the buyer should have the ordinary meaning of the words, which was the goods had been visually inspected by the certificate issuer. If the instructor intended that a particular method of inspection

[335] ISBP No.745, section M1; ISBP2007, para.41. See also *DOCDEX 2004-2008*, Decision No.241
[336] *ICC Unpublished Opinion 1995-2004*, R555
[337] *ICC Opinions 2005-2008*, R668
[338] As discussed in Chapter 3, a reasonable document checker does not need to have knowledge of all the specific requirements for the document, but he must be able to recognise the intended purpose of this document required in the credit. See Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 65
[339] *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279

should be adopted or that particular information as to the result of the inspection should be recorded, the credit needed to state expressly.[340] While in another case, *Kredietbank Antwerp v Midland Bank plc*,[341] the Court of Appeal accepted the "draft surveyor report" to take over the "draft survey report" required by the credit, even though they appeared to be different documents. The court analysed that the implied commercial intention of parties to call for a "draft survey report" was to understand the quantity of loading cargo rather than the vessel measurements themselves, so that the "draft surveyor report" would still be fit for the functional significance.[342] Since there are no established standards on determining to which degree the document will be regarded as fulfilment of its function, the parties who play with the unspecified credit have to take a risk. From another perspective, this risk may motivate an applicant or an issuing bank to illustrate the required documents in a clear and unambiguous manner.

The last remaining question is, as a residual category of general requirements, whether the scope of Article 14 (f) intends to contain the test of linkage.[343] In other words, the issue of linkage may be argued as an essential part to judge "fulfilling the function". Without particular stipulations in the credit, a generic document may not cover the description of goods or other data which can make this document identifiable as a part from the same transaction. For example, assume certificate of health merely stating "Livestock: Non-infected". Will this be sufficiently qualified under the UCP600 Article 14 (f) for the special species of "New Zealand Lamb" required by the credit? At the first glance, the words on the certificate appear to be a good tender. However, after further thinking, the certificate is not necessary to be issued for this transaction, since there is no linkage with the credit concerning whatever the description of goods are or any reference numbers. Therefore, in the author's opinion, without a clear linkage, this

[340] *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279, 285
[341] *Kredietbank Antwerp v Midland Bank plc* [1999] CLC 1108 (CA) 1111
[342] As analysed in Chapter 3, the author tentatively believes that the judges in this case went too far, because the bankers were not obliged to evaluate the implied intention of parties behind the required documents. With full respect, the author suspects that the artificial analysis from the court may constitute a breakout against the doctrine of strict compliance.
[343] Regarding the question of linkage and the relationship with the UCP600 Article 14 (f), the author will scrutinise it in the following part.

certificate of health cannot be deemed to "fulfil the function" of the required document in the credit.[344]

In conclusion, it is clear to see the UCP600 has adopted a more relaxed regime than the doctrine of strict compliance under the common law for examining a generic document. The UCP600 only requires that there is no conflict between data and whatever the data contained in a document, it has to fulfil the function of the required document. Nonetheless, without a clear definition of what will constitute a conflict and how to judge the functional fulfilment, there is still some leeway for controversies in practice. Particularly, by changing the notion of "consistency" in UCP500, whether the test of linkage still exists in the generic document examination and where it should be placed in will inevitably trigger certain debates.

4.4 Issue of Linkage

Following the questions left above, is the presenter obliged to tender the documents which are necessarily linked with the credit or other documents in the same transaction? On the other hand, does the bank have an obligation to check the linkage between or among the documents, and moreover is the bank entitled to reject the document without the linkage? The term "linkage" has not been expressly quoted into the UCP provisions; however, this notion did exist at common law cases and in the pre-UCP600 interpretations. 'The term "linkage" denotes an additional requirement, namely that the presented documents must all relate in some way to the transaction financed by the credit.'[345] Literally, the linkage test seems to create an additional requirement apart from the stipulations in the UCP600 Article 14, in which Article 14 (e) and Article 14 (d) only refer to no conflicts regarding descriptions and data content in the documents. Moreover, the residual article in the UCP600 Article 14 (f) merely mentions that whatever a document states, it has to fulfil the function required by the credit.

[344] Another example of missing linkage which caused functional failure can be seen in the *ICC Opinions 2009-2011*, R727

[345] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-124

Therefore, whether the linkage test exists in the UCP600, how strictly the linkage test should be set up and how to interpret this test into the UCP regime will be the core questions addressed in this part. The author prefers to adopt a chronological order to analyse the whole issue, starting with the common law and pre-UCP600 positions before turning to the issue under UCP600.

4.4.1 Common Law position

The notion of linkage was generated by the English courts as early as to *Re an Arbitration between Reinhold & Co and Hansloh.*[346] In this case, the Divisional Court held that the certificate of quality without referring to the mark "F" on the bags as the bill of lading stated was a bad tender, since there was no evidence to prove that the bags shipped were the subject-matter in this certificate. In *Bank Melli Iran v Barclays Bank,*[347] McNair J decided that a certificate mentioning that a number of vehicles were in new condition was defective because it failed to identify the required vehicles. In *Midland Bank Ltd v Seymour,*[348] Devlin J concluded that the documents were consistent with one another in that they had made up a set which was apparently referring to the same parcel of goods. He further analysed:[349]

> *'The set of documents must contain all the particulars, and, of course, they must be consistent between themselves, otherwise they would not be a good set of shipping documents. But here you have a set of documents which not only is consistent with itself, but also incorporates to some extent the particulars that are given in the other- the shipping mark on the bill of lading leading to the invoice which bears the same shipping mark and which would be tendered at the same time, which sets out the full description of the goods.'*

[346] *Re an Arbitration between Reinhold & Co and Hansloh* (1896) 12 TLR 422, cited in *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA) 731
[347] *Bank Melli Iran v Barclays Bank* [1951] 2 Lloyd's Rep 367 (KB) 375
[348] *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147 (QB)
[349] *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147 (QB) 153

From the above judgement, it is evident that the English Court could tolerate a generic document with incomplete descriptions or missing data, providing that this document can be linked with the other document in the same presentation and the incompletion can be supplemented by reading a set of tendered documents.[350] Consequently, under the common law, it is not sufficient for a document to literally be in "no conflict" with the other documents and the credit. The document must also carry a linkage to the same transaction, so as to render the presentation effective.[351]

4.4.2 Pre-UCP600 status

Since the UCP1974 revision, the notion of consistency has been involved in the test for documentary compliance. It was well recognised from the UCP1974 revision to UCP500 that 'documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit.'[352] It was also generally accepted that the description of goods in all other documents apart from the commercial invoice may be "in general terms not inconsistent with that in the credit", and moreover without specific stipulation in the credit, banks will accept a generic document as tendered.[353] Nevertheless, the notion of consistency was not narrowly restricted to its apparent meaning. In the DOCDEX Decision under UCP1974 revision, the ICC Banking Commission for the first time affirmed that, consistency required not only avoiding disparities in their content but also that 'the whole of the documents must obviously relate to the same transaction, that is to say that each should bear a relation (link) with the others on its face.'[354]

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[350] It should be noted that a deficiency in a document which does not comply with an express requirement of the credit cannot be cured by reference to another document. See *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 1 Lloyd's Rep 236 (CA) 240

[351] Sir John Donaldson MR expressed in *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA) 731 that he would accept the submission from the plaintiff following the above analysis in a case to which the UCP did not apply.

[352] See UCP1974 Article 7, UCP400 Article 15 and UCP500 Article 13 (a)

[353] See UCP1974 Article 32 (c) and Article 33; UCP400 Article 41 (c) and Article 23; UCP500 Article 37 (c) and Article 21

[354] ICC, *Decisions 1975-1979 of the ICC Banking Commission* (ICC Publication No.371, ICC 1980) R

In the meantime, *Banque de L'Indochine et de Suez SA v JH Rayner Ltd*,[355] as the leading case concerning linkage under letters of credit was brought to the English courts. At the first instance court, Parker J rejected the argument that the documents did not need to be linked with each other as long as their description were literally consistent with the requirement of Article 32 (c) in the UCP1974 revision.[356] Furthermore, Parker J emphasised that the documents must "be plainly seen to be linked with each other".[357] In the Court of Appeal, Sir John Donaldson MR still rejected the argument but on the basis of a real distinction between identification and description of the goods. Sir John Donaldson MR analysed that '*however general the description, the identification must, in my judgment, be unequivocal. Linkage between the documents is not, as such, necessary, provided that each directly or indirectly refers unequivocally to "the goods".*'[358] '*Clearly these certificates could relate to the goods, but they do not necessarily do so.*'[359] In consequence, the court held that the controversial documents did not satisfy the rule of consistency under the UCP1974 revision.

In the author's opinion, without an express reference of linkage under UCP, the *Banque de L'Indochine* had successfully discovered a breakout to make the consistency rule operative. From the above context, it is clear to see that a plain linkage as Parker J suggested at the first instance might not be necessary; however, in the words from the Court of Appeal, the documents have to "necessarily" relate to the goods in the same transaction.[360] According to the different methods of creating linkage, a linkage can be set up as a hard linkage or a soft linkage. Hard linkage means that each presented

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[355] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA)

[356] UCP400 Article 32 (c) reads that 'in all other documents [apart from commercial invoice] the goods may be described in general terms not inconsistent with the description of the goods in the credit.' It is similar to the UCP600 Article 14 (e).

[357] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA) 721

[358] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA) 732

[359] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA) 732

[360] The word "necessarily" means "with reasonable certainty" in Jack's view, see Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.49

document provides a clear and direct reference which makes the document plainly linked to the same goods or services, while soft linkage is achieved via an indirect description or information which makes the document possibly relate to the goods or services stipulated in the credit. It is quite clear in *Banque de L'Indochine* case that the first instance court preferred a hard linkage but the Court of Appeal tended to choose a soft linkage. Nonetheless, whether through unequivocal identification of the same goods or through clear links between the documents, the *Banque de L'Indochine* case affirmed that there had to be an irrefutable linkage, however achieved.

Subsequently, the UCP400 in 1983 maintained the general requirement of consistency and moreover, it followed the rule in the *Banque de L'Indochine* case to re-word its residual article, which indicated that in the absence of contrary instructions in the credit, documents within this purview would be accepted only if their data content made them "possible to relate" to the goods or services referred to in the commercial invoice or the credit.[361] Although the residual article in the subsequent UCP500 omitted the phrase, it was acknowledged that the minor wording change in the UCP500 was only for the purpose of clarity and concision.[362] Nevertheless, the ambiguity of this rule lies in the strictness of setting a linkage. In other words, it is hard to tell to which degree the data content would satisfy the test of "possible to relate". 'Was it necessary that each presented document clearly referred to the same goods or services ("hard linkage") or was it sufficient that each document might possibly so refer even though they might possibly not so refer ("soft linkage")?'[363] Neither the residual article in the UCP400 nor that in the UCP500 managed to clarify the formulation.

In the meantime, there were a series of ICC Opinions and DOCDEX Decisions that confirmed the linkage requirement as an ongoing aspect of consistency. However, they did not systematically demonstrate how tight the link should be and to which degree

[361] UCP400 Article 23

[362] Charles del Busto, *UCP500 & UCP400 Compared* (ICC Publication No.511, ICC 1993) 61

[363] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-124

the linkage should be regarded as sufficient. In the ICC Opinion R237, the Banking Commission decided that a failure to give any description of the goods in the presented packing list could not be construed as being a discrepancy, since there was a sufficient link between the data content in the commercial invoice and the packing list by indicating the quantity of goods, style number and invoice number.[364] Similarly, in the ICC Opinion R364, the Banking Commission established that 'a bank, faced with a document with no description of goods, should be satisfied that the document and its content relate to the transaction in hand. The inclusion of the invoice number on the beneficiary certificate would be sufficient information to relate this to the other documents.'[365] It is clear from these two opinions that the linkage can be undoubtedly achieved by inserting the unique number of a transaction appearing in the credit or commercial invoice, which should be so called "hard linkage".

Comparatively, the other type of linkage between documents might be achieved by "soft linkage", the character of which is not as obvious or clear-cut as "hard linkage". A general description of goods and other particulars appearing in the letter of credit terms or other documents could be a means of providing a subsidiary link. As the ICC Opinion R251 stated, 'if the credit provides a quantity of goods to be shipped and the certificates make reference to this among the other information that was required to appear, this may constitute a sufficient link.'[366] Similarly, the bills of lading presenting the same gross weights and total measurements as those stated in the packing lists were considered to have an adequate link with the presentation.[367] The provisional weight and moisture certificate showing the name of the vessel and the date of the bill of lading was deemed to unequivocally establish the necessary linkages between the documents relating to the shipment.[368] However, as mentioned in aforementioned

[364] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Collected Opinions 1995-2001* (ICC Publication No.632, ICC 2002) R237

[365] *ICC Opinions 1995-2001*, R364

[366] *ICC Opinions 1995-2001*, R251

[367] Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 1997-2003* (ICC Publication No.665, ICC 2004) Decision No.203

[368] *DOCDEX Decisions 1997-2003*, Decision No.213

opinions, each answer was provided on a case-by-case basis. The unpublished Opinion R556 subsequently proved the indefinite outcome by relying on the "soft linkage".[369] In this query, three certificates individually quoted the exact wording as required by the credit. Nevertheless, apart from the same beneficiary name, none of them provided any other information which could clearly link with the specific presentation. The Banking Commission concluded that the certificates issued by the named beneficiary did not create a sufficient linkage.

In another leading case under UCP500, *Glencore International AG v Bank of China*,[370] the courts held a divergent view concerning the identification test established in the *Banque de L'Indochine* case by measuring the wording used in the UCP500 and the above ICC Opinions. Rix J expressed that '*I am impressed by the fact that, consistently as it seems to me with the less demanding language of UCP revisions subsequent to* Banque de l'Indochine*, the ICC experts' test goes no higher than to demand a "sufficient link"*.'[371] The court believed that the minimal requirement for a packing list should be that it can unequivocally relate to the goods and its data content was not inconsistent with the other documents. In this case, the goods described in the packing list were found to be unequivocally, albeit indirectly, identified with both the letter of credit goods and the goods shipped. Therefore, the Court of Appeal concluded that the bank was not entitled to reject the packing lists which did not contain a description of the goods, since when reading in conjunction with the other documents, '*the linkage between the documents was clear, exact and devoid of discrepancy*.'[372] Regrettably, as the linkage argument was satisfied by the strictness of texts, the court felt unnecessary to further decide the requisite degree of specificity. In terms of the above cases, the only judicial conclusion that can be drawn is that, "consistency" as referred to in the UCP500 regime should include the meaning that the whole of documents must relate

[369] Gary Collyer and Ron Katz (eds), *Unpublished Opinions of the ICC Banking Commission 1995-2004* (ICC Publication No.660, ICC 2005) R556
[370] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135
[371] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (QB) 145
[372] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA) 154

to the same transaction. Regardless of if the relation is achieved by "hard" or "soft" means, it has to be a sufficient link between the data content of each document.

4.4.3 Linkage issue under UCP600

Under UCP600, the notion of "consistency" used in the previous UCP revisions has been deleted. Instead of it, the UCP600 starts to transplant the concept of "no conflict" into the generic document examinations regarding both descriptions of goods and the data content in the documents. In the meantime, the residual article in the UCP600, Article 14 (f), only mentions that the content in a generic document should fulfil its function as required. Literally, the UCP600 has left the question of linkage entirely outside its provisions. Moreover, it is strongly argued that the notion of "consistency", which embraced the linkage requirement into the previous UCP revisions, has been substituted by "no conflict" without further extension. It is therefore difficult to confirm whether the linkage requirement still exists, where it would be placed and how strict it would be if it still remains under UCP600.

4.4.3.1 Necessity of linkage under UCP600

From the current UCP600 provisions, it might be argued that there is no necessity to link the content in a generic document with the descriptions of goods or any reference numbers under the credit, and the document will be accepted as long as no conflict data in there. If so, the conclusion might be drawn that a generic document need not be positively related to, or identified with, the goods for which payment is sought. Nonetheless, 'that would be an invitation to fraud and would greatly detract from the security which the inclusion of such documents is aimed to provide.'[373] Since the UCP600 has already relaxed the strictness of compliance rule in some ways, such as setting up "no conflict" rule and tolerating lack of descriptions in most documents, the absence of a linkage requirement will inevitably bring detrimental results. Consider, as an example, the difficulty that would arise if a certificate of inspection only shows

[373] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.50

"Trucks—inspected", without bearing any reference to link with the credit which requires "100 new US Chevrolet trucks". That inspection certificate seems to fulfil the function of inspection as stated in the UCP600 Article 14 (f); however, it may be issued for another sale with "Benz trucks". No one can identify from the appearance of this certificate that it necessarily represents the goods stipulated in the credit. Since the linkage requirement is an effective tool to identify the goods bound under the specific credit and defend against documentary fraud, the author believes that it is of necessity to constitute a condition for document examination under UCP600.

Regrettably, the UCP600 does not refer to, expressly or implicitly, that linkage is necessary between or among documents. The only clue concerning linkage under the UCP600 regime can be found in the ISBP regarding the certificate of origin. The ISBP states that the certificate of origin must appear to relate to the invoiced goods, either through containing description in itself or by referring to a goods description appearing in another stipulated document.[374] However, there is no linkage requirement specified for other generic documents in the ISBP. Evidently, the express words concerning the issue of linkage under the UCP600 regime are far from enough. In stark contrast, whether from the historical succession or practical needs, the necessity of requiring linkage between or among documents is unshakable. Therefore, the question turns to where the linkage requirement should be put and how to achieve that.

4.4.3.2 Proposed way to impose the linkage requirement

Once the necessity is affirmed, how to achieve the linkage requirement under UCP600 should subsequently be considered. Apart from expressly requiring insertion of linkage in the credit, there are three proposed ways to impose the requirement of linkage on the parties, which include treating the linkage issue as the common law requirement, stretching the meaning of "no conflict" and expanding the scope of "fulfilling the function" as respectively analysed in the following paragraphs.

[374] ISBP No.745, section L4; ISBP No.681, para.183

The first approach would be to say that the requirement for linkage arises under common law, since the UCP is silent on the point. This approach was widely used by the English courts. In *Banque de L'Indochine*,[375] Parker J derived from the common law rules and concluded that the documents must be plainly linked with each other. The Court of Appeal also construed the UCP provisions by adding its own understanding, i.e. the documents must sufficiently identify the goods to which they relate. Even though the judges in the *Glencore* case believed the linkage and identification tests derived from *Banque de L'Indochine* were too rigorous, they were still intended to support a less demanding sufficient link between or among documents, in the absence of contrary provisions in the UCP.[376]

However, with the demise of the notion of "consistency" in the UCP600, the imposition of linkage requirement from common law will trigger the proposition that 'national law has a substantial role to play in articulating major principles relating to the operation of documentary credits, thereby jeopardizing the remarkable uniformity of law achieved by the UCP.'[377] It also raises the question that the parties involved into documentary credits might not wish to face with an uncertain situation and let their rights and obligations depend on the applicable national law. Moreover, it will inevitably cause difficulties and confusions in practice since the same examining bank has to use different standards to check documents required by various credits which are governed by different applicable law. The situation will be extremely embarrassing if a bank in London has to insist on linkage when examining documents under a credit governed by English law, but not when acting under a credit governed by a foreign law.

The second approach to the same end is to incorporate the concept of linkage into the requirement of "no conflict" mentioned in the UCP600 Article 14 (d) and Article 14 (e).

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375 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA)
376 *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA) 154
377 Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-124

Since the rule of "no conflict" superseded the notion of "consistency" under UCP500 and UCP400, it might argue that the new concept should also embrace the linkage requirement as attached in the notion of "consistency". In the author's view, this approach stretches the ordinary meaning of "no conflict" rule in an unrealistic way, in that no reasonable person can easily get this remote conclusion through an objective judgment. 'Linkage, whether hard or soft, cannot be read into absence of conflict in data content unless it is reduced to a degree of softness that denies it any independent meaning.'[378] In consequence, the author believes that the requirement of linkage has to find its own foothold to stay, even if without an express statement, its independent meaning needs to be clearly implied.

The third suggestion is to treat the vestige of linkage as a requirement of Article 14 (f) which states that a presented document must appear to fulfil its function. In the author's opinion, this proposal may make the scope of the documentary "function" in the Article 14 (f) slightly wide, but in a sensible way. In a recent ICC query, the Banking Commission intended to join the linkage issue and fulfilling documentary functions together.[379] The certificate of origin was presented with the words "We certify that the goods are of French origin" and bore the name of the beneficiary and a signature, but it contained no relationship to the invoiced goods. The Banking Commission held that the certificate was deficient, since it had failed to fulfil the function. Although the decision was made by reference to the ISBP No.681 para.183, which expressly required that a certificate of origin must appear to relate to the invoiced goods, the author cannot see why the same spirit would not be followed when it comes to the other documents. Even if there are no express linkage requirements under the UCP600 regime concerning other documents, it can still be strongly argued that linkage is an essential element to judge whether the presented document has fulfilled its function. This approach is closer to the previous UCP structures, i.e.

[378] ibid

[379] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Opinions 2009-2011* (ICC Publication No.732, ICC 2012) R727

putting the linkage issue into the residual clause, such as what the UCP400 Article 23 did.[380] Thus, the author tends to adopt this method to insert the linkage requirement into the UCP600 via a reasonable way.

Whatever the interpretation is, it can only be the exception rather than the rule. In any case, the ICC Banking Commission urgently needs to clarify the status of linkage in the UCP system. It is not about whether to make a compromise in putting the classic rule established by a national law into the UCP. In the author's view, the crucial question faced by the ICC Banking Commission is whether they will revise the UCP system in accordance with their strict compliance reform and the market needs so as to make the documentary credit transactions more secure and fluent.[381] It is not necessary to distinguish that the origin of a doctrine is from a national or international level, as long as the UCP initiates a big step to absorb this good practice and complies with its previous decisions. According to the above analysis, the author tentatively suggests that the ICC should indicate the requirement of linkage in UCP600 Article 14 (f), or at least place a clear and detailed reference concerning the linkage requirement in the ISBP, which can apply to all the presented documents without doubt.

4.4.3.3 Strictness of linkage

What kind of linkage needs to be built up between or among the documents is an issue surrounded with continuous disputes, from the unequivocal identification of goods stated by the Court of Appeal in *Banque de L'Indochine* to the "possible to relate" rule

[380] UCP400 Article 23 reads, 'when documents other than transport documents, insurance documents and commercial invoices are called for, the credit should stipulate by whom such documents are to be issued and their wording or data content. If the credit does not so stipulate, banks will accept such documents as presented, provided that their data content *makes it possible to relate* the goods and/or services referred to therein to those referred to in the commercial invoice(s) presented, or to those referred to in the credit if the credit does not stipulate presentation of a commercial invoice.'

[381] There is a clear sign that during the revision process, some ICC national committees believed that the UCP should include reference to linkage in the documents and they still thought linkage was being a remaining issue until now. See Gary Collyer, 'Responses to 9 "Key Issues" Help Shape the UCP 600' *Coastline Newsletter* (Issue 2, August 2006) <www.coastlinesolutions.com/issue02.htm> accessed 10 April 2013

stipulated in the UCP400. From the plain linkage required by Parker J in *Banque de L'Indochine* to the indirect linkage indicated in the *Glencore* case, and not to mention the massive volume of ICC expert opinions. The UCP, in which future revisions tend to reduce the rejection rate of documentary presentation, is not very likely to impose any compulsory fixed linkage, such as containing an identical reference number or requiring the specific description of goods in each presented document. Hence, it is suggested that the linkage is not necessary to be direct unless there is a contrary requirement in the credit.[382] A soft or indirect linkage is capable of satisfying the documentary requirement as long as it is sufficient, but the controversial point lies in what kind of linkage would constitute a sufficient linkage and how to judge a qualified linkage.

In the author's opinion, the linkage should be regarded as a sufficient one, if a reasonable banker will be able to unequivocally identify the shipped goods or undoubtedly relate the presented document to the credit transaction. There are many ways to constitute a sufficient linkage, such as referring to the correct quantity of goods in a named vessel, pointing out the ship markings on the bags, mentioning any specific reference number related to the transaction or providing particular descriptions of the goods as stated in the credit. Nevertheless, in the author's view, the sufficiency of linkage will not be satisfied by a link which leads the document such that they are "possible to relate" to the transaction as UCP400 stipulated. Comparatively, a sufficient linkage must make the presented document clearly, or to some degree necessarily, relate to the transaction. For example, if the credit states "100 new US Chevrolet trucks", a certificate of origin which only shows "new trucks" without other relevant linkages to the whole presentation would not be acceptable, since this linkage is possible but not sufficient enough to relate to the goods in the credit.[383] Although it is not possible to summarise a golden rule to judge the sufficiency, one point is definite,

[382] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 1 Lloyd's Rep 236 (CA) 240

[383] It may be argued that if the description in the certificate changes to "100 Chevrolet trucks", the sufficiency would be reached.

namely, the sufficiency should be satisfied if the document in issue clearly forms part of a set of documents or it unequivocally links to the subject of the credit. Again, similar to the process of deciding whether a document fulfils its function, the bank needs to perform reasonable care in judging the sufficiency of linkage between or among documents.

'It is clear, therefore, that hard, unequivocal linkage will not be required under UCP600 unless stipulated by the terms of the credit, nor indeed is soft linkage an aspect of compliance outside of Article 14 (f), as discussed.'[384] The safe course is for the applicants to ensure that their intention is covered by the express wording of the credit.[385] On the other hand, to be safe, the beneficiary should put in relevant descriptions of goods or at least a commercial reference number into the presented documents to ensure a sufficient link to the subject matter which payment is sought for. Nonetheless, the banks, which were frequently reminded for the existence of the linkage requirement, still face with dilemma to claim the missing linkage in practice, due to no express statement in the UCP600.[386] The author believes that the uncertainty can only be fundamentally solved by the ICC clarification. As analysed above, it is of great importance to insert the requirement of linkage into the current documentary compliance regime. The ICC Banking Commission can either choose to illuminate the issue in the UCP600 Article 14 (f) to supplement the "function" rule, or draft a new provision requiring "a sufficient link to the transaction" in the ISBP which would widely apply to any general documents other than to the certificate of origin only.

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[384] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-124

[385] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 1 Lloyd's Rep 236 (CA), in which the credit provided that each document should contain the credit number, LJ Lloyd p.240 held that even though the linkage between the documents without stating the credit number can be observed, the deficiency of missing credit number still cannot be cured due to such an express requirement in the credit.

[386] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.50, also cited by Rix J in *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (QB) 146

4.5 Mismatched quantity of anticipated documents

Apart from the deficient data in a document, the situation of mismatched quantity between the presented documents and the required documents in the credit frequently occurs in a documentary examination. The bank may face with more presented documents than those stated in the credit, or in another case the bank may suffer a shortage of documents compared with the expectations drawn from the credit. If a document is absent from the express list stated in the credit, the bank can unambiguously reject the deficient presentation. However, the trouble of shortage lies in when the credit terms state certain requirements rather than specifically request a document, i.e. non-documentary conditions. How should the bank deal with the difference between the actual documents called for and the anticipated documents inferred from the credit? The third situation concerning the mismatched quantity of documents happens in a presentation with the combined document, which means two or more required documents merged into a joint document. In this part, all the above three situations with respect to mismatched quantity of documents coming across in the bank's documentary examination will be thoroughly analysed.

4.5.1 Additional document

It is quite common for a bank to receive additional documents which are not required by the credit in a presentation. The additional documents, which may be used to strengthen the beneficiary's position to get payment or just tendered without intention, theoretically will not cause any impact on bank's decision. UCP600 Article 14 (g) expressly states that 'a document presented but not required by the credit will be disregarded and may be returned to the presenter'. In its predecessor, the UCP 500 Article 13 (a) declares that 'documents not stipulated in the credit will not be examined by banks…' It is obvious to see that UCP600 remains but clarifies the position under UCP500. Clearly, the official attitude towards the additional documents is that whether or not the documents are examined, they are to be disregarded which signifies that they

cannot be asserted as a basis for curing a discrepancy or refusing the presentation.[387]

Firstly, an additional document cannot be used to cure a discrepancy in a required document. For example, a required air waybill evidencing the applicant as the consignee in the credit could not be justified by presenting an air waybill filling the bank as the consignee plus a telex confirming the change in name of the consignee. In this case, the telex confirmation was considered as an additional document not called for in the credit, so that it would be ignored and could not affect the obvious discrepancy.[388] Nevertheless, sometimes it is hard to tell that the additional document intents to cure a discrepancy or supplement a gap left in the required documents. Taking the ICC Opinion case as an example, the credit required a pre-shipment inspection certificate issued by A (Country B) Ltd or their accredited representative. While, the certificate was tendered with A (Country I) Ltd as the issuer and its representative status was verified by a separate letter enclosed from A (Country B) Ltd. The ICC Banking Commission concluded that the inclusion of an additional letter would not be acceptable under the credit terms and the evidence of A (Country I) Ltd acting as the agent would need to appear on the actual certificate itself.[389] In the author's opinion, the ICC's reasoning was correct but too technical. The additional document in this case did not intend to cure an apparent conflict, but it was used to supplement the agent status in order to fit with the credit terms.[390] Unsurprisingly, the conclusion would be completely changed if there was a notation in the original certificate, which could easily turn the additional letter to be an integral part of certificate. From the above, the experience learnt is that the bank is entitled to disregard any additional documents as long as they cannot be alleged as a part of

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[387] James Byrne, The *Comparison of UCP600 & UCP500* (ICC 2007) 137

[388] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Collected Opinions 1995-2001* (ICC Publication No.632, ICC 2002) R406

[389] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Collected Opinions 1995-2001* (ICC Publication No.632, ICC 2002) R407

[390] The author suspects whether the difference in the issuer's names will be treated as a discrepancy under the current UCP600 Article 14 (d), in which the standard of examination changes to "conflict" rule rather than the "inconsistency" rule in UCP500. It might be quite difficult to justify the rejection if the difference in names is the only discrepancy.

required documents, whatever the additional document serves for.

Secondly, an apparently conforming required document cannot be rendered non-compliant by the inconsistent data in an additional document. Since the bank has already claimed to disregard the additional documents, it would not be justified if the bank still makes use of the inconsistencies in the additional document to allege discrepancies in a presentation. However, in practice, this conclusion is not absolute and the conflicting data in the additional document may trigger unexpected consequences. The reason lies in that the scope of the additional document is not very clear-cut and sometimes the extra document may be considered as a joint part of the required documents. In a DOCDEX Decision, the inconsistent data in the additional log list rendered the presentation discrepant.[391] The panel analysed that although the log list was not stipulated in the credit, the presented certificate of inspection which expressly referred to the "log list(s) attached" made the log list form an integral part of such certificate. Therefore, the panel concluded that the log list should not fall into the scope of additional documents which would be disregarded. Instead, as a part of documents to be examined, any inconsistent data in the log list would justify the rejection. From this case, it is clear to see that an additional document is not definitely to be disregarded if it bears a relation with the required documents. It should be alerted that the presenter has to take any possible risk for tendering the additional documents to the bank.

It is clear to see the official attitude towards the additional documents is that they should be disregarded and cannot be used as a basis for curing a discrepancy or refusing the presentation. However, in practice, the banks may suffer difficulties in determining whether the unlisted document in a bundle of presented documents is a so-called "additional" document or not. In an ICC Query, two forms of health

[391] Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 1997-2003* (ICC Publication No.665, ICC 2004) No.224

certificate were included within the presentation made to the issuing bank.[392] Since no reference was made in the covering schedule from the negotiating bank, the issuing bank had to consider which of the two certificates should be qualified as the required health certificate. Far from the opinion of the negotiating bank which regarded the Statutory Declaration to be an additional document, the issuing bank believed that the Statutory Declaration further named Health Certificate was the indivisible part of the original Health Certificate issued by the beneficiary, so that the alleged discrepancies in this document would render the whole presentation non-compliant. The ICC Banking Commission disagreed with the issuing bank's opinion, which held that the Statutory Declaration could only be treated as a part of documents to be examined if there was a reference made in the required health certificate to that effect.

The above query highlights the problem when an additional document is forwarded to the issuing bank, but no reference to this effect is made in the covering schedule of the negotiating bank. It is correct for the issuing bank to consider the content of all the presented documents and judge the nature of the additional document. However, in the process, both parties have taken a risk. If the document is considered as an integral part of the required document, then it will be subject to the "no conflict data" rule in the UCP600 Article 14 (d). Otherwise, the additional document has to be disregarded as the UCP600 Article 14 (g) even if it might indicate the discrepancy in the presentation. Clearly, inserting an additional document in a presentation hardly achieves the effect as a supplement and even worse it may cause unnecessary troubles. According to the above cases, the rule which claims passing on an additional document to the upstream examiner without responsibility may not be applicable in practice, since the nature of an extra document is indefinite.[393] If a bank decides to forward the additional document, the advisable way to do so would be to put an annotation in its covering

[392] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Opinions 2005-2008* (ICC Publication No.697, ICC 2008) R669

[393] See UCP500 Article 13 (a) para.2. The equivalent paragraph is deleted in the UCP600 Article 14 (g), which only leaves "may return to the presenter". However, the return opinion is not without doubt. Since the additional document belongs to the property of presenter, same as the return issue in a rejection, the time and condition of the returned document should be alerted by banks as well.

statement so as to let the next examiner know what has happened.

4.5.2 Non-documentary conditions

As mentioned in the introduction of this section, if the quantity of presented documents is less than the number of documents expressly listed in the letter of credit, the bank can reject the presentation without hesitation. However, the difficulty of mismatch lies in when the conditions stipulated in the credit are more than the documents actually required by the credit. In another words, the quantity of the actual calling is less than the anticipated documents inferring from the credit conditions. These conditions which cannot be matched and evidenced by the stipulated documents in the credit are so called non-documentary conditions. In this part, the author will firstly analyse the nature of non-documentary terms and the measures taken by the UCP to stop this incorrect practice. Then, the author will examine the cases that have occurred under the ambit of UCP provisions concerning non-documentary conditions and reveal the difficulties suffered in their applications. Subsequently, in order to solve the current dilemma, the author will review the common law position upon non-documentary conditions and make use of the experience extracted from the case law. Finally, a balanced proposal to deal with the non-documentary issue will be put forward.

4.5.2.1 Definition, nature and UCP measures

The non-documentary condition is a type of condition stated in the credit but without specifying a required document to evidence its compliance. It is evident that the non-documentary requirements will impose on the bank a duty which falls outside the traditional documentary examination. The bank is not likely to determine whether the non-documentary conditions have been satisfied by examining the stipulated documents, so it has to refer to extraneous materials within the limited examination time. As Sir John Donaldson pointed out, '*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.'[394] It is clear to see that the inclusion of non-documentary conditions in the credit not only undermines the basic principle of autonomy, but also corrodes the capacity of the bank to act with reasonable promptness. Despite the serious side effects caused by the non-documentary conditions, parties are still addicted to including these terms in their credits. The situation is partly attributed to professional incompetence in drafting, but mainly led by the account party who intends to strengthen its transaction security against the beneficiary through adding these qualifications. Clearly, in nature a non-documentary term is a tool designed by the applicant with the aid of the issuing bank against payment to the confirming bank and the beneficiary.

The ICC Banking Commission endeavours to strike this increasingly wrong practice which contradicts the provisions regarding to documentary examination, namely Article 2 defining a complying presentation, Article 4 and Article 5 stating principle of autonomy as well as Article 14 (a) stipulating standards of examination in the UCP600.[395] The ICC first shot at attacking non-documentary conditions could be found in UCP500 Article 13 (c), which held "the specific purpose of eradicating the totally wrong practice of incorporating non-documentary condition(s) into documentary credits".[396] It provided the "disregard rule", i.e. 'if a Credit contains conditions without stating the document(s) to be presented in compliance therewith, banks will deem such conditions as not stated and will disregard them.' [397] Subsequently, in order to clarify the meaning of Article 13 (c) and emphasise the ICC's disapproval concerning this wrong practice, the ICC issued a position paper to explain its position. It also proposed that 'sometimes, however, a condition appears in a documentary credit which can be *clearly linked* to a document stipulated in that documentary credit. Such a condition is not then deemed to be a non-documentary

[394] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA) 728
[395] In UCP500, inclusion of a non-documentary condition would conflict with Article 2 defining the meaning of credit, Article 4 and Article 5 (b) concerning principle of autonomy, as well as Article 13 (a) regarding to documentary examination.
[396] ICC Banking Commission, *Position Papers No 1, 2, 3, 4 on UCP 500 Uniform Customs and Practice for Documentary Credits* (1 September 1994) Position Paper No.3
[397] UCP500 Article 13 (c)

condition. For example, if a condition in the documentary credit states that the goods are to be of German origin and no Certificate of Origin is called for, the reference to "German origin" would be deemed to be a non-documentary condition and disregarded in accordance with UCP 500 sub-Article 13(c). If, however, the same documentary credit stipulated a Certificate of Origin, then there would not be a non-documentary condition as the Certificate of Origin would have to evidence the German origin.'[398]

It seemed under UCP500 that only if the term could not be clearly linked with the stipulated documents would it be counted as a non-documentary condition. Guided by this explanation, in several queries the ICC Banking Commission tried to distinguish the real non-documentary conditions from all the terms which were separated with the stipulated documents. In one case, it held that the name of carrier added in the "Additional Conditions" of the credit could undoubtedly be linked to the air waybill which was expressly required by the credit, so the term in the "Additional Conditions" would not be considered as a non-documentary condition.[399] Similarly, the term of "shipment to be by seafreight vessel sailing to Mombasa Port via Suez" mentioned in the "special instructions" of the credit would not be treated as a non-documentary condition, since the term can be related to the stipulated bill of lading which specified the port of loading and discharge. Moreover, in order to satisfy this additional term, the Banking Commission concluded that the bank was entitled to require the bill of lading which stated "the seafreight vessel would be sailing via Suez".[400] Nonetheless, the view held by the Banking Commission was not always consistent. In another ICC query, it concluded that a term "shipment must be effected by/through ABC" in the "special conditions" section of the credit without stipulating a corresponding document would be regarded as a non-documentary condition.[401] Since there was no guideline in

[398] ICC Banking Commission, *Position Papers No 1, 2, 3, 4 on UCP 500 Uniform Customs and Practice for Documentary Credits* (1 September 1994) Position Paper No.3

[399] Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 1997-2003* (ICC Publication No.665, ICC 2004) No.205

[400] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Collected Opinions 1995-2001* (ICC Publication No.632, ICC 2002) R212

[401] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Collected Opinions 1995-2001* (ICC

respect of judging "clearly linked", 'it has been suggested that the Position Paper's linkage test suffered from a regrettable vagueness that served only to introduce uncertainty.'[402]

Following the UCP500, the UCP600 keeps the same "disregard rule" concerning non-documentary conditions in its Article 14 (h), which states that 'if a credit contains a condition without stipulating the document to indicate compliance with the condition, banks will deem such conditions as not stated and will disregard it'. Although the words used for the non-documentary issue in the UCP600 are similar to those in the UCP500, the Position Paper No.3 which played a controversial role under UCP500 to interpret the "disregard rule" would not however be applicable under UCP600 anymore.[403] Therefore, the UCP600 Article 14 (h) would be arguably interpreted in a more literal fashion, i.e. *all* non-documentary conditions must be disregarded, whether or not its satisfaction is determinable through linking with the tendered document.[404] It seems that the scope of "disregard rule" under UCP600 is wider than that under UCP500, since all the non-documentary conditions would be disregarded even though some of them can be clearly linked to the required documents. Hence, to some degree, the literal recognition set out in the UCP600 might reduce the uncertainty caused by the linkage test and further discourage the use of non-documentary conditions.

It is evident that the non-documentary provision in the UCP aims to discourage the issuance of a credit containing the non-documentary terms through ignoring those terms. The UCP has put the responsibility on the applicant and the issuing bank to stipulate which documents need to be presented under the credit.[405] For this purpose, it is well grounded that the UCP500 Article 13 (c) (and by extension, the UCP600 Article

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Publication No.632, ICC 2002) R411

[402] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-114

[403] UCP600, Introduction

[404] Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 66; Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-114

[405] Charles del Busto, *UCP500 & UCP400 Compared* (ICC Publication No.511, ICC 1993) 43

14 (h)) avails the negotiating or confirming bank against the issuing bank and arguably, the issuing bank against the applicant, rather than in a reverse order.[406] Nevertheless, the ICC Banking Commission did not achieve its aim of eradicating the non-documentary conditions in the credit by setting up the "disregard rule" and the parties still follow their routine practice to inject non-documentary conditions into their credits.[407] Moreover, problems both in law and in practice have come out in the application of the UCP "disregard rule". Even worse, the courts have even decided to uphold a non-documentary clause in a credit rather than follow the UCP provision in certain circumstances. In the next part, the author will examine the cases decided under the UCP "disregard rule" and reveal the difficulties faced by the UCP from different perspectives.

4.5.2.2 Difficulties met by the UCP "disregard rule"

Since the UCP500 first introduced the "disregard rule" to discourage the usage of non-documentary conditions in documentary credits, several main difficulties have emerged both in law and in practice. These difficulties still remain under UCP600 in that the "disregard rule" has kept intact. In this part, the author will divide the main problems triggered by the "disregard rule" into four sections, namely, primacy of special terms in contract law, the challenge caused by "fundamental" importance, the practical dilemma faced by the issuing bank and interactions with other provisions under UCP600.

A. Primacy of special terms

The problem arises because the UCP does not have the force of law and its legal effect comes from the general incorporation into a contract. The status of the UCP terms is considered to be a set of standard terms. It is clear that the parties are free to make their

[406] *Korea Exchange Bank v Standard Chartered Bank* [2005] SGHC 220, [2006] 1 SLR 565, 577
[407] Roy Goode, 'Abstract Payment Undertakings and the Rules of the International Chamber of Commerce' (1995) 39 St Louis L J 725, 736-737

own bargain to expressly modify or exclude any provisions in the UCP.[408] Therefore, if the credit expressly provides that the UCP600 Article 14 (h) should not apply, the bank will need to follow the instruction and examine the compliance for non-documentary conditions. However, the difficulty lies in whether the same result can be achieved by implication, namely, whether the existence of non-documentary conditions can implicitly dismiss the UCP "disregard rule". Although the UCP600 Article 1 states that the UCP provisions are binding on all the parties after incorporation "unless expressly modified or excluded by the credit", it is suggested that the quoted words have not been interpreted so stringently as to mean that only an express exclusion will have effect.[409] '*It is enough if an express provision in UCP500* [or currently, UCP600] *in circumstances where an implication may be drawn that the intention was to exclude the operation of the UCP provision in question. In such an event, the express provision will override the provision of the UCP incorporated by reference only.*' [410] Therefore, it is questionable that whether the insertion of non-documentary conditions, which creates a situation different from that envisaged by the UCP "disregard rule", would constitute a modification to the UCP provision.

It can be strongly argued that non-documentary conditions are the specific terms which are particularly written by the parties in the credit to reflect their intentions. By contrast, UCP provisions are regarded as standard terms which are general incorporated into the credit. According to the principle of interpreting contract terms, in the event of conflict between a general term and a specific term, the latter should prevail on the ground that it is more likely to manifest the intention of the parties in

[408] UCP500 Article 1 and UCP600 Article 1

[409] In Gary Collyer and Ron Katz (eds), *ICC Banking Commission Opinions 2009-2011* (ICC Publication No.732, ICC 2012) R716, the Banking Commission concluded that 'a modification of a rule [under UCP600] may be made by the simple insertion of data that creates a situation different from that envisaged by the UCP.'

[410] *Korea Exchange Bank v Standard Chartered Bank* [2005] SGHC 220, [2006] 1 SLR 565 [32] Words used in the UCP600 Article 1 are similar to words in the UCP500 Article 1 so the analysis drawn under UCP500 in this case should remain unchanged in UCP600.

their transaction.[411] From this perspective, non-documentary conditions which act as bespoke terms are capable of overriding the UCP "disregard rule" incorporated by reference. Furthermore, nothing in the UCP attempts to grant the "disregard rule" paramount status over any inconsistent provision in the credit.[412] As a result, due to the primacy of special terms in the contract law, the "disregard rule" in the UCP has to step back when it comes across non-documentary conditions.

B. "Fundamental" challenge

The above difficulty is questioned by *Jack*, which suggests that 'in the absence of an express exclusion an English court will seek to uphold the scheme of the UCP by requiring all effective conditions to be documentary.'[413] However, in the same paragraph, it is also well recognised that the strength of the support for the UCP scheme will be subject to the importance of the non-documentary condition to the working of the credit. The more important the condition in the credit, the more effect will be given by the courts. This attitude can be demonstrated by a leading Singapore case under UCP500, *Kumagai-Zenecon Construction Pte Ltd v Arab Bank Plc*.[414] In this case, clause 2 of the credit called for the bank to pay the liquidators the sum payable by Low [the buyer] pursuant to his obligations to KIP [the seller] as determined by the judgments of the trial court and the Court of Appeal. The documents specified in the credit including copies of both courts' judgments and the accompanied demand. However, instead of assigning a precise figure, the judgments only indicated that Low's obligation was to pay the higher of the purchase price and the fair price of the relevant shares. Since the liquidators did not furnish the bank with a copy of the

[411] *Glynn v Margetson* [1893] AC 351 (HL) 358; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 AC 715 [11]

[412] Unlike Article 20 (c) (ii) of the UCP600 as analysed in Chapter 5, the disregard rule in Article 14 (h) does not specific its paramount status in its provision. Article 20 (c) (ii) confers the possibility of transhipment in the clause with the paramount status, even if there is an express clause in the credit which prohibits transhipment.

[413] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.24

[414] *Kumagai-Zenecon Construction Pte Ltd v Arab Bank Plc* [1997] SGHC 31, [1997] 1 SLR (R) 277, affd [1997] SGCA 41, [1997] 2 SLR (R) 1020

valuation report, the bank rejected the demand on the basis that it was not compliant with the terms of the credit. Regardless of "disregard rule" under UCP500, the court supported the bank's rejection on the ground that the documents tendered by the liquidators had failed to establish that the amount in their demand was the amount of Low's obligation under the judgments. Judith Prakash J further explained:[415]

> '*Whilst I recognised the desirability of upholding the provisions of UCP-500 in general, it appeared to me that in this instance the circumstances were such that the credit could only be operated if the non-documentary conditions* ie *the ascertainment of the fact and quantum of Low's obligation were satisfied. Otherwise the credit did not make sense since the implication was that any amount within the maximum limit of the credit could have been demanded irrespective of the effect of the two judgments. I therefore found that in this case Art 13c* [the "disregard rule" in UCP500] *had been excluded by implication because of the express wording of cl 2 of the credit.*'

Although the "disregard rule" in the UCP500 Article 13 (c) was implicitly excluded, the above judgment was still challenged by the "surplus documents rule" in the UCP500 Article 13 (a) second paragraph [equivalent to UCP600 Article 14 (g) as discussed above], which directed the bank not to examine documents not stipulated in the credit. However, in order to satisfy the non-documentary condition in the present case, a valuation report which was considered as an additional document must be presented and examined. The Court of Appeal emphasised, by reason of "irreconcilable inconsistency" between the credit terms and the UCP provisions, the "surplus documents rule" in the UCP500 Article 13 (a) had to be ignored by the bank as well.[416] It was evident that in front of the non-documentary condition, which was fatal to the

[415] *Kumagai-Zenecon Construction Pte Ltd v Arab Bank Plc* [1997] SGHC 31, [1997] 1 SLR (R) 277 [26]
[416] *Kumagai-Zenecon Construction Pte Ltd v Arab Bank Plc* [1997] SGCA 41, [1997] 2 SLR (R) 1020 [28]

operation of the credit, the courts had chosen to sacrifice the UCP rules and endeavoured to clear up all the barriers. In spite of the existence of "disregard rule" under UCP, the courts still found a leeway to get rid of it and called for the evidence to uphold the non-documentary conditions. The same approach was adopted by a subsequent case under UCP500, *Korea Exchange Bank v Standard Chartered Bank*.[417] In this case, the issuing bank contended that the "fluctuating price clause" in the credit was a non-documentary condition so that it should be disregarded. Nevertheless, following the *Kumagai-Zenecon* approach, the court held that:[418]

> '*…the importance of the price clause and the automatic fluctuation clause to the working of the credit is obvious. Without it, the credit would be unworkable as the price for the gas oil is not fixed but fluctuates with a benchmark. Therefore, even if they were non-documentary conditions, effect should be given to the two express clauses rather than to Art 13(c).*'

The similar approach dealing with the issue of non-documentary conditions can be also found in the U.S. Uniform Commercial Code (UCC) Revised Article 5. The UCC, as another main source to strike the wrong practice of non-documentary conditions in letters of credit, also initiates the "disregard rule". In Section 5-108 (g), it states that 'if an undertaking constituting a letter of credit under Section 5-102 (a) (10) contains non-documentary conditions, an issuer shall disregard the non-documentary conditions and treat them as if they were not stated.' Nonetheless, the UCC also points out 'that section does not apply to cases where the non-documentary condition is *fundamental* to the issuer's obligation.'[419] 'Where the non-documentary conditions are central and fundamental to the issuer's obligation (as for example a condition that would require the issuer to determine in fact whether the beneficiary had performed the underlying contract or whether the applicant had defaulted) their inclusion may remove the

[417] [2006] 1 SLR 565
[418] *Korea Exchange Bank v Standard Chartered Bank* [2005] SGHC 220, [2006] 1 SLR 565 [33]
[419] Uniform Commercial Code Revised Article 5 (US, 1995) Official Comment 6 of section 5-102 (a)(10)

undertaking from the scope of Article 5 entirely.'[420] Clearly, the UCC illustrates that the non-documentary condition should be ignored as superfluous, but when the non-documentary condition is fundamentally important to the operation of credit, the law of documentary credit stated in Article 5 would not govern.

According to the above case law and the UCC rules, it is evident that the impact of non-documentary terms on the proper working of a credit as a valid consideration has become a strong challenge against the "disregard rule". Since the situation remains unchanged under UCP600, it is very likely for the English courts to hold that at least non-documentary conditions which are fundamental to the commercial operation of the credit would not be overridden by the standard "disregard rule" in the UCP. The more important a non-documentary term, the more prepared a court would be to say that the general incorporation of UCP600 Article 14 (h) has been modified or excluded. However, the fatal risk hidden behind this approach lies in how to ascertain a "fundamental" non-documentary condition. None of the authorities has provided a set of tests to identify which kinds of non-documentary conditions should belong to the category of "fundamental".[421] Without knowing the standards of being "fundamental", it will be extremely difficult for the parties to predict the legal prospects led by different non-documentary conditions. From this perspective, the "fundamental" approach cannot be regarded as an efficient supplementary of the "disregard rule" and the argument of "fundamental" non-documentary conditions do challenge the application of the UCP "disregard rule".

C. Dilemma faced by banks

[420] Uniform Commercial Code Revised Article 5 (US, 1995) Official Comment 9 of section 5-108 (g)

[421] Concerning the tests for fundamental and non-fundamental non-documentary conditions, see Richard Dole, 'The Essence of a Letter of Credit under Revised U.C.C. Article 5: Permissible and Impermissible Non-documentary Conditions Affecting Honor' (1998-1999) 35 Hous L Rev 1079. In this article, the author suggested that in order to reveal the fundamental injustice caused by the "disregard rule", the applicant must prove that he had reasonably relied on the enforceability of a non-documentary condition involving extrinsic facts. However, this process would inevitably involve the concept of good faith.

The third difficulty caused by the application of "disregard rule" is the practical dilemma faced by the bank which has been involved in different contracts. The issuing bank, who has agreed with the applicant to open a letter of credit, has to deal with two or more contracts in the circulation of the credit. The first contract is an application contract between the issuing bank and the applicant. In this contract, the parties are free to negotiate and insert an express non-documentary term against payment, regardless of the general incorporation of UCP600 in the credit. Assuming a simple scenario without other banks involved, once the credit is issued, it will be as an independent unilateral contract between the issuing bank and the beneficiary. Since the credit is subject to the UCP600, the "disregard rule" concerning the non-documentary conditions will take effect. Up to this point, an irreconcilable problem has been generated. By agreeing to open a credit with such non-documentary instructions, it is indicated that in the application contract the issuing bank has consented to undertake this obligation, i.e. payment against the satisfaction of non-documentary terms. However, after involving the UCP "disregard rule" in the credit, the tacit situation has been changed significantly. The credit between the issuing bank and the beneficiary has incorporated the UCP "disregard rule". Without clear modification or exclusion, the beneficiary can claim that the non-documentary condition in the credit should be ignored by the issuing bank and the payment should be released upon the presentation. In consequence, the issuing bank would suffer the most unfortunate situation, which means it is obliged to take up the documents presented by the beneficiary but cannot be reimbursed from the applicant due to a non-documentary discrepancy.

Even in the case of incorporating UCP into the application form, assuming that the parties in the application contract have directed their intention clearly by inserting an express non-documentary condition, the UCP "disregard rule" as a general incorporation has to give way to the special expression. The issuing bank, who has agreed with its customer to include a non-documentary condition in its credit, may not be entitled to treat the term imposed by itself as a nullity. As the "disregard rule" directs, 'even though non-documentary conditions must be disregarded in determining

compliance of a presentation (and thus in determining the issuer's duty to the beneficiary), an issuer that has promised its applicant that it will honour only on the occurrence of those non-documentary conditions may have liability to its applicant for disregarding the conditions.'[422] It can also be strongly argued that the issuing bank has waived its right to claim for ignoring the non-documentary term since it was willing to include this term in its credit.[423] Furthermore, it is doubtful as to whether the issuing bank owes a duty of reasonable care to its customer in the credit drafting. If the issuing bank does owe this duty, it will be in breach of its duty to the customer in accepting such instructions without pointing out that these terms will be null and void under the "disregard rule".[424] To sum up, it is evident that the "disregard rule" has caused a dilemma for the issuing bank. If the issuing bank follows the disregard rule to ignore the non-documentary conditions, it may breach the application contract and may not get reimbursement from its customer. On the contrary, if the issuing bank claims a discrepancy regarding the non-documentary term, the bank may be sued for the wrong rejection since the non-documentary condition is supposed to be disregarded under the UCP.

D. Interactions with "no conflict" rule

Unlike UCP500, the "disregard rule" under UCP600 does not involve the "linkage" test, so that the bank is supposed to ignore all conditions without calling for a specific document to prove them. For example, under UCP600 Article 14 (h), the bank was

[422] Uniform Commercial Code Revised Article 5 (US, 1995) Official Comment 9 of section 5-108 (g)

[423] In *Korea Exchange Bank v Standard Chartered Bank* [2005] SGHC 220, [2006] 1 SLR 565, the court concluded that the "disregard rule" should be the tool used by the confirming bank against the issuing bank or the issuing bank against the applicant and the claim in the reverse order should not be allowed. Although this interpretation was inferred from the UCP Drafting Group's intention of setting up the "disregard rule", the conclusion is doubtful since the rule itself has not been clearly restricted in this way. The author wonders whether the principle of estoppel can be applied in this scenario. According to "a man cannot be permitted to take advantage of his own wrong" principle, the issuing bank has waived its right to claim nullity of this term by actions (i.e. putting the non-documentary term in the credit).

[424] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.23 Nonetheless, some scholars do not agree with this proposition. See Ebenezer Adodo, 'Non-documentary Requirements in Letters of Credit Transactions: What is the Bank's Obligation Today?' [2008] JBL103, fn 57

entitled to disregard a non-documentary requirement concerning the place of delivery, even though a "goods receipt" was called for in the credit which might be clearly linked with the fact and evidence the performance.[425] Nevertheless, the ICC Banking Commission further restricts Article 14 (h) by Article 14 (d) via suggesting that, the data contained in a non-documentary condition must not be in conflict with the data in the other stipulated documents. In Query TA644 rev[426], the Banking Commission held that a condition referring to a "latest shipment date" without stipulating a required document to indicate its compliance would be deemed as a non-documentary condition and disregarded under Article 14 (h); however, should the beneficiary elect to insert the data regarding the "latest shipment date" on any other stipulated document, it must ensure that the data did not conflict with those data in the non-documentary condition. The conclusion drawn by the ICC is that, since a non-documentary condition remains to be a part of the credit, "Article 14 (h) is not absolute and is qualified by the content of Article 14 (d)".[427]

The conclusion of Query TA644 rev was added into the new ISBP No.745, which clarified the UCP600 disregard rule as follows. 'When a credit contains a condition without stipulating a document to indicate compliance therewith ("non-documentary condition"), compliance with such condition need not be evidenced on any stipulated document. However, data contained in a stipulated document are not to be in conflict with the non-documentary condition. For example, when a credit indicates "packing in wooden cases" without indicating that such data is to appear on any stipulate document, a statement in any stipulated document indicating a different type of packing is considered to be a conflict of data.'[428] It is clear to see that the non-documentary

[425] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Opinions 2005-2008* (ICC Publication No.697, ICC 2008) R640. It should be noticed that a forwarding agent's "goods receipt" is not a transport document covered by UCP600 Article 19-25, so it is not obliged to evidence the shipment and delivery ports.

[426] Gary Collyer and Ron Katz (eds), *ICC Banking Commission Opinions 2005-2008* (ICC Publication No.697, ICC 2008) R631

[427] The conclusion was followed by Query TA689 in Gary Collyer and Ron Katz (eds), *ICC Banking Commission Opinions 2009-2011* (ICC Publication No.732, ICC 2012) R743

[428] ISBP No.745, section A26

conditions cannot be literally ignored by the bank. The bank has to examine whether there are any conflict in data between the non-documentary condition and the presented documents. It seems that completely disregarding the information stated in a non-documentary condition under UCP600 would result in a harsh and unfair result, so that the ICC endeavours to use "no conflict" rule to restrict its side effect under UCP600.[429] Although this effort has not brought as much uncertainty as the linkage test under UCP500, it does involve the bank to concern about the non-documentary condition and spend time comparing with data in all the documents. Consequently, under the practical pressure, the ICC has added a qualification to the "disregard rule", which was supposed to be unrestricted in the UCP600.

Through analysing the above difficulties and qualifications in the application of "disregard rule", it is questionable that whether the ICC's laudable endeavour to impose discipline in the marketplace would achieve its desired effect. Even though the UCP literally states that the bank should ignore the non-documentary conditions, the beneficiary or the confirming bank may not be entitled to use the "disregard rule" as a shield when the non-documentary condition is fundamentally important to the operation of the credit. Meanwhile, the issuing bank may be faced with a dilemma to choose the priority between the "disregard rule" and the special term in the application contract. 'It seems likely that Article 13 (a) [Article 14 (h) now in the UCP600], well-intentioned though it is, will lead to problems more serious than those it was designed to prevent.'[430] It is also evident to see that the courts were straining to qualify the absolute prohibition contained in the "disregard rule" and this rule was rarely successfully invoked in the real cases.[431] Therefore, the author wonders whether there is a better way to get rid of the current quandary. How about a different approach of requiring documentary evidence of compliance which was adopted under common

[429] Paul Downes, 'UCP600: Not So Strict Compliance' (2007) 22(4) JIBFL 196, 198

[430] Roy Goode, 'Abstract Payment Undertakings and the Rules of the International Chamber of Commerce' (1995) 39 St Louis L J 725, 736-737

[431] It seems that the "disregard rule" was never successfully invoked in the English courts. See *Credit Agricole Indosuez v Generale Bank (No.2)* [2000] 1 Lloyd's Rep 123 (QB); *Oliver v Dubai Bank Kenya Ltd* [2007] EWHC 2165 (Comm) [15]

law? Compared with the current "disregard rule", which one is more reasonable?

4.5.2.3 Approach adopted by the English courts

Prior to the existence of "disregard rule", the English courts have adopted a different approach through asking for the documentary proof to solve the problem caused by non-documentary conditions in a letter of credit. The revolutionary case in the English courts concerning the issue of non-documentary conditions is *Banque de l'Indochine v J H Rayner (Mincing Lane) Ltd*[432]. In this case, the credit under the heading "Special Conditions", stated: "Shipment to be affected on vessel belonging to shipping company that member of an International Shipping Conference"; however, it did not call for a shipping company certificate to evidence. The dispute between the beneficiary and the confirming bank lied in whether the absence of documentary proof for this non-documentary condition in the credit would justify the rejection. Parker J held that:[433]

> '*As to the primary contention of the parties, since the credit expressly stipulated for shipment on what for convenience I shall call merely "a Conference Line vessel" the plaintiffs* [the confirming bank] *were both entitled and obliged to ensure that the stipulation was complied with. No specific documentary proof was called for by the credit but, since parties to documentary credits deal only in documents, the bank were in my judgment entitled to insist upon, and the defendants* [the beneficiary] *were obliged to provide, reasonable documentary proof. The requirement for a certificate was, in my view, a reasonable requirement and accordingly the bank were entitled to regard its absence as a valid ground for refusing payment even if, as was in fact the case, the vessel was a Conference Line vessel.*'

[432] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 In this case, the credit was subject to UCP 1974 reversion, where had no express provisions concerning non-documentary conditions.
[433] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (QB) 719

In the Court of Appeal, Sir John Donaldson completely upheld Parker J's decision and further complemented:[434]

> '*This is 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. The condition required a state of fact to exist. What the letter of credit should have done was to call for a specific document which was acceptable to the buyer and his bank evidencing the fact that the vessel was owned by a member of a conference. It did not do so and as, accordingly, the confirming bank had to be satisfied of the fact, it was entitled to call for any evidence establishing that fact.*'

The approach of calling for evidence was followed in several English cases after *Banque de l'Indochine*. In *Floating Dock Ltd v Hong Kong & Shanghai Banking Corp*,[435] Evan J held that the bank was entitled to demand any documentary evidence regarding "delivery dates" under the credit terms even though the stipulation did not specify any document. In *The Messiniaki Tolmi*,[436] concerning the requirement of "a Gas-free certificate to be approved by the Taiwan Authorities" in the credit, Lloyd LJ reasoned that '*the fact of approval had to be evidenced by a contemporary document accompanying the gas-free certificate, if not by endorsement on the certificate itself. The fact (if it be the fact) that such documentary evidence may have been hard or even impossible to get is neither here nor there.*'[437]

It has been subsequently argued that the approach adopted by the English courts regarding calling for documentary proof would generate considerable uncertainty in

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[434] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA) 728

[435] *Floating Dock Ltd v Hong Kong & Shanghai Banking Corp* [1986] 1 Lloyd's Rep 65 (QB) 79-80 The non-documentary requirement in the credit was stating that "the latest delivery date is 20 February 1985".

[436] *Astro Exito Navegacion SA v Chase Manhattan Bank NA (The Messiniaki Tolmi)* [1986] 1 Lloyd's Rep 455 (QB), affd in [1988] 2 Lloyd's Rep 217 (CA)

[437] *Astro Exito Navegacion SA v Chase Manhattan Bank NA (The Messiniaki Tolmi)* [1988] 2 Lloyd's Rep 217 (CA) 220

dealing with non-documentary conditions.[438] Meanwhile, since a majority of the ICC National Committees voted for the application of "disregard rule", the approach established by the *Banque* line of cases has been laid aside in the subsequent UCP revisions.[439] Under this circumstance, it is doubtful whether the English courts can still follow the cases decided on the basis of previous UCP revisions to achieve a result which would be contrary to the current "disregard rule". The first case met by the English courts after introducing the disregard rule in the UCP was *Credit Agricole Indosuez v Generale Bank (No.2)*.[440] The credit in this case required a condition of "shipment to be effected not later than July 30 1998" without stipulating a corresponding document. Relying on the UCP500 Article 13 (c), the beneficiary contended that the clause was non-documentary so that it should be disregarded. By rejecting this "misconceived" contention, David Steel J. held that a bill of lading dated after the latest date of shipment would properly be refused by the bank.[441] It should be noticed that David Steel J. made this conclusion by interpreting the credit terms rather than mechanically applying the "disregard rule" or referring to the "clear linkage" test in the Position Paper No.3 under UCP500. Even though the linkage test was ticked off in the UCP600, the conclusion would be still justified according to the new established "no conflict" rule between data in the credit terms and those in the presented documents.

Nevertheless, would the conclusion be changed if the bill of lading was not a stipulated document in the credit, so that there would be no way to compare the data? Alternatively, what about the requirement in the non-documentary condition stating the "delivery date" instead of the "shipment date", so that the bill of lading would be ineffective to evidence it? Under this circumstance, would the court be able to follow Evans J in *Floating Deck Ltd v Hong Kong & Shanghai Banking Corp*[442] to ask for

[438] Ebenezer Adodo, 'Non-documentary Requirements in Letters of Credit Transactions: What is the Bank's Obligation Today?' [2008] JBL103, 107
[439] Gary Collyer, 'A Look Back at the UCP Revision' (2006) 12(4) DCInsight 1, 23
[440] *Credit Agricole Indosuez v Generale Bank (No.2)* [2000] 1 Lloyd's Rep 123 (QB)
[441] *Credit Agricole Indosuez v Generale Bank (No.2)* [2000] 1 Lloyd's Rep 123 (QB) 127
[442] *Floating Dock Ltd v Hong Kong & Shanghai Banking Corp* [1986] 1 Lloyd's Rep 65 (QB)

documentary proof regardless of the "disregard rule"?[443] There seems to be no direct authority in point. However, it is generally accepted that 'David Steel J. hinted strongly that the courts might stick with the old beneficent practice that enabled the construction of a non-documentary clause as requiring the production of a reasonable documentary proof in spite of the prevailing UCP regime.'[444]

The UCP "disregard rule" has also failed to be invoked in a subsequent English case, *Oliver v Dubai Bank Kenya Ltd*.[445] In this case, condition 3 of the credit expressed the payment against presentation of an authenticated swift message and tested telex issued by the issuing bank "confirming the beneficiary's fulfilment of their commitments towards" the applicant in the underlying contract. The claimant alleged that condition 3 should be disregarded as contrary to the principle of autonomy and the "disregard rule" in the UCP500 Article 13 (c). However, Andrew Smith J. could not accept that Article 13 had any application in this case. He compared the position addressed by the disregard rule with the fact of the current case:[446]

> '*Article 13c is concerned with an attempt to make a payment (or equivalent) obligation conditional upon something other than a documentary condition in a letter of credit. The letter of credit in this case does not lay down any condition for payment other than that it is to be made against the draft (properly marked), the certificate and the telex referred to in condition 3…The express terms of the letter of credit do not make, or purport to make, the obligation to pay conditional upon anything other than a documentary condition. (If they did, then the court might have to consider whether the general words that incorporate the UCP into the letter of credit should prevail over the parties' express stipulation in condition 3…)*'

[443] Some scholars suggested the answer might be yes, but the author doubts this is correct. See Ebenezer Adodo, 'Non-documentary Requirements in Letters of Credit Transactions: What is the Bank's Obligation Today?' [2008] JBL103, 108

[444] Ebenezer Adodo, 'Non-documentary Requirements in Letters of Credit Transactions: What is the Bank's Obligation Today?' [2008] JBL103, 107-108

[445] [2007] EWHC 2165 (Comm)

[446] *Oliver v Dubai Bank Kenya Ltd* [2007] EWHC 2165 (Comm) [14]-[15]

Nevertheless, it is clear to see behind the screen that the required document in condition 3 has inevitably included the issuing bank's statement of facts which are outside its own records and operations. The parties generally admitted in the court that condition 3 had imported an implied obligation on the issuing bank to issue the telex in some circumstances. Because of that obligation, the claimant argued that condition 3 had given rise to a "condition without stating the document[s] to be presented in compliance therewith", which would fall into the domain of "disregard rule". However, Andrew Smith J rejected this argument and held that '*the basis for any such implication would be that it is necessary in order to give business efficacy to condition 3, and no obligation can be said to be implicit in condition 3 if the effect of implying the term is that condition 3 is to be disregarded and so given no business efficacy.*'[447]

It should be recognised that condition 3 in the *Oliver* case was an abnormal clause to be inserted into a credit. The inclusion of such a condition would not only be a trap for the beneficiary to lose control of compliance, but also deprive the bank's undertaking of independence in the credit. However, the court simply interpreted the condition as its literal meaning to call for a telex so as to avoid the application of the "disregard rule".[448] Although the condition in the credit has contaminated the principle of independence, it seems that Andrew Smith J still preferred considering the parties' intention rather than applying the "disregard rule".[449] The actions taken in the *Oliver* case has once again proved that the English courts are very reluctant to change the

[447] *Oliver v Dubai Bank Kenya Ltd* [2007] EWHC 2165 (Comm) [15]

[448] It has been argued by James Barnes, 'Non-documentary Conditions and the L/C Independence Principle' (2008) 14(4) DCInsight 11, that in nature there was no difference between a condition in the present case addressing a telex and a condition which did not mention a telex but required to fulfil the same obligation, such as payment on "the issuing bank's determination of completed performance of the beneficiary's obligation to the applicant". It has been suggested that both of the above conditions should be treated as the same and be disregarded, since neither of them belonged in an independent undertaking.

[449] It was reckoned that different results would be come out if the *Oliver* case was decided in the U.S. by applying the revised UCC Article 5. The U.S. courts would tend to determine "whether a purported letter of credit strays too far from the independence principle, in which case either the offending credit provision should be disregarded or, in extreme cases, the undertaking should be re-characterised as an ordinary promise or suretyship undertaking". See James Barnes, 'Non-documentary Conditions and the L/C Independence Principle' (2008) 14(4) DCInsight 11, 11-12

bargain that parties have deliberately made and alter the wording of a special term that they have agreed on into nothing.[450] Instead of mechanically following the "disregard rule" set out by the UCP, it is clear to see that the English courts have endeavoured to construe the non-documentary conditions as special contract terms and as much as possible provide the business efficacy to them. Ultimately, it seems that the UCP "disregard rule" has got little room to play in the English courts and the English courts have kept to pursuit of justice concerning the matter of non-documentary conditions in their own way.

4.5.2.4 Proposed way out

It is clear that all the major sources disapprove of the inclusion of non-documentary conditions in a credit, because the existence of such a condition breaks the first rule of documentary credit transactions, namely, that the parties are dealing in documents, not facts. However, the question as to what should be done when the non-documentary conditions are inevitably confronted by the bank in the course of documentary examination, and by the courts in documentary credit litigations, remains problematic. In this part, the author will put forward a set of thoughts different from the UCP "disregard rule" to solve the issues brought by non-documentary conditions, and furthermore the author will endeavour to clarify each party's role played in the new scheme. In addition, some practical suggestions under the current regime will be provided so as to help the parties minimise the dilemma as much as possible.

A. Solution in principle

The "disregard rule", is well-intended, but rarely achieves the desired effect. On the contrary, as illustrated above, the "disregard rule" in the UCP has caused more serious difficulties in law than those it was designed to prevent. Through the emergence of the "disregard rule", it seems that the document checker under a credit incorporating the

[450] Roger Fayers, 'Non-documentary Conditions and the Oliver Case' (2008) 14(4) DCInsight 13

UCP500 or the UCP600 cannot confidently rely on the *Banque* line of cases and call for evidence to satisfy the non-documentary requirements. Meanwhile, the English courts have to find certain revolving methods to interpret the rule and struggle in giving effect to certain non-documentary terms. Nevertheless, with the legal difficulties in construction of contract terms and the reluctant attitude from the courts, the beneficiary also cannot be confident to contend that all non-documentary conditions in the credit must be disregarded. Although the efforts made by the ICC to regulate the non-documentary conditions needs to be fully appreciated, it is well recognised that the "disregard rule" has defeated the commercial expectations and caused confusion in law. Therefore, by absorbing the merits from the English courts approach, the author speculates whether the improved "evidence approach" can take over the "disregard rule" in dealing with the matters triggered by non-documentary conditions.

According to the "evidence approach" set up by *Banque* case, certain reasonable documentary proof needs to be provided in order to satisfy the non-documentary condition in a credit and get payment. The supporters of "disregard rule" claim that the "evidence approach" would generate considerable uncertainties from two main aspects. Firstly, what documentary evidence should be called for to establish that the non-documentary condition has been fulfilled? Secondly, what will the position of the bank be if the tendered documentary proof is in fact an ingenious forgery? Regarding the first question, the author's answer will be that the presented documentary evidence should be considered to be enough as long as it appears to "fulfil the function" of the requirements in the non-documentary condition. Similar to the UCP600 Article 14 (f), which concerns the required document without stipulating its data content in the credit, the ICC states that banks will regard the document to be compliant if its content appears to fulfil the function of the requirement and also complies with "no conflict" rule in the UCP600 Article 14 (d). In the author's view, there is no reason to prevent the "function" standard driving from Article 14 (f) applying to the fresh documentary evidence for non-documentary conditions because its content is also not stipulated in

the credit. One might argue that this method would give the bank too much discretion and cause uncertainties. However, it must be admitted that the bank's discretion is voluntarily granted by the parties who have not stipulated a corresponding document and specified the data content. Arguably, Article 14 (f) faces with the same challenges in terms of judging whether the presented document can fulfil its function under the credit.

The second question brought by the opponents is whether the bank should bear any responsibility towards the genuineness of the presented documentary evidence supporting for the non-documentary terms. This answer can be found from the decision of the Privy Council in *Gian Singh v Banque de l'Indochine*.[451] In this case, a special non-documentary condition required that the signature on the certificate should be that of a person called Balwant Singh holding a specific Malaysian passport. A fake but compliant in appearance passport was provided by the beneficiary to the confirming bank to prove the satisfaction of that condition. The court held that the non-documentary requirement would impose upon the bank an additional duty to take reasonable care to check that the signature on the certificate appeared to correspond with the signature on an additional document presented by the beneficiary; however, the bank's position to claim a compliant presentation would not be affected by the genuineness of the tendered document proof.[452] Evidently, this conclusion is in accordance with the principle of autonomy and the UCP "disclaimer clause", i.e. the bank is under no duty to responsible for the genuineness, sufficiency or materiality of the presented documents.[453] Therefore, even if the documentary evidence submitted for the non-documentary condition is forgery, the bank still bears no responsibility and naturally the forgery will not stop the customer from claiming fraud under the credit.

In author's opinion, the improved "evidence approach" is a balanced way to solve the

[451] *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 1 WLR 1234
[452] *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 1 WLR 1234, 1238-1239 Clearly, the onus of proving lack of reasonable care in failing to detect the forgery of the certificate lies upon the customer who claims against the bank.
[453] See UCP600 Article 34

non-documentary issues. Since it will not be generally possible to imply a term which is non-documentary in nature, there must be certain documentary evidence which can be related to the non-documentary requirement and prove its satisfaction.[454] The core idea of "evidence approach" lies in effectively transferring the passive resistance of the "disregard rule" to the positive reaction. In the course of this transformation, the business intention can be better reflected and the conflict brought by the hierarchy of contract terms can be easily solved. Business is business. There should be no reason for changing a bargain that parties have deliberately made, especially in an express term. Since in the majority of cases, the non-documentary conditions are the results of the buyer's efforts to protect himself against the sharp practice of the seller/beneficiary, it will be sensible to uphold the non-documentary conditions in commercial bargains so as not to destroy the commercial expectations.

Moreover, the author believes that, through a set of burden sharing measures, the improved "evidence approach" will be a reasonable approach to handle the emergence of non-documentary conditions in practice. Since the non-documentary conditions can be satisfied by the documentary evidence which only appears to fulfil the function of requirements, it will not be too difficult for the beneficiary to present such a documentary proof. Meanwhile, compared with leaving the issue of non-documentary conditions to the court which inclines to develop the exceptional construction against the "disregard rule", the beneficiary under the "evidence approach" will be much easier to predict and handle the fate of the presentation. The bank, in the same token, might bear less, increasing its chances of reimbursement than that under the "disregard rule". This is because calling for evidence will drag the bank out of the dilemma faced between the applicant and the beneficiary. What the bank needs to do is simply follow the same documentary examination rule to check the tendered evidence, i.e. compliance in appearance but without genuineness and sufficiency guarantee. The

[454] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.28 which referred to the position in *Uzinterimpex JSC v Standard Bank plc* [2008] EWCA Civ 819, [2008] 2 Lloyd's Rep 456 [23]

applicant, who has voluntarily inserted the non-documentary conditions without further stipulations, has to bear the risk of receiving a documentary proof which might be far from his imagination. The author believes that the unsatisfactory experience will motivate the applicant to clearly illustrate what he wants in the future, so as to reduce the chance of non-documentary conditions in the credit.

In addition, the author cannot be completely convinced by the proposition that a rule should be established with the aim of protecting the beneficiary against the non-documentary conditions. In the author's opinion, the existence of non-documentary conditions in the credit would not put the beneficiary in a very unfair position. If a letter of credit is not issued in line with the requirements under the underlying sale contract, the buyer (normally the beneficiary) is entitled to object such a credit and ask for modification. Hence, if a non-documentary condition is deliberately added in the credit by the applicant or the issuing bank, the beneficiary will be entitled to delete it or even claim against the applicant who has breached the underlying contract by opening an unmatched letter of credit. On the other hand, if the non-documentary condition is a part of the contract terms but the parties have not illustrated any corresponding document towards this requirement, the beneficiary has to provide some reasonable document proof to satisfy this requirement in the credit since the non-documentary condition has been used to reflect the true intention of the parties. Alternatively, the beneficiary can negotiate with the applicant to stipulate a specific document in the credit so as to make such a term to be documentary. It is obvious to see from above that the emergence of non-documentary conditions is not necessary to cause the unfair treatment to the beneficiary. On the contrary, in most cases, the non-documentary conditions are designed to reflect the real bargain between the parties. Even if the applicant intentionally wants to trap the beneficiary by adding non-documentary conditions in the credit, the beneficiary can still use his own right under the underlying contract to refuse and rectify these terms.

Clearly, construing a non-documentary clause as requiring the production of a

document evidencing its satisfaction may not be without difficulty; however, the envisioned difficulties and uncertainties cannot be overly exaggerated. Compared with the dilemma faced by the "disregard rule", the improved "evidence approach" can solve most difficulties in law. The improved "evidence" approach not only meets the commercial expectations, but also balances the parties' interest in commercial transactions. The author believes that, in a long run, it will contribute to eliminating the wrong practice of non-documentary conditions and benefit the operation of documentary credits.

B. Solution in practice

Since the current dominant rule regulating the bank towards non-documentary conditions is still the "disregard rule", it is worthy of mentioning here some practical measures which would drag the parties out of the present dilemma caused by the "disregard rule" and other UCP provisions. Under the reign of "disregard rule", the bank will not be entitled to request any documentary proof from the beneficiary regarding to non-documentary condition in the credit. On the contrary, according to the above analysis, the non-documentary condition may not be able to be ignored in any circumstances. It is also unclear whether the issuing bank is entitled to use the "disregard rule" against the applicant. 'The only satisfactory solution, however, is that banks should not accept instructions to issue or to confirm credits containing non-documentary conditions.'[455] If the bank with weak bargaining power has to accept the instructions, it should attempt to transfer such instructions into documentary requirements.

Since the legal status of the "disregard rule" is still controversial, it is unclear to conclude whether the beneficiary can use Article 14 (h) as an effective defence to defeat the non-documentary conditions which are specifically expressed in the credit.

[455] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.23

Thus, a better way for the beneficiary is to discourage the applicant from inserting any non-documentary terms into the credit and ask for alteration as soon as such a term has been found. If the beneficiary has already accepted a credit with non-documentary conditions and trapped himself in a tricky position, the only safe way is to provide certain evidence which can prove the satisfaction of non-documentary conditions. Nevertheless, the form of such evidence will be inevitably restricted by the UCP600 Article 14 (g).[456] Since Article 14 (g) states that the bank will disregard the document which is not required by the credit, the evidence for satisfying non-documentary conditions must be presented in a required document rather than in an additional document. Even if an additional document has to be tendered to satisfy the non-documentary conditions, such an additional document must belong to a part of the certain stipulated document so as to meet the requirement of Article 14 (g).[457]

In conclusion, avoidance of issuing a credit with non-documentary conditions is the ideal solution. However, it seems impossible to eliminate such an incorrect practice easily. Under the current circumstances, the parties have to be alert the difficulties brought by the "disregard rule" and squeeze themselves into a safe area. In the long term, the author believes that a balanced common law approach is more suitable for solving the non-documentary issues and achieving commercial expectations.

4.5.3 Combined documents

The third situation caused the quantity mismatch between the number of required documents in the credit and the number of tendered documents lies in the existence of combined documents. Combined documents, namely are two or more individual documents combined together into one document. The issue of combined documents should be divided into two circumstances. The first scenario occurs when the presenter

[456] It is unclear whether the UCP600 Article 14 (g) will be removed if the ICC decides to adopt the "evidence approach" instead of the "disregard rule". According to the Singapore case *Kumagai-Zenecon Construction Pte Ltd v Arab Bank Plc* [1997] SGCA 41, [1997] 2 SLR (R) 1020 under UCP500, the second sentence of Article 13 (a) concerning the "ignorance of additional document" was removed as the same time as excluding the application of the "disregard rule" in Article 13 (c).
[457] See Part 4.5.1 concerning "additional document".

tenders a combined document instead of two individual documents required by the credit. The second situation happens when the credit asks for a combined document but the presenter tenders two separate documents. Both issues are not expressly covered by the UCP, but they are continuously addressed in the different versions of the ISBP.

Concerning the first situation, the ISBP expressly stipulates that documents required by a credit must be presented as separate documents.[458] In most cases, the combination of listed documents into one would constitute an inconsistent presentation. However, the ISBP illustrates an exceptional example by stating that 'a requirement for an original packing list and an original weight list will also be satisfied by the presentation of two original combined packing and weight lists, provided that such documents state both packing and weight details.'[459] It is obvious to see that the possible solution for the beneficiary, who chooses to tender a combined document, is to present the same number of combined documents as separate documents required in the credit. Nevertheless, such a combined document should be able to fulfil the function of each document, and meanwhile the bank can clearly identify the details of the required document from the combined document. Therefore, a combined packing and weight list may satisfy the credit requirement, but a commercial invoice which includes the details of weight list might not be regarded as a combined document of commercial invoice and weight list. Another exception for accepting combined documents is illustrated by the ISBP No.681 in respect of declarations and certifications. 'A certification, declaration or the like may either be a separate document or contained within another document as required by the credit.'[460] It was suggested by the DOCDEX panel that unless the credit stipulated conversely, the presentation of several shipper's statements in one combined document and of several beneficiary's certificates in one combined document should be considered as a compliant

[458] See ISBP No.745, section A40, ISBP No.681, para.42 and ISBP No.645, para.44
[459] ISBP No.745, section A40
[460] See ISBP No.681, para.8 and ISBP No.645, para.8. It is deleted by the ISBP No.745; however, the author does not think the previous practice will change by this deletion.

presentation.[461]

The second scenario is concerning that two or more separate documents are presented for satisfying a combined document required in the credit. On the contrary to the first situation which will cause the shortage of documents, under this circumstance, the quantity of tendered documents will appear to be more than the number of required documents. The latest ISBP revision for the UCP600 newly addresses this issue, i.e. 'a document required by a credit that is to cover more than one function may be presented as a single document or separate documents that appear to fulfil each function.'[462] 'For example, a requirement for a Certificate of Quality and Quantity will be satisfied by the presentation of a single document or by a separate Certificate of Quality and Certificate of Quantity that each document appears to fulfil its function and is presented in the number of originals and copies as required by the credit.'[463] It is evident that there is no objection to transfer a combined document required by the credit into several separate documents tendered by the presenter; however, the reverse way of presenting a combined document for separate documentary requirements is highly restricted. Clearly, the revised ISBP has been made in accordance with the market practice and also it would effectively supplement the previous gap regarding to the issue of combined documents.

4.6 Conclusions

The chapter has focused on the issues occurring in the process of general document examination. Different from most authorities, the chapter has conducted a layer-by-layer in-depth analysis for bank's obligations on examining generic documents under UCP600. The chapter starts from illustrating the requirements for examining a single document before gradually drilling down to the interactions among documents. In respect of examining a single document, the most frequently raised issue

[461] Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 1997-2003* (ICC Publication No.665, ICC 2004) No.211
[462] ISBP No.745, section A41
[463] ISBP No.745, section A41

concerning descriptions of goods is addressed firstly and separately. The description in commercial invoices must correspond with that in the credit; however, correspondence is not equal to duplication and some additional wording might be accepted. Different from descriptions in commercial invoices, the description in other general documents is governed by a "no conflict" rule, which reflects the tolerance in documentary examination provided by the UCP. Nevertheless, for documentary security, this tolerance should be restricted to a reasonable latitude. In the author's opinion, the requirement of linkage will effectively and sufficiently solve the worry. However, the wording of the UCP600 has been far from enough to support this requirement. Interpreting the linkage requirement through reading into Article 14 (f) and analysing its implication is a compromise rather than an ideal solution. It is necessary for the ICC Banking Commission to review the problem and boldly face with it by drafting the requirement into explicit wording.

Apart from examining the content of documents, the chapter also considers the mismatch of quantity between the documents which the credit has called for and those actually tendered by the beneficiary. Although the UCP600 stipulates that the document is not required by the credit will be disregarded, it should be noticed that the surplus document should not necessarily be ignored since it might be regarded as a part of the required document. A mismatch of quantity can also occur through the emergence of combined documents. If a credit asks for two separate documents, presenting a combined document instead will not be allowed in most cases. However, a requirement of combined documents can be taken over by presenting two separate documents as long as they have fulfilled the function of the required document. Last but not least, a distorted mismatch can be triggered by the existence of non-documentary conditions. With such a term, the conditions in the credit will be more than the number of documents it has actually called for. The UCP measure is to cure such a mismatch by intentionally deleting the non-documentary conditions. Nevertheless, the result is not as ideal as expected. Therefore, the author attempts to solve the issue in another way, i.e. through adding a documentary proof to satisfy the surplus condition in the credit.

Up to now, the author has elaborately analysed the standards for examining generic documents under UCP600 and endeavoured to supplement the gap left by the current regime. In the next Chapter, the author will turn attention to special documents which have been specifically dealt with by the UCP provisions and analyse the standards for examining those special documents, especially sea transport documents.

Chapter 5 Standards for Examining Transport Documents and Impacts on Bank's Security

5.1 Introduction

The overall standards for banks in a documentary examination and the requirements of examining general documents under UCP600 have been analysed in Chapter 3 and Chapter 4. In this Chapter, the author is going to dig into the requirements set up by UCP for examining the "specific" documents – transport documents. The transport document is one type of the documents invariably required to be presented under a commercial letter of credit, because "it serves as an objective and apparently enforceable assurance by a third party carrier that there are goods and that they have been shipped as indicated".[464] Without the emergence of the traditional bill of lading and other developing transport documents, neither international trade nor documentary credits could have achieved their current state.

A transport document not only demonstrates the status of the shipped goods, but also evidences the contractual terms under the carriage contract between the shipper and the carrier.[465] Moreover, in the case of a transferable bill of lading, it is regarded as a "document of title", which can transfer the constructive possession to its holder.[466] Presently, the traditional bill of lading is gradually superseded by other alternative forms of transport documentation, which are not necessary to perform all the same functions, but the common role of all transport documents is still the same, i.e. facilitating international commercial sales and strengthening transaction security. From the bankers' perspective, not only do they need to concern themselves with whether the tendered transport document would fit the requirements set up in the credit, but more

[464] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 171

[465] The contractual relationship was built by statute, Bill of Lading Act (BLA) 1855 and more developed in Carriage of Goods by Sea Act (COGSA) 1992.

[466] There is no unified definition for "document of title", but some explanation will be given below. Moreover, the property right brought by the bill of lading will be analysed below.

importantly, they have to concern themselves with the security brought by the transport document against the default parties.

Since 1974, successive revisions of the UCP have responded to the rapid changes in trading practice and in law. Although the traditional bill of lading still form the mainstay in the specific provisions, the UCP has already reacted to the increasing use of non-traditional documentation, in particular multimodal transport documents, non-negotiable sea waybills and charterparty bills. The current version UCP600 has succeeded the style under UCP500 and enumerated the acceptable transport documents in Articles 19-25. If a transport document called by the credit does not fall into the scope of Articles 19-25, the standard for general documents examination in Article 14 will be applied.[467] However, it is regrettable to see that the UCP600 still leaves the most problematic issue under UCP500 intact. More importantly, these issues are closely connected with the banks' security.

In this chapter, the author will endeavour to clarify the issues surrounding the transport documents from two aspects. Firstly, what types of transport document tendered by the seller can or must the bank accept under the UCP600? Secondly, what security can the transport document provide the bank against the default party under the letter of credit and will this document jointly bring any liabilities on the bank towards another party, such as the carrier? To avoid an over-bloated discussion, the author will not examine each and every document mentioned in the UCP, but instead focus on the transport documents which have taken most of the international market share, i.e. sea-carriage related documents.

The traditional bills of lading, which are the focus of most of the reported decisions, will be highlighted in the first instance in Part 5.2. The alternative forms of sea transport documentation, including sea waybills, straight bills of lading, charterparty bills of lading and multimodal transport documents will be discussed in Part 5.3 to Part

[467] Detailed analysis for requirements under Article 14 can be found in Chapter 4 of this thesis.

5.6 respectively. Since the rules covering most of transport articles are very similar, the author will only elaborate the part concerning bills of lading article by article as an example. For the remaining documents, the emphasis will be put on the differences compared with bills of lading, both under the common law and UCP positions. However, the author will carefully consider the security issues involved by each type of transport document and provide the most secure way for banks to proceed in every scenario. In Part 5.2 together with the bills of lading, the author will also illustrate the miscellaneous provisions in the UCP600 regarding sea transport documents, such as clean document, on deck cargo and additional freight.

5.2 Negotiable Bills of Lading

Since the emergence of marine carriage towards the close of sixteenth century, bills of lading have been in widespread use and dominated international carriage over several hundred years. A traditional bill of lading, in very broad terms, 'is a two-sided one page document usually issued by or on behalf of the carrier, acknowledging that goods have been shipped on board a particular vessel bound for a particular destination'.[468] With the changes that have occurred in commercial practice and the development of standardised container transport, the varieties in bills of lading as well as the other forms of transport documentation have actively participated in the market. The common varieties from earliest bills of lading include straight bills of lading, charterparty bills of lading, received for shipment bills of lading and through bills of lading.[469] However, the bills of lading varieties are not necessary to hold the same functions and share the same legal status in law as the traditional bills of lading. That is why the author will analyse different types of bills of lading respectively in the following parts. In this part, the author will only focus on traditional bills of lading, i.e. bills of lading which can be transferred for re-selling the goods. For achieving both academic and practical consistency, the author will use the word "negotiable" to describe this kind of bills of lading, although the real meaning is "transferable" rather

[468] Filippo Lorenzon, *Sasson: CIF and FOB Contracts* (5th edn, Sweet & Maxwell 2012) 115
[469] Through bills of lading, are deduced into multimodal bills of lading discussed in Part 5.6

than "negotiable" in law.[470]

5.2.1 Legal status and functions of the bills of lading

The reason that the bill of lading (B/L) is crucial to the smooth running of international trade and the documentary credit system lies in that the B/L is regarded to be a "document of title".[471] Dating back to the early common law case *Lickbarrow v Mason*,[472] in which the court recognised a custom of merchants that a shipped bill of lading enabled the holder to transfer the property in the goods to the transferee. Then in *Sanders Brothers v Maclean & Co*,[473] Bowen LJ in the Court of Appeal described the B/L as "*the key to unlock the door of the warehouse*" and held that "*the endorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo*".[474] Although it was established later in *Sewell v Burdick*[475] that the transfer of a B/L is not necessary to transfer the property of the goods because the property could only be passed when the parties intended to do so, it was still no doubt that the transfer of a B/L would create a special legal title, which can give the holder of B/L "*a pledge accompanied by a power to obtain delivery of the goods when they arrive, and to realise them for the purpose of the security*".[476] Therefore, it is evident that a B/L, as a document of title, can give the transferee a constructive possession of the goods as well as the right to control and dispose of them, and even the right of property if so intended.

Apart from being "document of title" at common law, B/L also acts as a receipt of the

[470] The word "negotiable" has been used both in the UCP600 and the Hague-Visby Rules. However, the bills of lading are traditionally regarded as non-negotiable since a transferor cannot transfer a better title than he has. See Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 18-111; Paul Todd, *Bills of Lading and Bankers Documentary Credits* (4th edn, Informa Publishing 2007) para 3.17 fn 24; Charles Debattista, *Bills of Lading in Export Trade* (3rd edn, Tottel Publishing 2009) para 3.6

[471] However, there is no authoritative definition of "document of title" at common law. See Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 18-007

[472] *Lickbarrow v Mason* (1794) 5 TR 683

[473] *Sanders Brothers v Maclean & Co* (1883) 11 QBD 327 (CA)

[474] *Sanders Brothers v Maclean & Co* (1883) 11 QBD 327 (CA) 341

[475] *Sewell v Burdick* (1884) 10 App Cas 74 (HL)

[476] *Sewell v Burdick* (1884) 10 App Cas 74 (HL) 105

goods in charge of the carrier for delivery. The carrier will put the time of shipment and the port of loading in the B/L. Moreover, the carrier will normally specify the description of the goods as well as their apparent order and condition in the B/L. These statements will offer the cargo-interests an assurance when paying against the document. Meanwhile, these statements on the B/L will become the conclusive evidence for the third party to whom the B/L had been transferred against the default carrier in case of cargo damage or non-delivery.[477]

The third function of the B/L is to act as evidence of the contract of carriage. Usually the B/L contains a number of carriage clauses contracted between the carrier and the consignor on its reverse side; however, the contractual rights and obligations represented by these clauses can now be vested in the third party who becomes a lawful B/L holder under the COGSA1992.[478] As we will see later, if a party can bring himself within one of the categories listed in the Act, he will obtain the title to sue the carrier under the contract of carriage evidenced in the B/L for the situation of loss, damage or short-delivery. However, before digging into the security offered by B/L under English law, the author would like to first look at what kind of B/L is acceptable under UCP600 Article 20 and whether the stipulations under UCP600 can sufficiently protect banks from suffering the loss.

5.2.2 Requirements under UCP600 Article 20

Generally speaking, there are not many substantial differences between the requirements under UCP500 Article 23 and those listed in the UCP600 Article 20, although the language has been somewhat simplified. However, from another perspective, the congenital deficiencies left by the UCP500 mainly remain in the UCP600. In this part, the author is going to examine the requirements set out by the UCP600 Article 20 with the aid of the latest ISBP revision in 2013, i.e. ISBP No.745,

[477] See COGSA1971 Article III. 4 and COGSA 1992 s.4

[478] COGSA 1992 s.2(1)(a). The COGSA 1992 has effectively built a bridge for the privity gap between the carrier and the third party. Moreover, different from the Bill of Lading Act 1855, the contractual right for the B/L holder under COGSA 1992 has separated with the property issue.

so as to further analyse the loopholes. The analysis will mainly follow the order of the UCP600 Article 20 provisions. The analysis will start from delimiting the application of Article 20 and then examine the issues covered by Article 20 concerning a negotiable B/L, including issuance and signature, shipment and route, role of carriage terms and transhipment.

5.2.2.1 Application of Article 20

UCP600 Article 20 addresses its application to the general bills of lading, "however named", without specifying more details. Comparatively, it has omitted the phrase "covering a port-to-port shipment" under the corresponding article in UCP500.[479] However, this omission does not mean that the UCP600 Article 20 is intended to extend its scope more than covering a marine, ocean bill of lading. This conclusion can be reached by referring to the ISBP provisions. In the ISBP No.681 paragraph 91, it makes clear that Article 20 is applicable if a credit requires presentation of a bill of lading covering sea shipment only. Moreover, the ISBP No.745 further explains that Article 20 is to be applied only if a credit is calling for a transport document merely covering a "port-to-port shipment",[480] i.e. "a credit that contains no reference to a place of receipt or taking in charge or place of final destination."[481]

A bill of lading need not be titled "marine bill of lading", "ocean bill of lading", "port bill of lading" or words of similar effect, since Article 20 is applicable to bills of lading covering port-to-port shipment, *however named*. The ISBP No.745 section E2 emphasises that even when the credit so names the required document, the bill of lading is not necessary to bear the same title. It is the function rather than the name of a transport document to decide whether Article 20 is going to apply. For example, a

[479] UCP500 Article 23(a)

[480] The port should mean an ocean port, rather than an inland waterway port, since an inland waterway bill will fall within UCP600 Article 25. However, arguably, the wording in the ISBP No.745 section E1 is not as precious as it intends to be. Deletion of "sea shipment" from the ISBP No.681 para.91 does achieve conciseness but at the same time the new version creates the space for imagination.

[481] ISBP No.745 section E1. If a transport document combines the sea carriage with other carriage, such as carriage by land, it will be considered as a multimodal transport document, which will fall within the UCP600 Article 19.

document which is in a form of a standard combined transport document can still be regarded as an acceptable tender against a credit requiring a bill of lading, as long as it relates exclusively to sea carriage and meets the other requirements under Article 20.[482]

Nevertheless, Article 20 is not applicable to all types of bills of lading. Charterparty bills of lading are one type of bill of lading excluded by Article 20 and they are under the province of UCP600 Article 22.[483] Article 20 (a) (vi) addresses that a bill of lading under this article should not contain any indication that it is subject to a charterparty. A transport document mentioning "freight payable as per charterparty", will be treated as a charterparty bill of lading under UCP600, since it is subject to or has a reference to a charterparty. By contrast, a document heading a name normally associated with a charterparty bill of lading, such as "Congenbill" or "Tanker Bill of Lading", but without any further reference to that charterparty,[484] will be examined as a usual bill of lading under Article 20.[485] Once again, substance rather than the title determines whether a transport document will belong to Article 20.

Clearly, Article 20 is designed to apply to all types of bills of lading other than charterparty bills. It, therefore, covers both negotiable and straight bills of lading.[486] However, the basic rule is that, unless the documentary credit requires such a document, the bank will not accept that document, even though it can fall into the scope of Article 20. Thus, if the credit requires a negotiable bill of lading, a straight bill of lading which is consigned to a named person will not be acceptable. Based on the special status of straight bills of lading, the author would like to discuss them particularly in a separate part and the negotiable bills of lading are the subject-matter

[482] Gary Collyer (ed), *Opinions of the ICC Banking Commission on UCP 500 (1995-1996)* (ICC Publication No.565, ICC 1997) R219

[483] A transport document, however named, containing any indication that it is subject to, or any reference to, a charterparty is deemed to be a charterparty bill of lading. The author will focus on charterparty bill of lading later in this chapter.

[484] A Congenbill with the heading "Bill of Lading to be used with Chater Parties" will be considered as a charterparty bill; however, if a Congenbill is presented without this reference, it will be examined under article 20. See *ICC Opinions 2005-2008*, R648.

[485] ISBP No.745, section G3

[486] ISBP No.745, section E12

focused on here.

5.2.2.2 Issuance of a bill of lading

A. Identification of the carrier

UCP600 Article 20 (a) (i) firstly requires that a bill of lading "must appear to indicate the name of the carrier", which in other words, requires that a bill of lading must state the name of the carrier on its face.[487] It is unclear here whether the appearance of a carrier's name is sufficient or it is necessary to point out the identity of that name. The issue is effectively supplemented by the ISBP, which not only requires the indication of the carrier's name, but also identifies that name as the carrier.[488] Therefore, a bill of lading that indicates only the company's name "XYZ Ltd" is not enough, since it is difficult for the bank to assess whether such a company is the carrier. The word "carrier" appears on the bill of lading must be linked to the name of the company.

There is no express requirement in the UCP600 which governs the specific position of the carrier's name on the face of the bill of lading. It can be demonstrated by a letterhead of a company bill or by a specific reference added in the middle of the page on a public bill which is for general use. The manner of identifying the carrier is not exclusive. It can simply be achieved by adding a specific reference on the face of the bill of lading, such as "XYZ Ltd, the carrier", or by signing the document with capacity, e.g. "For XYZ Ltd as carrier". Nevertheless, one point was raised by the Position Paper No.4 under UCP500, which stipulated that the name of the carrier must appear on the front of the document.[489] It further emphasised that banks would reject documents which failed to indicate the name of the carrier on the front of the document, even

[487] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 174

[488] ISBP No.681, para.94; ISBP No.745, section E5. The requirement of identifying the carrier is also referred by the Hong Kong case *Southland Rubber Co v Bank of China* [1997] 2 HKC 569. Nonetheless, the author believes a small change in the wording of the UCP600 will be better than clarifying it in the ISBP. Article 20 (a) (i) can be amended as "a bill of lading must indicate the name of the carrier, identified as the carrier…"

[489] Although it is authoritatively unclear whether these position papers are effective under UCP600, the author believes they still have the persuasive effect to the extent that the provisions in UCP600 remain similar to those of UCP500.

though the identity of the carrier might be indicated on the back of the document.[490] However, since the Position Paper would not take effect under UCP600, it is pending for the ICC Banking Commission to clarify the situation.[491] Before that, the safest way to satisfy the requirement under Article 20 (a) (i) is still to indicate the carrier's name as well as identify the carrier altogether on the front page of the bill of lading.

As mentioned above, a bill of lading works as evidence of a carriage contract and it is fundamental requirement to know who is undertaking the carriage. If a document is issued by a company called "XYZ Ltd" as the carrier, it can possibly be the vessel owner, a charterer or anyone who has the right to the vessel. However, the bank is not required to identify the carrier from the perspective of carriage of goods by sea. It is well established that the bank is only obliged to determine whether a document appears to be compliant or not without further investigation.[492] Moreover, the bank is not responsible for the genuineness and sufficiency of the documents.[493] The research for the capacity of in which the company is acting is obviously beyond the scope of bank's duty. Therefore, banks are merely obliged to follow the shortcut designed by the ICC Banking Commission, i.e. the requirement of identifying the carrier is satisfied as long as there is an indication on the face of the document to identify the carrier.

B. Signature in a bill of lading

The UCP600 Article 20 (a) (i) also goes on to describe what is required by way of signature.[494] A bill of lading can be signed by the carrier, the master or a name agent. However, a simple signature on the bill of lading does not suffice. Article 20 (a) (i) requires the capacity of the person who signs the bill of lading must be identified. Therefore, the word "carrier", "master" or "agent" must be added respectively in the

[490] The reason is that under UCP500 Article 23 (a) (v), banks would not examine the back of the document containing the terms and conditions of carriage. It has been applied to the ICC Opinion R760 under UCP600. See *ICC Opinions 2009-2011*, R760.
[491] According to the analysis in Chapter 3 of this thesis, it is clear that "the face of the document" under UCP600 should not mean the front page of the document only.
[492] See Chapter 3 of this thesis.
[493] UCP600 Article 34
[494] UCP600 Article 3 recognises different methods to sign a document, but the issue will not be particularly discussed here.

signature box after the signature. However, if a bill of lading is already identified elsewhere on the front of the bill of lading, it is not necessary for the carrier to be named again at the location where the carrier or the agent signs the bill of lading.[495] In addition, if the party is signed as the agent, the name of that agent must be included, as well as demonstrating the principal for whom it is signing.[496]

It should be noted that the requirements of signature has not changed between UCP500 and UCP600, apart from when the bill of lading is signed by an agent on behalf of the master. Different from UCP500 Article 23 (a) (i), UCP600 Article 20 (a) (i) does not require stating the name of the master.[497] 'The transportation industry pointed out that it is quite common for agents not to know the name of the master of a vessel at the time the transport document is issued, and therefore the name of the master should not need to be indicated on the bill of lading.'[498] It has also been suggested that the name of the master was irrelevant to the letter of credit examination, although the status (whether for the carrier or master) mattered.[499] Consequently, the argument has been recognised by the rules, which currently require all the parties identifying the capacity, but only the carrier and the agent need to be named.[500]

C. Bills of lading signed by freight-forwarders

The terms "forwarder bill of lading" and "freight forwarder's bill of lading" are frequently used in the letter of credit; however, these terms were not defined specifically in the UCP600 and many disputes were generated there. It is common in international trade to engage a freight forwarder in the process of arranging for

[495] ISBP No.745, section E5 (c). In addition, section E5 (b) supplements that "when a bill of lading is signed by a named branch of the carrier, the signature is considered to have been made by the carrier".
[496] The article does not treat the master as the normal agent to demonstrate the principal. It is enough if the carrier is named on the bill of lading and the master has signed as the master. The reason has been presumed to be "because it is within the ordinary authority of a master to issue bills of lading on behalf of the party who has the right to the use of the vessel". See Jack, para.8.89.
[497] See ISBP No.681, paragraph 94 (b); ISBP No.745, section E5 (d) It should be noted that the corresponding paragraph 4 in Position Paper No.4 which required stating the name of the master would be overruled by the new provision under UCP600.
[498] Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 91
[499] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 174
[500] ISBP No.745, section E5 (d) & (e)

carriage of goods by sea and it may perform a variety of roles. It may be acting as an agent of the cargo owner or the shipper of the goods, and in certain cases, it may enter into a carriage contract as a contractual carrier. Alternatively, it may be acting as an agent of for the actual carrier to sign a bill of lading.

It is clear that a bill of lading may be issued by any party other than a carrier or master provided that the transport document meets the requirement of Article 20.[501] There is no legal impediment or reason why a freight forwarder is unable to sign the bill of lading as an agent of the carrier, since by then, the bill of lading will be considered as an acceptable bill of lading between the shipper and the carrier as long as it satisfies the requirement under Article 20.[502] However, the situation may become quite controversial if a bill of lading is signed by a freight forwarder in its own capacity or in the capacity of an agent for the shipper, since it is not strictly considered as a normal bill of lading.[503] Such bills of lading are often referred to "freight forwarder's bill of lading" or "house bill of lading".

If a document is issued by a company called "XYZ Ltd" and on the face of the document identified it as the carrier, it is possible that "XYZ Ltd" is a freight forwarder acting in its own capacity rather than a shipping company who actually carries the goods. Nevertheless, it is very difficult to tell from the appearance of the bill of lading. In whose capacity a freight forwarder signs a bill of lading depends entirely on the facts of each case and the arrangements between the parties. '*In these circumstances, it will be impractical to impose such an onerous duty on the bank to investigate the legal status of the signing party when it is not privy to the arrangements entered into by the parties to the shipping transaction.*'[504] If banks are not going to investigate the underlying facts, how can they ensure the real capacity of the person who has signed as

[501] ISBP No.745, section E3; also cf. UCP600 Article14 (l)
[502] *Abani Trading Pte Ltd v BNP Paribas* [2014] SGHC 111, [2014] 3 SLR 909 [39]
[503] Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011) para 3.21 It is suggested that the freight forwarder bills of lading cannot perform three functions as a "normal" bill of lading since they are not regarded as documents of title to the goods.
[504] *Abani Trading Pte Ltd v BNP Paribas* [2014] SGHC 111, [2014] 3 SLR 909 [40]

the carrier on the bill of lading?

The UCP600 does not respond to this specific point as directly as the UCP500 did, but instead it explains the issue in the ISBP.[505] If a credit states "freight forwarder's bill of lading is acceptable" or words of similar effect, a bill of lading may be signed by a freight forwarder in its own capacity, without the need to identify the capacity in which it has been signed or the name of the carrier.[506] On the other hand, the ISBP No.745 section E4 emphasises that the term "freight forwarder's bills of lading are not acceptable" or words of similar effect "has no meaning in the context of the title, format, content or signing of a bill of lading unless the credit provides specific requirements detailing how the bill of lading is to be issued and signed". Therefore, in the absence of these requirements, the stipulation of "freight forwarder's bills of lading not acceptable" is to be disregarded, and the bill of lading presented is to be examined according to the requirements of UCP600 Article 20.[507]

Clearly, issuance of a bill of lading by a freight forwarder is an established and acceptable practice under the UCP. However, in the context of UCP600, the expression "freight forwarder's bills of lading" will not take the same effect in the process of documentary examination as it does under carriage of goods by sea.[508] A document checker will not be in a position to determine the status of the signing company when it signs as carrier.[509] Terms, which exclude freight forwarder's bills of lading but do not clearly define the type of document that would be acceptable, are ambiguous and will be disregarded. As long as a bill of lading can pass through the two tests under Article 20 (a) (i), i.e. identifying the carrier and following the rule of signature, it will be accepted by banks.

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[505] UCP500 Article 30 dealt with the issue of freight forwarder bills of lading. However, the specific article has been deleted in the UCP600 itself, but instead it has been put into the ISBP.
[506] ISBP No.745 section E3 (b)
[507] ISBP No.745 section E4, which was not included in the ISBP No.681. See also *ICC Opinions 2005-2008*, R643
[508] If a freight forwarder signs as carrier, the bill of lading becomes a carrier document. See *ICC Opinions 2005-2008*, R643
[509] *ICC Opinions 2009-2011*, R734

5.2.2.3 Shipment of the goods

The UCP600 Article 20 (a) (ii) stipulates that a bill of lading must "indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit". [510] In the absence of the contrary statement in the credit, a received-for-shipment bill of lading will not be accepted by the bank. Clearly, the UCP requirement is in line with the traditional common law position in which a received-for-shipment bill is not a good tender under an international sale contract.[511] It has been argued that a received-for-shipment bill could neither acknowledge the actual shipment nor afford adequate security to the bank under a letter of credit. Since a received-for-shipment bill of lading has not traditionally been recognised as a document of title at common law, it is doubtful whether it could give its holder bailment rights against the carrier.[512] Although the problem has been partly solved by the COGSA1992 which confers the "lawful holder" of a received bill of lading a contractual title to sue the carrier, the traditional bias towards shipped bill of lading is still strong.[513] More fatally, the evidential problem still remains, since a received bill cannot function as a receipt for the goods shipped without the aid of an on board notation.

UCP600 Article 20 (a) (ii) provides two ways to satisfy the requirement for a shipped bill of lading, i.e. by pre-printed wording or by an on board notation indicating the date of shipment.[514] The date of issuance of the bill of lading will be deemed to be the date

[510] Once again, the substance prevails over the title. Any phrases that incorporate "shipped" or "on board" which have the same effect as the words "shipped on board" are acceptable, such as "Shipped in apparent good order", "Laden on board", "Clean on board" etc. See ISBP No.745, section E7

[511] *Diamond Alkali Export v Bourgeois* [1921] 3 KB 443; *Yelo v SM Machado* [1952] 1 Lloyd's Rep 183 (QB)192

[512] *Diamond Alkali Export v Bourgeois* [1921] 3 KB 443, in which McCardie J distinguished *The Marlborough Hill* [1921] 1 AC 444 and held that a received for shipment bill cannot be regarded as document of title, without proof of custom.

[513] COGSA1992 s 1 (2) (b) has specifically covered received-for-shipment bills of lading and s 2 (1) (a) confers its holder the title of suit.

[514] UCP400 Article 26 (a) (ii) required an on board notation carrying both the date of shipment and the initials or signature of the carrier or his agent. The need for initials or an extra signature has been dispensed since UCP500 and the requirement for on board notation has been relaxed as to simply require the date of shipment. The relaxation coincides with the Hague-Visby Rules Article III (7) [incorporated by COGSA1971], under which the shipper (normally the seller) has no right to demand an additional

of shipment unless the bill of lading bears a separate date on board notation, in which case the date stated in the on board notation will be deemed to be the date of shipment, no matter if it is before or after the issuance date of the bill of lading.[515] If the bill of lading contains two different "shipped on board" dates, i.e. one from pre-printed wording "shipped on board" and the other from the on board notation, the conflict will not constitute a ground for rejection and the date in the on board notation will be treated as the date of shipment.[516] Consistent with the autonomy principle, banks are only required to check the shipment status on the face of the bill of lading, rather than to ascertain whether the goods have been in fact shipped on the "deemed" date of shipment.[517]

Article 20 (a) (ii) emphasised that the goods have been shipped on board a "named vessel" as stated in the credit. If the bill of lading contains the indication "intended vessel" or similar qualification in relation to the name of the vessel, an on board notation is needed which must indicate both the date of shipment and the name of the actual vessel.[518] The additional notation is necessary even where the vessel actually carrying the goods is the same as it was intended. Moreover, according to Article 20 (a) (ii), the bill of lading must indicate that the goods have been shipped on board "at the port of loading stated in the credit". If the bill of lading indicates a different place or if the port of loading is qualified as "intended", an on board notation is required as described next, even if the bills are pre-printed in a shipped-on-board form.

5.2.2.4 The route

A. Port of loading

signature with the on board notation.

[515] See UCP600 Article 20 (a) (ii); ISBP No.745, section E6 (a). However, the bill of lading must evidence a date of shipment within the permitted shipment period under the credit.

[516] See *ICC Unpublished Opinions 1995-2004*, R572.

[517] *Westpac Banking Corp v South Carolina National Bank* [1986] 1 Lloyd's Rep 311, 315-316

[518] UCP600 Article 20 (a) (ii) However, according to the interpretations of the ICC Commission on Marine Transport, a bill of lading which in its pre-printed form uses the words "or substitute vessel" is not to be considered as a qualification similar to "intended vessel" here. See ICC Opinions 1995-2001, R349 which has replaced the conclusion of Query R283 in Gary Collyer (ed), *More Queries and Responses on Documentary Credits - Opinions of the ICC Banking Commission 1997* (ICC Publication No.596, ICC 1998)

The UCP600 Article 20 (a) (iii) requires that the bill of lading must indicate shipment from the port of loading to the port of discharge stated in the credit. It further states that if the port of loading in the bill of lading is different from what has been stated in the credit, or if the port is qualified as "intended" or by similar words, an on board notation containing the port of loading, the date of shipment and the name of the vessel must be added on the bill of lading. Compared with the corresponding provisions under UCP500, the statement under UCP600 Article 20 is much simplified. Moreover, the UCP600 deletes the wording that appeared in UCP500 Article 23 (a) (ii) dealing with a place of receipt or taking in charge different from the port of loading, since the wording in UCP500 was seen to encourage the presentation of a document covering pre-carriage of the goods.[519] However, unexpectedly, the omission caused more confusion on the specific requirements of on board notation, which had already been complicated enough.[520]

It is common in practice that the contract of carriage may contain the clause for the goods to be collected from an inland point for delivery to the port of loading for loading onto the vessel, but the letter of credit only refers to shipment from port to port. The bill of lading may consequently evidence a place of receipt that is different to the port of lading or even include the details of pre-carriage.[521] The bill of lading may also contain the pre-printed wording "shipped on board in apparent good order and condition" or add an on board notation with the date of shipment as usual. Consequently, the problem is how can a document examiner determine that "shipped

[519] UCP500 Article 23 (a) (ii) reads: "If the bill of lading indicates a place of receipt or taking in charge different from the port of loading, the on board notation must also include the port of loading stipulated in the credit and the name of the vessel named in the bill of lading. This provision also applies whenever loading on board the vessel is indicated by pre-printed wording on the bill of lading." See Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 91

[520] The problem concentrates on whether the on board notation requires more than just a date when the bill of lading indicates place of receipt and/or pre-carriage details.

[521] Pre-carriage refers to the carriage between the stated place of receipt and the stated port of loading on a bill of lading. See ICC Banking Commission, *Recommendations of the Banking Commission in respect of the Requirements for an On Board Notation* (Document No 470/1128 rev final, 22 April 2010) 8

on board"[522] statement is connected with the sea-going vessel at the required port of loading, rather than with any other means of conveyance for the pre-carriage of the goods between a place of receipt and the port of loading, by solely reading text on the face of the bill of lading. With respect to this problem, the ICC Banking Commission endeavours to provide a detailed guidance concerning the requirement of on board notation to the bank, so that the bank can draw a conclusion from simply reading the words on the face of the transport document.[523] The baseline is that unless the shipped on board statement on the bill of lading evidently applies to the vessel and the required port of loading, a specific on board notation is required.[524]

The distinction can be set up between whether the bills of lading contain the pre-carriage details or not.[525] When there is no indication of a means of pre-carriage, the bill of lading will be acceptable if it contains the "shipped on board" statement (pre-printed wording or by a separate notation as stipulated in Article 20 (a) (ii)), no matter whether the bill of lading indicates a place of receipt and whether the place of receipt is the same as the port of loading stated in the bill of lading or different.[526] Nevertheless, it is subject to one exception. If there is an express clause on the face of the bill of lading to indicate that, when the place of receipt box has been completed, "loaded on board" or words to like effect shall be deemed to be on board the means of transportation performing the carriage from the place of receipt to the port of loading, a specific on board notation showing the port of loading and the name of the vessel is needed, even without seeing the details of pre-carriage on the bill of lading.[527]

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[522] It can be a part of the text in a pre-printed form or as an on board notation added to the bill of lading.

[523] ICC Banking Commission, *Recommendations of the Banking Commission in respect of the Requirements for an On Board Notation* (Document No 470/1128 rev final, 22 April 2010), which has been incorporated into the ISBP No.745 section E6 without major changes.

[524] *ICC Opinions 2005-2008*, R648

[525] With due respect, the author believes that the ISBP No.745 section E6 (b) and (c) are not drafted very concisely and skilfully. The section seems to mirror-image the conclusion wording in the *ICC Recommendation Paper*. The section has taken two pages to describe the different circumstances, but the only decisive point for drawing an acceptable on board notation is to distinguish whether there is a pre-carriage.

[526] ISBP No.745, section E6 (b). This new rule has replaced the ICC Opinion R644 which required an on board notation in the circumstance of no pre-carriage details but with a different place of receipt.

[527] ISBP No.745, section E6 (d) However, the author doubts how can the bank observe such a clause if the bank is not going to examine the terms of carriage in the bill of lading as stated in Article 20 (a) (v).

By contrast, when a bill of lading indicates a place of receipt different from the port of loading and there is also an indication of pre-carriage (either in the pre-carriage field or the place of receipt field), an on board notation containing the date of shipment, the name of the vessel and the port of loading as stated in the credit must be added to the bill of lading, no matter that the bill of lading is in a pre-printed shipped form or in a received-for-shipment form.[528] The requirement remains the same even if there is no place of receipt shown in a bill of lading. As long as there is an indication of pre-carriage, the on board notation with the three elements described above must be added on the bill of lading.[529]

The above rules set out by the ISBP No.745 seem pretty clear. If a bill of lading indicates the details of pre-carriage, in whatever form, an on board notation containing the time of shipment, the name of the vessel and the port of loading is necessary. If a bill of lading does not address the details of pre-carriage, it will be acceptable as long as it shows the goods have been shipped on board, since the bank supposes to be able to connect "shipped on board" or words of similar effect with the sea journey, rather than linking with any pre-carriage. It is suggested that although the situation that appeared in UCP500 Article 23 (a) (ii) regarding "the place of receipt or taking in charge different from the port of loading" has not been incorporated into UCP600 Article 20, the position remains unchanged. Evidently, the ICC Banking Commission has endeavoured to follow developments in the transport industry and cater for cases where the carrier receives the goods at a point earlier than the port of loading. Nevertheless, a few problems will come up if we take a step back and have another review at the whole picture.

Firstly, the compromise of allowing different modes of pre-carriage may undermine the

[528] ISBP No.745, section E6 (c)

[529] If the place of receipt is the same as the port of loading in the bill of lading, it is deemed that no pre-carriage is needed. If the pre-carriage box in the bill of lading is however completed, a three-element on board notation which contains the date of loading, the place of loading and the name of the ocean vessel must be added. See *ICC Opinions 1995-2001*, R350, R457

scope of Article 20. In order to fit the market practice, the ICC Banking Commission concludes that 'a bill of lading is a generic term for a transport document that includes, but is not necessarily limited to, transport by sea from a port of loading to a port of discharge.'[530] It is recognised that there will be occasions when the shipping company or its agent will include reference to a place of receipt or taking in charge that is different from the port of loading, whether it is a feeder port or an inland point.[531] To cover this eventuality, the ICC Banking Commission designs a set of rules concerning the on board notations as stated above, so as to lead bankers to determine the acceptability of a bill of lading which contains a pre-carriage by the inland conveyance. A bill of lading covering two different modes of transport may not be considered as a combined transport document and may not be rejected for that reason, provided it contains a dated on board notation specifying the port of loading and the vessel's name.[532]

It is clear from the beginning of this chapter that the bank will accept the document, "however named", as long as it satisfies the requirements under the credit and the UCP. The name of the document does not necessarily have to represent its content. Whether the document falls within Article 19 or Article 20 is a test of substance not form. For example, a document only covering a single means of transportation cannot be regarded as a multimodal transport document, even though it has been named so. Arguably, in principle, a so called "bill of lading" containing more than one means of transportation on the face of the document should not be examined under Article 20, which only applies to a bill of lading covering transport by sea from one port to another port.[533] When any other means of conveyance apart from sea carriage is envisaged, the parties should ensure that the credit allows for a multimodal transport document under UCP600 Article 19.

[530] *ICC Opinions 2005-2008*, R648, R645
[531] *ICC Opinions 1995-2001*, R280
[532] *ICC Opinions 2005-2008*, R648, R645
[533] If a credit requires the presentation of a marine bill of lading and either the port of loading or discharge, as specified in the credit, is not actual ports, an amendment should be obtained so as to call for a multimodal transport document. See *ICC Opinions 1995-2001*, R454

If a credit is only calling for a multimodal transport document, presenting a document which contains sole sea carriage may not be acceptable. Comparatively, is it fair to accept a transport document containing two or more modes of transport when the credit specifically calls for a marine bill of lading and prohibits presentation of other documents? If a transport document containing both an inland conveyance (by air, rail, road or inland waterway) and a sea carriage is acceptable under Article 20, the need for stipulating a separate Article 19 for multimodal transport documents will be significantly diminished, since the scope between these two articles will be largely overlapping. In this perspective, the rules in the ISBP No.745 appear to be inconsistent with the scope of Article 20, since these rules are dating back to the position under UCP500 and catering for combined transport operations, which are designed to be covered exclusively by UCP600 Article 19.[534]

In order to distinguish a bill of lading containing pre-carriage details with a multimodal transport document, the ICC Banking Commission shifts the emphasis to the on board statement, i.e. the on board statement in the bill of lading must be in correspondence with the port of loading and the port of discharge stated in the credit. As long as the on board notation can correct the inconsistencies and make sure that the notated port is compliant with the credit, the bill of lading containing more than one mode of transport will still be accepted under Article 20.[535] This solution is able to temporarily provide a practical guidance for the bankers in the process of documentary examination; however, the problem has not been solved radically, especially when the credit only states a geographical range for loading and discharge.[536]

As Figure 5 illustrated, assuming the credit states loading at any Chinese port and

[534] In Paul Todd, *Bills of Lading and Bankers Documentary Credits* (4th edn, Informa Publishing 2007) para 8.12, it states that 'there is no equivalent in Article 20 of UCP600, multimodal transport now being covered exclusively by Article 19.'

[535] *ICC Opinions 2005-2008*, R648, R645

[536] When a credit indicates a geographical area or range of ports of loading, a bill of lading is supposed to state the actual port of loading within that geographical area or range of ports of loading. The geographical area itself is not required to show on the bill of lading. See ISBP No.745 section E6 (g).

shipping to Southampton, with transhipment allowed, the tendered bill of lading provides the following details respectively:

Bill of Lading 1	Bill of Lading 2
Port of Receipt: Qingdao	Port of Receipt: Wuhu
Pre-Carriage by: Vessel A	Pre-Carriage by: Vessel A
Port of Loading: Shanghai	Port of Loading: Shanghai
Ocean Vessel: Vessel B	Ocean Vessel: Vessel B
Port of Discharge: Southampton	Port of Discharge: Southampton

Figure 5

Since both bills of lading contain the details of pre-carriage, according to the ISBP No.745 section E6 (c) above, a dated on board notation indicating the name of the vessel and the port of loading as stated in the credit must be added to the bill of lading. For the Bill of Lading 1, when Shanghai is used as the port of loading, the on board notation must indicate "Shipped on board Vessel B at Shanghai as the port of loading on XXX (date)", so that the on board statement can relate to the main carriage. Alternatively, Qingdao is a Chinese port which may be qualified as the port of loading in the credit as well, even though it has been put down in the bill of lading as the place of receipt. Since it is uncommon for the bill of lading in current use to provide fields for the ports of transhipment, the port of loading stated in the credit is always customarily noted as the place of receipt and the transhipment port is subsequently added in the field of port of loading.[537] The inconsistent data, however, can be rectified by adding an on board notation with the actual port of loading.[538] In the current example, the bank will regard Qingdao as the port of loading if the bill of lading contains an on board notation which indicates "Shipped on board Vessel A at Qingdao as the port of loading on XXX (date) for transhipment via Shanghai on Vessel B".

[537] Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 92. See also *ICC Opinions 1995-2001*, R227
[538] See ISBP No.745, section E6 (e). See also *ICC Opinions 1995-2001*, R458, R460

Consequently, since the credit does not stipulate a specific port of loading, the bill of lading may indicate the port of loading as either the port (Shanghai in the current example) where the goods have been loaded on board the ocean vessel or the port (Qingdao in the current example) where the goods have been loaded on board the feeder vessel. In each case, additional notation as stated above must be added on the bill of lading.

The format in the Bill of Lading 2 looks very similar to that in the Bill of Lading 1. The on board notation may mark the ocean port Shanghai as the port of loading by stating "Shipped on board Vessel B at Shanghai on XXX (date)". Nevertheless, different from Qingdao in the Bill of Lading 1, Wuhu probably cannot be an alternative port of loading even with the aid of the on board statement such as "Shipped on board Vessel A at Wuhu as the port of loading on XXX (date)", because Wuhu is an inland river port and the inland waterway carriage from Wuhu to Shanghai is arguably under the scope of UCP600 Article 24.[539] If Wuhu is used as the port of loading, the entire carriage from Wuhu to Southampton must at least contain both the inland waterway carriage and the sea carriage. In this circumstance, the tendered transport document must be a multimodal transport document under article 19 rather than an ocean bill of lading under Article 20 as required by the credit. Moreover, turning back to the practical solution provided by the ISBP No.745 E6 (c), another on board notation which can relate to the ocean carriage from Shanghai to Southampton is still required, since the on board statement "Shipped on board Vessel A at Wuhu as the port of loading on XXX (date)" only confirms the goods have been shipped on board for the inland waterway pre-carriage.

However, the most challenging problem here is whether a bank is able and obliged to identify a foreign port being an ocean port or inland waterway port, so as to tell the needs for the second on board statement. Is a reasonable banker supposed to know the

[539] UCP600 Article 24 covers the carriage by road, rail or inland waterway.

difference between Qingdao and Wuhu without making queries to the external resources? The answer is possibly no, but unfortunately the bank who is unaware of the situation and induced to accept the discrepant document may be the party paying for the loss caused by the less specific requirement in the credit and the impracticality of the rules.

It is clear that the ISBP rules for judging the on board shipment have been very detailed, but certain problems are still unavoidable. The ISBP rules for on board notations works perfectly well when the whole journey is connected by two or more legs of sea journey, especially when the entire carriage is partly performed by a container feeder vessel and partly performed by a mother line vessel.[540] As stated above, the ISBP rules for on board notations can also provide the beneficiary an opportunity to rectify the inconsistent port of loading stated in the bill of lading, especially when the port of transhipment is customarily put down into the box of port of loading.[541] The rules seem also quite handy when apply to an inland place of receipt with the pre-carriage by air, road or rail. However, practical difficulties for judging an on board notation will rise up when the credit only draws a geographical area and the place of receipt is a feeder port with a pre-carriage by inland waterway. It is difficult to make the rules perfect unless fundamentally changing the whole structure of the UCP transport articles. However, if the applicants and the banks can carefully select the transport document which reflects the correct routing and appropriate means of conveyance, many of the issues seen above would be avoided.[542]

B. Port of discharge

The UCP600 has provided detailed texts dealing with identifying the port of loading; however, it does not mention the circumstance concerning a different port of discharge

[540] It is also commonplace in the container trade to use a feeder service, which is utilized by the carrier to bring cargo from a number of ports to a hub port or vice versa. See *ICC Opinions 1995-2001,* R227, R352, R459, R460

[541] It arguably reflects the relaxation of doctrine of strict compliance under UCP.

[542] Most shipments today seem to contain an element of multimodal transport and perhaps. Therefore, the parties should ensure that the credit allows for a multimodal transport document to be presented.

stated in the bill of lading. The ISBP No.745 has effectively supplemented this gap. The ISBP No.745 section E8 (a) requires that the named port of discharge, as stated in the credit, should appear in the port of discharge field within a bill of lading. However, the ISBP No.745 section E8 (b) also admits that the named port of discharge may be stated in the field headed "Place of final destination" or words of similar effect, provided there is a notation evidencing that the port of discharge is the one stated under "Place of final destination" or words of similar effect. For example, the credit requires shipment from Southampton to Shanghai with transhipment allowed. However, the port of transhipment Singapore has occupied the box of port of discharge and Shanghai is subsequently put down into the field of place of final destination. In this circumstance, the bill of lading evidencing a port of discharge different from the port of discharge as stated in the documentary credit would be acceptable, as long as a notation stating "Port of discharge Shanghai" is added into the bill of lading.[543]

Similar to the situation concerning the port of loading above, the rule works very well when identifying the port of discharge in a sole sea carriage with transhipments, but the problem may still occur when a general geographical area is stated by the credit.[544] In the author's opinions, the condition precedent of section E8 (b) must be that the goods are to be transported to that place of final destination by sea carriage.[545] Hence, when a credit states transportation to any Chinese port, it must mean a Chinese sea port rather than an inland river port. Using the previous example in *Figure 5* reversely, if the credit calls for shipment from Southampton to any Chinese port, in the Bill of Lading 1, both Shanghai and Qingdao are possible to be the port of discharge. Comparatively, in the Bill of Lading 2, only Shanghai can be the port of discharge

[543] The ISBP No.745 section E8 (b) only requires a notation to evidence the actual port of discharge in compliance with that in the credit. It does not specify any detailed requirements for the notation. Comparing with the position under UCP500 Article 23 (a) (iii) in the *ICC Opinions 1995-2001*, R460, which concluded that the reference to the port of discharge would not necessarily correct the inconsistency unless it has been included within the on board notation.

[544] When a credit indicates a geographical area or range of ports of discharge, a bill of lading is supposed to state the actual port of discharge within that geographical area or range of ports of discharge. The geographical area itself is not required to show on the bill of lading. See ISBP No.745 section E10.

[545] The condition appeared in the ISBP No.681 para 99, but the corresponding phrase was omitted in the ISBP No.745. The author believes the condition is still implied in the new ISBP rules.

since Wuhu is an inland waterway port.

In order to compromise the practice of transport industry, the ICC tries to break the boundaries between the bill of lading and the multimodal transport document superficially. Since the operation is not in principle, the confusion still remains when the carriage involves more than one mode of transport. It is clear that if a credit requires the transportation to an inland point, an amendment should be obtained so as to call for a multimodal transport document.[546] However, how about if a credit calls for a port-to-port bill of lading, but the bill of lading contains an inland place of delivery which is different from the port of discharge as stated in the credit? Will the bill of lading including an inland on-carriage to the place of delivery still be examined under Article 20?[547] If it is acceptable under Article 20, the author wonders what is left for Article 19 concerning multimodal transport documents.[548]

5.2.2.5 The full set

In early days of international trade, bills of lading are usually issued in sets (usually of three) to provide the protection against loss, but it can largely increase the risk of fraud, due to the principle of "the one being accomplished, the others to stand void".[549] Hence, it is usual to demand the entire set of bills of lading as a precaution against fraud under documentary credits.[550] On the other hand, as a document of title, bills of

[546] *ICC Opinions 1995-2001*, R454 See also *ICC Opinions 2009-2011*, R751, although the author does not agree the second half of analysis, in which Article 20 applies to the transport document with an inland final destination.

[547] There is no work concerning the on-carriage issue, as what the ICC did for the pre-carriage in its Recommendation Paper.

[548] There is no clear authority for this point. The ICC Opinion R280 under UCP500 Article 23 suggested a bill of lading showing an inland point would be acceptable provided that a valid on board notation was included, but it did not clearly explain the situation between the port of discharge and the place of delivery.

[549] Each of the three original bills of lading can be separately negotiated so as to obtain delivery of the goods from the carrier. However, the carrier's duties extend no further than to deliver the goods to the first person who has presented an original bill of lading. Under common law, the carrier need not wait all original bills against delivery, nor need he take further step to make sure that the presenter is in fact the person entitled. See *Glyn Mills & Co v East and West India Dock Co* (1882) 7 App Cas 591 (HL)

[550] Under the common law case, *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1 (CA), the credit called for a full set of bills of lading. The Court of Appeal held that two out of three bills of lading accompanied by either an undertaking to produce the third or an indemnity for accepting less than three was not a sufficient tender.

lading can control delivery of the goods and give rights to the holder. If in any event the banks are stuck with the goods, the full set of bills of lading would provide the banks some security concerning delivery and disposal of the goods. Based on the importance of holding a full set of bills, the UCP600 Article 20 (a) (iv) continues to stress the UCP500 position and require the beneficiary to present the full set of original bills of lading as issued or the sole original bill of loading if only one was issued.[551] Moreover, the ISBP No.745 section E11 requires a bill of lading to indicate the number of originals that have been issued.[552] It further stipulates that bills of lading marked "First Original", "Second Original", "Third Original", or "Original", "Duplicate", "Triplicate" or similar expressions are all originals.[553]

5.2.2.6 Carriage terms

The UCP600 Article 20 (a) (v) requires a bill of lading to contain terms and conditions of carriage or make a reference to another source containing the terms and conditions of carriage (i.e. a short form or blank back bill of lading). It further emphasises that contents of terms and conditions of carriage will not be examined, whether or not they are contained in the bills themselves. Nevertheless, broadly speaking, terms and conditions of carriage can include both "special terms" regarding the transport of goods, such as port of loading/discharge, name of the vessel and the carrier, shipment and transhipment details, and "general terms" which are customarily stated on the back of a bill of lading or by reference to another document. The UCP600 Article 20 has made specific requirements for the former and described the latter as "terms and

[551] In respect of this requirement, UCP is more stringent than the position in an ordinary sale contract under common law, which demonstrates in the absence of an express stipulation, tender of one is sufficient. See *Sanders Brothers v MacLean & Co* (1883) 11 QBD 327 (CA)

[552] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 254, fn 48 suggests that absent such an indication, it should be understood that the bill of lading was issued in one original. However, in James Byrne, *UCP600: An Analytical Commentary* (IIBLP 2010) 894, it believes the assumption is that the bill of lading will state the number of bills of lading issued even if it is the sole original.

[553] It is suggested that if a bill of lading is not an original document, it will not be regarded as a transport document under the UCP600 at all. According to UCP600 Article 17, it is however not necessary for a document to have an "original" mark on its appearance in order to be recognised as original.

conditions" in Article 20 (a) (v).[554]

Following this division, the "special terms" must be examined by the bank whereas the "general terms" cannot be used as a basis for refusal. The confusion arises when the "special terms" which are supposed to be examined by the bank cross-refer to clauses on the reverse side of the bill of lading. Is a bank required to read the carriage terms which appear on the reverse of the bill of lading in order to understand the information contained on the front side? The ICC Banking Commission responded negatively to this question, which stated that "reference to specific clauses, by number or otherwise, within the terms and conditions listed on the reverse of a bill of lading do not compel the bank to review such clauses to establish compliance of the document with the credit terms and conditions."[555] This conclusion also equally applies to short form bills of lading when the carriage terms can only be found from an external source.[556]

The intention behind Article 20 (a) (v) is to deter the banks to review any terms and conditions of carriage and to make the banks rely solely upon the data that appear on the face of the document. Unfortunately, the UCP does not specify whether the terms and conditions (or reference thereto) are to appear on the front or reverse of the document, nor does it provide a guidance for the bank as to how to distinguish between the "special terms" and the "general terms". The situation may look straightforward if a bill of lading follows the traditions to address the former on its front page and leave the latter on the reverse. However, the situation becomes "more clouded" should the general carriage terms appear on the face of the bill of lading.[557] Unless the general terms have been clearly indicated within the layout of the text, it would be extremely difficult for the bank to distinguish those carriage terms under Article 20 (a) (v) from the whole data in the process of reviewing the front of a bill of lading, especially when

[554] James Byrne, *UCP600: An Analytical Commentary* (IIBLP 2010) 895
[555] *ICC Unpublished Opinions* 1995-2004, R575
[556] *ICC Opinions 2009-2011*, R759
[557] *ICC Unpublished Opinions 1995-2004*, R576

those terms are linked with the letter of credit criteria.[558]

Another issue arises when the general carriage terms contradict with the letter of credit terms or render the required terms in the bill of lading meaningless. It is not uncommon for the content of the terms and conditions to not be in compliance with the terms of a letter of credit. However, the UCP has not provided any specific guidance concerning these circumstances. It simply states that the carriage terms will not be examined. The question is therefore can the bank still dishonour the presentation based on the contradictions between the carriage terms and the credit terms? If not, does the provision "contents of carriage terms will not be examined" mean that the bank is going to disregard all the general carriage terms and will not give any effect to whatever have been stated on the bill of lading? Before hassling to answer these questions, the author would like to review the relevant ICC Opinions first.

In the ICC Opinion R646,[559] the credit required presentation of a bill of lading marked "freight pre-paid". The presented bill of lading was so marked, but contained pre-printed wording which qualified the "freight pre-paid" statement. The qualification, though stated on the face of the bill of lading, was still classified as one of the general carriage terms and conditions by the Banking Commission. Accordingly, the qualification term was not to be examined and the bill of lading was not discrepant. In the ICC Opinion R758,[560] the credit required "bills of lading that on their face indicate that goods may be released without presentation of an original bill of lading are not acceptable". However, the tendered bill of lading contained a delivery clause which distinguished between the negotiable form and the non-negotiable form. It stated the same presentation rule as the credit for the negotiable form, but contained an inconsistent rule for the non-negotiable form, where the carrier might give delivery of goods to the named consignee upon reasonable proof of identity. The Banking

[558] For example, R758 in the *ICC Opinions 2009-2011* concerned whether the bank should examine the "delivery clause" shown above the carrier's signature on the front of the bill of lading, which was also linked with the letter of credit requirement in respect of delivery.
[559] *ICC Opinions 2005-2008*, R646
[560] *ICC Opinions 2009-2011*, R758

Commission considered the delivery clause on the face of the bill of lading as the terms and conditions of carriage so that it would not be examined according to Article 20 (a) (v). Moreover, since the bill of lading was issued in a negotiable form, there was no discrepancy for this specific bill of lading.

Regrettably, the above ICC Opinions did not manage to clarify the scope of "carriage terms and conditions" as well as the meaning of Article 20 (a) (v). Although the conclusion reached seemed reasonable for the specific case, the analysis leading to the conclusion was vague and difficult to generalise.[561] Taking the second case as an example, if the credit calls for a straight bill of lading and expressly requires delivery against presentation of the bill of lading, would the bank still be obliged to accept the bill of lading with a contradictory "carriage term" on its face stating "delivery of the goods upon reasonable proof of identity"?[562] The conclusion is probably opposite to the above ICC Opinion R758. Looking back to the general standards for documentary examinations, a complying presentation must be in accordance with the terms of the credit, the UCP and international standard banking practice.[563] More specifically, data in a document must not conflict with data coming from the same document, data in any other stipulated document or the credit.[564] Nothing in the UCP has attempted to grant Article 20 (a) (v) paramount status over the bespoke terms in the credit. If the credit explicitly prohibits delivery without presentation of the bill of lading, the term in the bill of lading must not conflict with this requirement.

The above situation can also lead the banks to face with a practical dilemma. It has been suggested that with respect to a nominated bank, the rule of not examining carriage terms and conditions is absolute except when the terms of the bill of lading so

[561] Kim Christensen, 'The Reasoning behind Recent ICC Opinions' (2009) 15(4) DCInsight 7, 7-8

[562] Whether a straight bill of lading is a document of title and the relevant debate under English law is not the issue concerned here. The scenario here is assuming the credit expressly requires delivery against presentation of a straight bill of lading.

[563] UCP600 Article 2, Article 14 (a)

[564] UCP600 Article 14 (d). Even the non-documentary term stated in the credit which will be disregarded by the bank under UCP600 Article 14(h) has overridden by Article 14 (d), i.e. there must be no conflict between the non-documentary term itself and the terms in the required documents. See detailed discussion in Part 4.5.2.2 section D of this thesis.

depart from the norm to justify the meaning of particular term or condition.[565] However, the issuing bank, who has agreed with its customer to include a carriage condition in the credit, may not be entitled to treat the term issued by itself as a nullity. Even though the carriage terms and conditions would be disregarded in determining compliance of a presentation, an issuer who has promised its applicant that it will honour upon certain carriage terms may have liability to its applicant for accepting a contradictory term on the bill of lading. Therefore, the issuing bank would suffer the most unfortunate situation, which means it is obliged to take up the documents presented by the beneficiary but cannot be reimbursed from the applicant due to the conflict between carriage terms and the credit terms.

In the author's opinion, the root of the problems lies in that there is no clear scope for the carriage terms and conditions regulated under Article 20 (a) (v). Article 20 (a) (v) simply requires the existence of the carriage terms and states that banks will not examine these terms; however, it fails to outline what belong to the carriage terms and conditions under this article. It seems odd to indicate that some parts of a pre-printed text will not be examined because they represent terms and conditions, while other parts of the same pre-printed text clearly must be examined to check compliance with Article 20.[566] It also sounds arbitrary that the bank is only entitled to examine particular carriage terms mentioned within the UCP regime rather than any other terms specially required by the credit, especially when those terms are vital to the parties' security.[567] If the UCP stops the bank from examining the delivery clause since it has been regarded as a carriage term under Article 20 (a) (v), will it still make sense to require a full set of bills of lading so as to guarantee the safety of delivery?

Clearly, radically contracting out Article 20 (a) (v) is not the best solution for the above

[565] James Byrne, *UCP600: An Analytical Commentary* (IIBLP 2010) 896

[566] See *ICC Opinions 2009-2011*, R758, in which the delivery clause was stated in the same pre-printed paragraph with the status of shipment and the number of bills of lading. The statement for the latter two elements was examined by the bank without doubt.

[567] For example, as stated in the ISBP No.745 section E6 (d), the bank needs to examine whether the on board statement on the bill of lading is for the pre-carriage from the place of receipt to the port of loading.

difficulties, since the bank is reluctant to waste time in scrutinising all the small print and to undertake any corresponding responsibilities, even though it might be of benefit for the bank's own security.[568] In the author's opinion, the better approach is to tailor the scope of general carriage terms covered by Article 20 (a) (v) and make it fit for the practical needs. As the UCP specifically required, the bank needs to examine several terms on the face of bill of lading, such as identity of the carrier, route of carriage, on board statement, transhipment clauses and description of the goods etc.[569] Apart from these special terms, the credit should be able to speak out certain carriage terms which have not been included in the UCP provisions and make those terms exclusive from the coverage of Article 20 (a) (v). For example, if the credit expressly requires delivery against presentation of a bill of lading, the bill of lading indicating that the carrier may deliver the goods without production of an original bill will not be acceptable.[570] The right interpretation of Article 20 (a) (v) must be that the content of carriage terms and conditions will not be examined, *unless the terms have been otherwise specified in the credit*.

Although reducing the scope of Article 20 (a) (v) may bring certain burdens on the bank in the process of examination, comparing with the huge risk borne by the banks and traders, the author believes it is still worth doing.[571] If this approach is adopted, the result of Article 20 (a) (v) can only mean that the bank does not look at the general terms and conditions of carriage save for anything already required by the credit. The author suggests that the standard of examination for those carriage terms specified in

[568] The bill of lading represents the carriage contract between the carrier and the third party bill of lading holder, such as the bank. If the bank is stuck with the goods, it will have to rely on the bill of lading terms to claim delivery and sue for damages against the carriers.

[569] The UCP tends to exempt the bank from examining the small print on the reverse of a bill of lading, even relating to those special terms.

[570] The express clause in the credit can in some degree solve the gap left by the UCP600, in which the delivery issue was not regarded as appropriate to be addressed according to the Drafting Group. See Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 89. The express stipulation in the credit also solves the dilemma faced by the straight bill of lading, since at the moment there is still no decisive answer regarding production of a straight bill for delivery.

[571] The author believes that transaction security provided by the documentary credit mechanism should not be worse than the buyer's position under the cash against document method. Even under the cash against document circumstances, the buyer is hardly to accept a bill of lading carrying a clause regarding delivery without production.

the credit must be the same as that used for the special terms mentioned in the UCP, which means the bank is going to examine on the face of the bill of lading rather than scrutinise all the small print on the reverse, unless the credit expressly contracts out article 20 (a) (v) and requires the bank to do so.[572]

5.2.2.7 Transhipment clauses

It is common in practice for bills of lading to contain a clause conferring on the carrier a right of transhipment. Furthermore, transhipment is routinely carried out in the container trade where containers are often transferred between different vessels. In recognition of these practices, UCP600 provides Article 20 (b)-(d) to specifically deal with the transhipment issues. UCP600 Article 20 (b) defines transhipment as "unloading from one vessel and reloading to another vessel during the carriage from the port of loading to the port of discharge stated in the credit".[573] UCP600 Article 20 (c) combines the situations addressed by UCP500 Article 23 (c) and (d) together.[574] By omitting the preface "unless transhipment is prohibited by the terms of the credit" in the UCP500 Article 23 (c), the UCP600 Article 20 (c) (i) starts with that banks will accept bills of lading which "indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same bill of lading".[575] Article 20 (c) (ii) further states that even if transhipment is expressly prohibited by the

[572] This standard is in accordance with the common law position, which held that the general practice of banks was not to examine the small print on the back of the bill. See *National Bank of Egypt v Hannevig's Bank* (1919) 1 Ll L Rep 69 and *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542 (QB), also cited in *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2014] 1 AC 715 [77]

[573] Transhipment may have another meaning in the context of Article 19 regarding transhipment between different modes of transportation. In addition, as the ISBP No.745 section E17 provides, when a bill of lading does not indicate unloading and reloading between loading port and discharge port, it is not transhipment in the context of the credit and UCP Article 20.

[574] UCP500 Article 23 (c) reads 'unless transhipment is prohibited by the terms of the Credit, banks will accept a bill of lading which indicates that the goods will be transhipped, provided that the entire ocean carriage is covered by one and the same bill of lading.' UCP500 Article 23 (d) reads 'even if the Credit prohibits transhipment, banks will accept a bill of lading which: (i) indicates that transhipment will take place as long as the relevant cargo is shipped in Container(s), Trailer(s) and/or "LASH" barge(s) as evidenced by the bill of lading, provided that the entire ocean carriage is covered by one and the same bill of lading…'

[575] Reading in the whole context of UCP600 Article 20 (c), the author believes that the omission of the preface "unless transhipment is prohibited by the terms of the credit" in the UCP500 Article 23 (c) should be for the purpose of conciseness. Article 20 (c) (i) will have no application if the credit prohibits transhipment, since the situation will fall in the region of Article 20 (c) (ii).

credit, where the goods evidenced in the bill of lading have been shipped in a container, trailer or LASH barge, a bill of lading indicating that transhipment will or may take place is still acceptable. Lastly, UCP600 Article 20 (d) stipulates that clauses in a bill of lading stating that the carrier reserves the right to tranship will be disregarded.[576]

It is clear to see that UCP600 is intended to accommodate the nature of modern transportation in which containerized shipment frequently involves transhipment. The default position of UCP600 is that transhipment is permitted unless expressly prohibited by the credit. Even though the credit has prohibited transhipment, it is still highly possible for the goods to be transhipped. However, the drafting of UCP600 transhipment provisions is somewhat complicated and through reviewing those clauses, two different scenarios will be considered respectively, i.e. when the bill of lading stating that the goods *will* be transhipped and when the bill of lading stating that the goods *may* be transhipped. Firstly, concerning the situation when the bill of lading stating that the goods will be transhipped, the entire carriage must be covered by one and the same bill of lading. However, what is the true indication behind the requirement of entire carriage coverage? Does it mean coverage of route or coverage of liability? Secondly, regarding the scenario when the bill of lading indicating that the goods may be transhipped, what are the interactions between Article 20 (c) and Article 20 (d)? Moreover, should the requirement of entire coverage still apply to the situation when the bill of lading indicates that the goods may be transhipped?

A. Bills of lading stating that the goods will be transhipped

UCP600 Article 20 (c) covers the situation when the bill of lading states that the goods will or may be transhipped. Unless the credit prohibits transhipment, UCP600 Article 20 (c) (i) stipulates that a bill of lading stating that goods will or may be transhipped is acceptable, provided that "the entire carriage is covered by one and the same bill of lading". By contrast, UCP600 Article 20 (c) (ii), considering the circumstance when

[576] The UCP however does not provide the meaning of "disregard". It may signify that no attention should be paid to what is being disregarded and liberty of transhipment clause may not be a basis for refusal of a presentation.

the credit prohibits transhipment, omits the requirement of entire carriage being covered by one the bill of lading, which was stated in its predecessor UCP500 Article 23 (d) (i). This deletion, of course, gives rise to the question of whether the requirement should be still applied to Article 20 (c) (ii).[577] It is suggested that since there has been no policy change, the better interpretation of Article 20 (c) (ii) must be that even where the credit prohibits transhipment, bills of lading stating that there will or may be transhipment are acceptable as long as the goods have been shipped in a container, trailer or LASH barge, provided that "the entire carriage is covered by one and the same bill of lading".[578]

As inferred above, when the bill of lading indicating that the goods will be transhipped, Article 20 (c) requires one and the same bill of lading to cover the entire carriage.[579] Separate documents covering each leg of a journey would not be applicable, whether the credit permits transhipment or not.[580] However, it is not entirely clear what the entire coverage means.[581] Does this requirement simply mean that the bill of lading must cover the entire carriage route, namely from the port of lading to the port of discharge stated in the credit, despite the fact that the goods will be transhipped? If this is the case, the requirement of entire coverage in Article 20 (c) seems not to add anything more than what has been already stipulated under Article 20 (a) (iii). Alternatively, the requirement of entire coverage may imply that there must only be one contract of carriage and that the issuing carrier must undertake the liability for the whole voyage, even if several carriers have involved for each part of the route. If this is

[577] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 176; James Byrne, *UCP600: An Analytical Commentary* (IIBLP 2010) 902

[578] See Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 176; same opinion in James Byrne, *UCP600: An Analytical Commentary* (IIBLP 2010) 902, which describes the omission as a draft oversight. *Jack* was presuming UCP600 Article 20 (c) (ii) is subject to the entire carriage being covered by one bill of lading although it has not been spelled out in the article. See Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.100

[579] In this part, the author just focuses on the situation of "will" transhipment. The issue of entire carriage concerning "may" transhipment will be discussed in the next part together with liberty of transhipment clauses.

[580] Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 93

[581] A full discussion for this point can be found in Charles Debattista, 'The New UCP 600 - Changes to the Tender of the Sellers's Shipping Documents under Letters of Credit' [2007] JBL 329, 344-350

the case, the bank needs to make sure that there is no clause disclaiming carrier's liability after transhipment. However, this process will inevitably involve examination for the general carriage terms and conditions which are supposed to be avoided under Article 20 (a) (v).

Purely in terms of construction, it is suggested that redundancy is better than self-conflict.[582] The first interpretation, that Article 20 (c) (i) simply re-states the route coverage of Article 20 (a) (iii), seems preferable than the second interpretation concerning liability, which will cause an internal inconsistence with Article 20 (a) (v) by ordering document checkers to examine terms and conditions of carriage.[583] However, considering the interests of the buyers and the banks who have stuck with the goods, pure literal construction appears to be inappropriate, since they desire to obtain recourse under the bill of lading against the carrier for any loss or damage during the whole voyage. The rationale behind the second interpretation is consistent with the common law principle that a sound bill of lading must provide a continuous documentary cover during the whole journey. The principle was stated in *Hansson v Hamel and Horley Ltd*,[584] where the House of Lords decided that the bill of lading issued by the subsequent carrier who only undertook liability regarding the second part of journey, without any complementary promises to bind the prior carriers, was a bad tender.

If the requirement of entire coverage under UCP600 Article 20 (c) is construed in line with *Hansson v Hamel*, a bill of lading seeking to disclaim the carrier's responsibility after transhipment would definitely be rejected, or even more rigid, banks may only accept the bills of lading which indicate that the issuing carrier undertakes liability in respect of the whole voyage.[585] Nevertheless, since the case of *Hansson v Hamel* was

[582] Charles Debattista, 'The New UCP 600 - Changes to the Tender of the Sellers's Shipping Documents under Letters of Credit' [2007] JBL 329, 344

[583] This interpretation will benefit the seller's interest and also lead to decreasing the number of rejections.

[584] *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36 (HL) 44-46

[585] *Jack* suggests that a bank should reject a bill of lading indicating that the goods will be transhipped

not payment by letter of credit, it has been questioned whether the decision under a sale contract could be simply transplanted into construing the documentary requirement under letters of credit so as to conclude that the bank would be liable for accepting a bill of lading containing disclaimer for the issuing carrier's responsibility after transhipment.[586] Moreover, in order to check what liability the issuing carrier is undertaking, it is inevitable to examine the carriage terms and conditions, which are supposed to be disregarded under Article 20 (a) (v). The conflict between request of the entire carriage liability and Article 20 (a) (v) appears to be irreconcilable. It has been suggested that the conflict leads to the literal interpretation that Article 20 (c) simply requires the whole journey is covered by one bill of lading as already stated in Article 20 (a) (iii) and nothing has been added concerning liability.[587]

Without doubt, the literal interpretation will be very harsh on the buyer, since his position *vis-à-vis* the carrier might, through a bill of lading accepted by the banks, be worse than it would have been had he scrutinised the document by himself under a cash against document sale.[588] Furthermore, a bill of lading does not provide a continuous documentary cover will inevitably impair the bank's security against the carrier. The bank, who has stuck with the documents, may face with the situation that there would be no recourse against the issuing carrier if the damage or lost occurred in a leg of journey not performed by the issuing carrier. Therefore, it remains to be seen which of these two interpretations is held to be correct. Based on the long term benefit and the transaction security as illustrated above, the author prefers the second interpretation, i.e. covering entire carriage means that the carrier will undertake his liability for the entire voyage, although once again the ICC Banking Commission

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but the carrier will cease being liable after transhipment. See Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.101; also see Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 254, which also tends to agree with the second interpretation.

[586] See Charles Debattista, 'The New UCP 600 - Changes to the Tender of the Sellers's Shipping Documents under Letters of Credit' [2007] JBL 329, fn 52

[587] Anna-Mari Antoniou, 'Complying Shipping Documents under UCP600' (PhD thesis, University of Southampton 2011) 83

[588] Under cash against document sale, a bill of lading can only be a good tender if it states that the goods will be transhipped but without disclaiming carrier's responsibility after transhipment, whether the sale contract permits transhipment or is silent as to this point.

needs to work out the scope of Article 20 (a) (v) and make it compatible with the requirement under Article 20 (c).

B. Bills of lading stating that the goods may be transhipped

It is common for the bill of lading to contain a liberty of transhipment clause without declaring that there will actually be transhipment. The liberty of transhipment clause confers the carrier a right to tranship the goods, although the goods are not certain to be transhipped. In recognition of this practice, UCP600 Article 20 (d) stipulates that clauses in a bill of lading stating that the carrier reserves the right to tranship will be disregarded. However, two questions arise from this short statement. Firstly, what if the credit expressly prohibits transhipment? Secondly, is the bill of lading containing a liberty of transhipment clause still subject to the requirement that the entire carriage is covered by one and the same bill of lading?

The first question concerns whether the liberty of transhipment clause will pass across the express prohibition in the credit. Apparently, a bill of lading stating that the carrier reserves the right to tranship would conflict with the express prohibition for transhipment in the credit. The conflict is specifically solved under UCP500 Article 23 (d) (ii) by stipulating that "*even if the credit prohibits transhipment*, banks will accept a bill of lading which incorporates clauses stating that the carrier reserves the right to tranship". Nevertheless, the words "even if the credit prohibits transhipment" have now been omitted under UCP600 Article 20 (d). It can be argued that since no attention should be paid to what is being disregarded, the liberty of transhipment clauses in a bill of lading which will be disregarded according to Article 20 (d) is supposed not to be a basis for refusal of a presentation, even though when the credit prohibits transhipment.[589] This argument will lead to the same effect as stated in UCP500, i.e. the bill of lading which reserves the right to tranship would still be acceptable even if the credit prohibits transhipment.

[589] James Byrne, *UCP600: An Analytical Commentary* (IIBLP 2010) 903

However, one point cannot be omitted is the effect brought by Article 20 (c) on Article 20 (d). UCP600 Article 20 (c) not only concerns the situation when the bill of lading stating that the goods will be transhipped, but also covered the scenarios when the bill of lading indicating the goods *may* be transhipped. In essence, the bill of lading which reserves right to tranship is indicating that the goods may be transhipped. When the credit does not expressly prohibit transhipment, a bill of lading indicating that the goods may be transhipped will be accepted under Article 20 (c) (i). When the credit prohibits transhipment, Article 20 (c) (ii) allows the bank to accept a bill of lading indicating that the goods may be transhipped, but only for the situation that the goods have been shipped in a container, trailer or LASH barge. Reading Article 20 (c) in a whole, if the credit prohibits transhipment, a bill of lading indicating that the goods may be transhipped will not be acceptable, unless the goods have been carried in certain conveyance. Clearly, if Article 20 (d) means to disregard the liberty of transhipment clauses even when the credit prohibits transhipment, it will inevitably cause a conflict with the interpretation of Article 20 (c). On the other hand, if Article 20 (d) only takes effect when the credit does not prohibit transhipment, it will obviously become superfluous, since Article 20 (c) (i) has already covered when the goods may be transhipped. The overlap for the situation of "the goods may be transhipped" between Article 20 (c) and Article 20 (d) is "probably simply a matter of oversight"[590]; however, it does cause a great difficulty in construing the application of Article 20 (d) and redraft of the section seems indispensable.

The next question concentrates on whether Article 20 (d) is subject to the requirement of entire coverage. There is no express reference in Article 20 (d) itself regarding to the entire carriage; however, Article 20 (c) (i) which requires the entire carriage to be covered by one and the same bill of lading, applies not only to bills of lading which indicate that the goods *will* be transhipped, but also to bills of lading which indicate that the goods *may* be transhipped, i.e. bills of lading in which the carrier reserves the right to tranship. Therefore, once again, the question turns back to what "the entire

[590] James Byrne, *UCP600: An Analytical Commentary* (IIBLP 2010) 903

carriage to be covered by one and the same bill of lading" means. Does it simply duplicate the requirement of Article 20 (a) (iii), i.e. the bill of lading needs to "indicate shipment from the port of lading to the port of discharge", or does it reflect the common law principle in respect of providing a continuous documentary cover? If the latter prevails, the bills of lading showing that the carrier reserves the right to tranship under Article 20 (d) are arguably restricted by the requirement of entire coverage under Article 20 (c) (i).

Hence, should a bank accept a bill of lading that gives the carrier liberty to tranship but also disclaims the carrier's responsibility after transhipment? The discussion at common law before the UCP for this point is full of uncertainty. In *Soproma SpA v Marine Animal By-Products Corp*,[591] McNair J decided that at least if the liberty is unexercised, the bill of lading is not objectionable. He stated:[592]

> '*I should not be disposed to hold that a bill of lading otherwise unobjectionable in form which did in fact cover the whole transit actually performed would be a bad tender merely because it contained a liberty not in fact exercised but which, if exercised, would not have given the buyers continuous cover for the portion of the voyage not performed by the vessel named in the bill of lading.*'

However, the statement has given rise to a great difficulty, since the bank may have no means of knowing at the time of tender whether the goods have actually been transhipped or not. The approach is clearly contrary to the principle of autonomy, because it will inevitably induce the bank to take account of a fact which might not be apparent from the face of the documents presented to it, namely whether the transhipment had been or would be actually taken. Moreover, the logic of the above statement is also inconsistent with the nature of international sales. The buyer, who

[591] *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep 367 (QB)
[592] *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep 367 (QB) 388-389

barely has any physical control over the goods, should be entitled to obtain a continuous documentary cover over the bill of lading against the carrier for any damage or loss occurred at sea.[593]

Based on the needs for a complete cover, it has been therefore suggested that 'a liberty to tranship, whether arising from the express terms of the credit or by reason of Article 20, does not affect the principle that the transport document must cover the whole voyage.'[594] It is inferred from this conclusion that a bill of lading issued by a carrier which covers transport by more than one carrier, is acceptable only if the issuing carrier undertakes liability in respect of the whole voyage. However, the position is not easy to identify where a bill of lading gives a liberty to tranship in its small print with saying that the carrier will no longer be contractually responsible for part of the voyage if the transhipment is exercised. Since a bank will not examine the carriage terms and conditions according to Article 20 (a) (v), how can a bank legitimately reject the bill of lading which disclaims the carrier's liability after transhipment in its small print? In the absence of an authoritative judicial decision clarifying the meaning of entire carriage, it is difficult to conclude whether a bank is obliged to check the documentary cover provided by a bill of lading, since the inconsistency between continuous liability coverage and not reading carriage terms seems to be irreconcilable.

Reading Article 20 (d) alone, a bank is supposed to accept a bill of lading in which the carrier reserves the right to tranship despite the fact that the carrier may cease being liable under the carriage contract after transhipment. As Article 20 (d) currently stands, a bill with liberty of transhipment clauses will nonetheless be permitted, whether the credit has allowed or prohibited transhipment.[595] Mere prohibition in the credit will not exclude transhipment. To avoid any form of transhipment, it will be necessary to expressly exclude relevant UCP articles. Before the application of Article 20 (d) being

[593] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 19-027
[594] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.101
[595] The position for this point under UCP500 is much clearer than UCP600, since UCP500 Article 23 (d) expresses the acceptance for the bill of lading which contains liberty of transhipment clauses even if the credit prohibits transhipment.

clarified, the best way for an applicant to completely prohibit transhipment in a non-container transport would be to state that transhipment is prohibited and exclude the application of Article 20 (d) at the same time.

C. Rethink for the transhipment section

It is clear that the UCP600 transhipment section is intended to justify the common practice regarding to transhipment involved in carriage of goods by sea as well as to reflect the realities of container transport. Accordingly, the transhipment section in the UCP has been structured to render the unrealistic prohibition terms under the credit ineffective unless the drafters of the credit pay considerable attention to modify the UCP provisions radically.[596] Nevertheless, the main problem for the UCP600 transhipment rules is that they have failed to make them harmonised either within the section itself or with other sections. The rules have not only overlapped between Article 20 (c) and Article 20 (d) concerning liberty of transhipment, but more importantly they have triggered tension in respect of examining the carriage terms and conditions. However, the tension will be very difficult to eradicate, since in nature, the transhipment terms are carriage terms *per se*. How can a bank assess the coverage of carrier's liability without digging into carriage terms and conditions? How can a bank know that the goods may be transhipped without looking at carriage terms?

The first point that needs addressing is the requirement of entire carriage under Article 20 (c) (i). If "entire carriage" simply means that the bill of lading should indicate shipment from the port of loading to the port of discharge as stated in Article 20 (a) (iii), the deletion will not cause any loss, since the requirement remains the same even when the bill of lading shows that the goods will or may be transhipped. On the other hand, if "entire carriage" means carrier's undertakings for the entire voyage, the section still needs to be redrafted so as to harmonise with Article 20 (a) (v) that banks will not examine carriage terms. It is impossible to get the best of both worlds. The

[596] Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 93; James Byrne, *UCP600: An Analytical Commentary* (IIBLP 2010) 900

UCP may have to set up an exception for the banks to check the carriage terms with respect to entire liability, or it may have to leave the issue completely out of the UCP regime and let the parties decide what they want by diligently drafting the credits and instructing their banks.

The second point that needs to be considered is when the credit prohibits transhipment.[597] In the author's opinion, the common position should be, if the credit prohibits transhipment, a bill of lading indicating that goods *will* or *may* be transhipped would not be accepted unless the goods have been shipped in certain ways, such as in a container, trailer or LASH barge, which make prohibition of transhipment unrealistic. However, in order to ensure that the bill of lading does not contain such a clause permitting the goods to be transhipped, the bank has to act against Article 20 (a) (v) and check through carriage terms. On the other hand, if the bank primarily chooses to disregard carriage terms, i.e. liberty of transhipment clauses as stipulated in Article 20 (d), a bill of lading which indicates that the goods *may* be transhipped would still be accepted, even though the credit has specifically prohibited transhipment in a non-containerised carriage.[598] This method will put the applicants who have particularly asked for a non-transhipped bill of lading in a very unfair position and also generate a chain of contractual problems.[599] Nevertheless, there seems no good solution which can keep the transhipment section in the UCP regime without challenging Article 20 (a) (v).[600] If the UCP insists on bringing transhipment clauses

[597] There will not be any concerns if the credit permits or is silent for transhipment, since unless transhipment is prohibited by the credit, the bank will accept a bill of lading indicating that the goods will/may be transhipped anyway.

[598] Arguably, the UCP approach will leave buyer's position worse than that under common law. The position at common law is that a bill of lading which permits transhipment is acceptable provided, first, that the bill of lading gives rights in respect of the entire carriage and secondly, that transhipment is not prohibited by the terms of the credit. See Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.100

[599] Analogous to the disregard of non-documentary conditions, Article 20 (d) can also cause problems concerning hierarchy of the terms as well as unbalanced terms between different parties. See Part 4.5.2 in Chapter 4 of this thesis.

[600] It has been suggested in Anna-Mari Antoniou, 'Complying Shipping Documents under UCP600' (PhD thesis, University of Southampton 2011) 83-84 that, the UCP should remove out all the transhipment rules and leave the transhipment issue to the credit terms if there are any specific instructions. If the credit prohibits transhipment, the bank will follow the instruction to reject the bill of lading showing that the goods will/may be transhipped. However, the author suspects that the ICC Banking Commission is probably reluctant to relieve all the control in respect of transhipment under

into its rules, it has to set up an exception for the bank to check the relevant carriage terms.

In conclusion, the current transhipment provisions provided by UCP600 are far from satisfactory. Redrafting and clarifications are urgently needed. Apart from removing all the overlapping and inconsistent parts, the author suspects that the transhipment section may still be alive in the next version, but what effects the transhipment provisions are going to bring into the UCP system really depend on the ambition of the UCP.

5.2.3 Miscellaneous provisions

It is common in practice that a carrier will protect himself from liability by indicating defects on the face of the transport document at the time that he takes charge of the goods. Obviously, applicants and banks are unwilling to pay for a transport document which contains a clause indicating the defects in the goods and leaves them no resource against the carrier. Based on this assumption, the UCP600 Article 27 requires a clean transport document, which is applicable not only to the ocean transport document, but also to all the other types of transport document under UCP600. Meanwhile, the UCP600 Article 26 addresses three types of standardised terms that commonly appear on the transport document, namely those relating to deck stowage in Article 26 (a), disclaiming the carrier's liability for load, count and contents of shipment in Article 26 (b), and reference for additional charges in Article 26 (c). In common with Article 27, Article 26 also expands its application to all transport documents instead of only transport documents involving carriage by sea.

It should be noticed here that those miscellaneous articles are neither the core of the UCP nor treated as a high priority in the process of documentary examinations; however, it is necessary to mention as non-compliance of those rules would still lead to

UCP, especially for the situation when the prohibition is unrealistic, e.g. containerised carriage.

rejection. The author will therefore consider Article 26 (b) together with Article 27 and address the miscellaneous provisions in the three following parts: clean transport documents, on deck stowage, and freight and other charges.

5.2.3.1 Clean transport documents

UCP600 Article 27, which is substantially identical to UCP500 Article 32, mandates a bank to only accept a clean transport document unless otherwise indicated in the credit. When it is known that the type of goods to be shipped or their packaging may cause a concern for obtaining a clean bill of lading, the terms of the documentary credit should specifically cater for this.[601] The UCP position is in accordance with that at common law, which required clean bills in nearly all circumstances even if the credit was silent on the point.[602] Apart from setting up a definitive requirement for a clean transport document, Article 27 also provides the meaning of being "clean". It stipulates that "a clean transport is one bearing no clause or notation *expressly* declaring a defective condition of the goods or their packaging".[603] Hence, a clause on a bill of lading such as "packaging is not sufficient for the sea journey" will definitely constitute a discrepancy. Nevertheless, a clause such as "packaging *may* not be sufficient for the sea journey" or words of similar effect will not render a bill of lading unclean under UCP600, since it does not expressly declare a defective condition of the packaging.[604]

Since Article 27 only focuses on the condition and packaging of the goods, clauses concerning the quantity of goods will not make the bill unclean.[605] Clauses such as "weight and quantity unknown", "shipper's load and count" and "said by shipper to

[601] For example, if shipping non-stainless steel, it is sensible for the credit to provide that the bills of lading claused "oxidation" or "rust" are acceptable. Banks are only required to have the knowledge of the banking industry practice rather than any customs of a particular trade.
[602] *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542 (QB) 551
[603] The UCP definition of "clean transport document" is substantially similar to that at common law. Salmon J in *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542 (QB) 551 inclined to view that "a clean bill of lading is one that does not contain any reservation as to the apparent goods order or condition of the goods or the package".
[604] ISBP No.745, section E20 (b)
[605] However, the quantity of the goods as a part of data on the transport document is restricted by Article 14 (d), which must not conflict with data on the other documents or the credit.

contain" are still acceptable.[606] In addition, Article 27 makes clear that it is unnecessary that the word "clean" appears on a transport document, even when the credit requires that transport document to be marked "clean on board". Deletion of the word "clean" does not expressly declare a defective condition of the goods or their packaging.[607] Therefore, the UCP will treat each bill of lading to be clean, unless it bears an express clause or notation indicating that either the condition of the goods or their packaging is defective.

However, the UCP600 Article 27 does not refer to the time to which any clause or notation should relate. Under the common law case *The Galatia*,[608] both Donaldson J and the Court of Appeal held that a clean bill of lading must be the one in which there is nothing to qualify the admission by the carrier that the goods were in apparent good order and condition *at the time of shipment*. Having been clean at the time of shipment, a bill of lading could not be rendered unclean by the notation added at a later stage recording the fire damage after shipment. This conclusion makes perfect sense in the context of international commercial sale, since risks normally pass to the buyer on or from shipment. If there is any loss or damage to the goods after shipment, the buyer is still obliged to take up the documents and then use recourse against the carrier or insurer.[609]

The Galatia was not a documentary credit case. It is therefore doubted whether a distinction should be drawn between a merchant who can determine the acceptability of documents on the basis of knowledge of particular trade and a banker who is not required to have such knowledge. However, matters of general commercial custom such as those pertaining to bills of lading must be distinguished from a particular trade usage of which a bank is not required to know or should ignore.[610] The bank should take notice of the former as a matter of law. The time of shipment as the golden section

606 See UCP600 Article 26 (b)
607 ISBP No.745, section E21 (b)
608 *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc (The Galatia)* [1980] 1 WLR 495 (CA)
609 *Manbre Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 KB 198
610 Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.56

point between the carrier and the shipper's liability is a crucial element that the bank must refer to in deciding the cleanliness of a transport document. A different criterion held by banks in judging a clean transport document will definitely cause a big mess for the market, particularly for international chain sales, since the same transport document which has been accepted by the buyer in the upstream transaction would possibly be rejected by a bank in the downstream transaction.

It is also argued that where a document is in an unusual form and raises problems which cannot be answered readily, the bank is entitled to reject the document. This is perhaps why the UCP still does not react on the point long after the problem of *The Galatia*. The clause on the bill of lading declaring any defective conditions appears to make it unusual; however, by properly reading and understanding, it calls for no inquiry or doubt upon the fact that the goods have been shipped in apparent good order and condition, it should not be regarded to be unclean.[611] What the bank needs to do is just use reasonable care to read the notation or clause on the bill of lading and making its judgement concerning whether the bill of lading is claused before or after the time of shipment. Due to the importance of following the basic rule in shipment sales, the UCP has no choice other than tying the definition of a clean transport document to the moment of shipment. Therefore, it is urgent for the UCP to redefine a clean transport document in Article 27 as "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*".

5.2.3.2 Stowage on deck

Due to a high risk of damage exposed by on deck cargo, Article 26 (a) stipulates that a transport document must not indicate that the goods are or will be loaded on deck.[612]

[611] *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc (The Galatia)* [1980] 1 WLR 495 (CA) 510-511

[612] The UCP position is in accordance with 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 carried on deck. Parties are free to contract on any terms or conditions relating to the damage of such cargo.

Nevertheless, a clause on a transport document stating that the goods may be loaded on deck is acceptable. It is clear from this article that the possibility of loading on deck is allowed; however, any definitive statement regarding on deck stowage must be prohibited unless the credit otherwise specifies. It is suggested that when it is known that the type of goods to be shipped may give rise to goods being loaded on deck, the terms of credit should cater for this.

Compared with the equivalent article [Article 31] under UCP500, the words "unless otherwise stipulated in the credit" have been deleted. The reason for deletion is because UCP600 Article 1 has already expressed that the rules under UCP can be modified or excluded by the terms of credit. Article 26 (a) is arguably modified when a credit specifically allows the goods to be loaded on deck. By contrast, what is the position if the credit expressly prohibits loading on deck or calls for under-deck loading?[613] Is the transport document indicating that the goods may be loaded on deck still acceptable? Clearly, under a cash against documents sale, where the sale contract expressly prohibits deck stowage, a bill of lading stating that the goods will or may be loaded on deck constitutes a bad tender. However, the answer is not straight-forward in a letter of credit transaction subject to UCP600. It may be argued that the liberty of on deck stowage clause in the bill of lading belongs to the carriage terms and conditions, which should neither be examined by the bank nor treated as a discrepancy to reject the documents according to Article 20 (a) (v). Once again, banks face with the tension between the credit terms and the UCP terms. Until the ICC Banking Commission provides a clarification, the only way to eliminate the possibility of on deck stowage is to prohibit loading on deck and expressly modify Article 26 (a) in the credit at the same time.

[613] In Richard King, *Guttidge & Megrah's Law of Bankers' Commercial Credit* (8th edn, Europa Publications 2001) 217, it mentioned that the terms of Article 31 [of UCP500, which is equivalent to UCP600 Article 26 (a)] will apply even if the credit calls especially for shipment under deck and in such a case it is not necessary for the bill of lading expressly to state this.

5.2.3.3 Freight and other charges

Unless the contract specifically requires certain type of bills of lading, the general rule is that a seller has an option under a c.i.f. sale to provide either pre-paid bills of lading or freight collect bills with a freight-deducted commercial invoice.[614] The position under a letter of credit is the same. Unless the credit expressly calls for a freight prepaid transport document, a bank can accept a freight collect (or freight payable) transport document, provided that it is not inconsistent with data in any other documents presented, such as commercial invoice.[615]

Nevertheless, in practice, it is common for the credits to call for a freight prepaid transport document, since such a document will provide the buyer with the security of knowing that the carrier will not seek to exercise a lien over the goods for unpaid freight. Where the credit requires the transport document to show freight prepaid, it must indicate so. In *Soproma SpA v Marine & Animal By-Products Corp*,[616] the bills of lading marked "freight collect" was not regarded as a good tender under the credit which called for "freight prepaid" bills of lading, since the bill of lading and the credit terms were "mutually inconsistent".[617]

In addition, the UCP600 Article 26 (c) provides that a transport document may bear a reference, by stamp or otherwise, to charges additional to the freight. Clearly, when a credit states that costs additional to freight are not acceptable, a bill of lading should not indicate such charges have been or will be incurred.[618] The ISBP No.745 section E27 (c) further supplements that reference in a bill of lading to costs which may be levied due to demurrage or detention should not count as an indication of costs additional to freight.

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614 *Norsk Bjergningskompagni A/S v Owners of the Pantanassa (The Pantanassa)* [1970]1 All ER 848, 855

615 ISBP No.745, section E26. The equivalent provision in UCP500 article 33 (a) was removed in UCP600 itself.

616 *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep 367 (QB)

617 *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep 367 (QB) 387

618 ISBP No.745, section E27 (a)

5.2.4 Bank's security upon bills of lading

It is clear from the above part that the UCP600 has paid enormous attention to set out requirements under Article 20 in respect of examining a bill of lading. Most requirements under Article 20 however focus on the function of a bill of lading as a receipt of the goods and reflect the bill of lading acting as evidence of the carriage contract.[619] Regrettably, the same as in UCP500 Article 23, the UCP600 does not deal with the function of being a document of title. Article 20 touches neither the delivery issue nor the form of the bill of lading, which are the two aspects closely related to the bank's security. It is true that nowadays few banks would rely solely on the security provided by the transport documents.[620] Nevertheless, the reality is, where the bank pays inadvertently against irregular documents that are declined by the buyer, the bank would be left with no recourse apart from seeking the security provided by the presented documents.

Frankly speaking, the bank's interest does not lie in getting the actual goods, what it really wants is the right of stopping the default party to take delivery of the goods from the carrier before payment. Furthermore, if the bank becomes unfortunately stuck with the goods, it would want to make sure that it has the rights to ask physical delivery of the goods from the carrier and resell the goods in exchange for the money already paid. In the least ideal situation, if the carrier has damaged or lost the cargo, the bank who has stuck with the goods may want to claim his loss from the carrier so that the title to sue the carrier will be another right desired by the bank. In the following part, the author will review the bank's security offered by a negotiable bill of lading in English law by tying in the position under UCP600 from two perspectives, i.e. right of delivery and right of disposal.

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[619] For the requirements linked with the receipt function, see UCP600 Article 20 (a) (ii). For the evidence of carriage contract, see Article 20 (a) (i), Article 20 (a) (iii), Article 20 (a) (v), Article 20 (a) (vi) and Article 20 (b)-(d)

[620] Richard King, *Guttidge & Megrah's Law of Bankers' Commercial Credit* (8th edn, Europa Publications 2001) para 8.01

5.2.4.1 Presentation rule and rights of controlling delivery

As reviewed in Part 5.2.1 concerning the legal status of bills of lading, a negotiable bill of lading, being a document of title at common law, can provide the holder a constructive possession of the goods. Given the right to delivery claimed by the holder of the bill of lading who might be the unknown third party through transfer of the bill, it follows that presentation of the bill should be "an essential evidential precondition to delivery of the goods".[621] It has long been established at common law that in absence of an exclusion clause protecting the carrier, the carrier is not entitled to deliver goods without the production of the bill of lading, even to the consignee in the bill of lading.[622] However, the carrier would be exempted from the liability towards the true cargo owner as long as it released the goods against presentation of one bill of lading out of a set.[623] Therefore, in order to stop the unpaid party from taking delivery of the goods from the carrier, it is essential for the bank to hold all the original copies of the bills of lading.

The UCP600 Article 20 (a) (iv), which calls for a full set of the bills of lading if issued in more than one original, has effectively stopped the competing claims to delivery brought by third parties against the carrier. Nevertheless, tender of the full set is the only restraint set out by the UCP600 in respect of the delivery issue and the defence line can be easily broken into by a delivery clause in the bill of lading which permits the carrier to deliver the goods by proof of identity. The delivery clause in a bill of lading, which is arguably regarded as a term and condition of the carriage contract, is supposed to be ignored by the bank according to UCP600 Article 20 (a) (v). Since

[621] Charles Debattista, *Bills of Lading in Export Trade* (3rd edn, Tottel Publishing 2009) para 2.16

[622] The carrier who has delivered the goods without presentation of the bill can constitute a breach of contract and risk an action in conversion. There are many authorities concerning production of B/L for delivery. The earliest one can be found in *The Stettin* (1889) 14 PD 142, 147. The doctrine was followed by *Sze Hai Tong Bank v Rambler Cycle Co* [1959] AC 576, in which this breach was considered as fundamental and deprived the carrier of all contractual exclusions/limitations. In *Kuwait Petroleum Corp v I & D Oil Carriers Ltd (The Houda)* [1994] 2 Lloyd's Rep 541 (CA), the Court of Appeal concluded that there should not be any exceptions to the simple rule concerning delivery against presentation.

[623] It is common ground that if one bill of lading is realised, the others are void. See *Glyn Mills Currie v East and West India Dock* (1882) 7 App Cas 591, in which the carrier was held to be not liable to deliver the goods against presentation of one original copy of the bills of lading.

there is no presentation rule for delivery established by the UCP, the bank's security provided by a full set of bills of lading will be largely weakened by the delivery clause in the bill of lading.[624]

5.2.4.2 Rights to claim delivery and title to sue

The negotiable bill of lading, being a document of title, can offer the bank a strong position against the default party at common law. Before 1992, the law of bailment and the Bill of Lading Act 1855 s.1 can offer the bill of lading holder a right to claim delivery and a cause of action against the carrier for damage to the goods; however, both of the actions require a proprietary link with the goods and the bank find itself with insufficient protection as a pledgee who does not own the property of the goods.[625] From 1992, the Carriage of Goods by Sea Act (COGSA1992), which replaced the Bill of Lading Act 1855 and removed the proprietary link, has built a contractual relationship between the carrier and the bill of lading holder for justification of the right of suit and the right of delivery.[626] COGSA1992 Article 2 (1) (a) transfers the "lawful bill of lading holder"[627] all rights of suit under the contract of carriage against the carrier.[628] In other words, the Act also vests in the lawful bill of lading holder the contractual rights to claim delivery.[629]

In order to claim delivery and obtain the right of suit against the carrier, the bank must make sure itself to fall within the scope of COGSA1992 as a lawful holder.[630] Where a

[624] As we can see in the next part, the tension between the presentation rule and the delivery clause under a negotiable bill of lading is not as prominent as the situation concerning a straight bill of lading.
[625] *Sewell v Burdick* (1884) 10 App Cas 74 (HL) 105
[626] It has been suggested that the presentation rule for delivery of goods under bills of lading remains unchanged in COGSA1992 although there is no express statement. COGSA1992 s 5 (2) defines the bill of lading holder must be a person with possession of the bill, which strongly indicates the common law rule of presentation against delivery under the Act. See Charles Debattista, *Bills of Lading in Export Trade* (3rd edn, Tottel Publishing 2009) para 2.17
[627] However, the definition of lawful holder is far from simple. See Paul Todd, 'Bank as Holder under Carriage of Goods by Sea Act 1992' [2013] LMCLQ 275
[628] The contract of carriage here means "the contract contained in or evidenced by that bill of lading". See COGSA 1992 s 5 (1)(a)
[629] Charles Debattista, *Bills of Lading in Export Trade* (3rd edn, Tottel Publishing 2009) para 2.8
[630] If an unpaid bank cannot justify itself as a consignee or an endorsee under COGSA1992, the only recourse from contractual point of view at common law is to apply implied contract established by *Brandt v Liverpool* [1924] 1 KB 575 (CA). However, *Brandt v Liverpool* is only limited to damage or

bank is the consignee or endorsee of an order bill of lading or holding a bearer bill of lading, it has a contractual right to claim delivery against the carrier under COGSA 1992.[631] If the bill of lading is made out to the order of the confirming bank, the unpaid bank may need the cooperation of the confirming bank to endorse the bill of lading, and *vice versa*. However, if the bill of lading is made out to the order of the buyer, the situation might be more difficult, since the defaulting buyer is usually reluctant to co-operate with the unpaid bank.[632] There is nothing in the UCP600 Article 20 as to the form of the bill, for example whether it be made out to bearer, or to order, and if the latter, to whose order. The ISBP indicates various forms of the bill of lading that might be presented in a documentary credit transaction, including "to order", "to order of the shipper", "to order of (named consignee)" and "to order of issuing bank or applicant". However, the ISBP does not make any specific requirements except for presenting a "to order" or "to order of the shipper" bill of lading, which has to be endorsed by or on behalf of the shipper.[633]

Therefore, in the absence of stipulation in the credit, the bank is not entitled or bound to consider the name of the consignee or the order party on the transport documents. However, due to the close connection between the bank's security and the form of transport documents, the bank may seek to stipulate in the credit to ask for a form of bill of lading which can offer the maximum security to it. The safest form for the bank is to insist at the time of application that the bill of lading must be made out to the bank's order as consignee. Alternatively, the most common but satisfactory form in practice would be for the shipped bill of lading to be made out to shipper's order and endorsed in blank or in favour of the intermediary bank. Having the documents drawn in the way suggested will put the bank in a reasonably easy position to obtain physical delivery of the goods and to resell them, as well as to claim against the carrier for any

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short delivery situation. If the goods have been lost, no such contract can be implied. See *The Aramis* [1989] 1 Lloyd's Rep 213 (CA)

631 COGSA1992 s 5 (2)

632 The bill of lading which is made out to the order of the buyer may have property consequences so as to further reduce the security of the bank in tort.

633 ISBP No.745, section E13 (a), which is the same paragraph copied from the ISBP No.681, para.102

damages.[634]

5.2.4.3 Right to sale and pledge

The person within the list of COGSA1992 has the right to claim delivery of the goods and the title to sue against the carrier; however, it does not necessarily mean that he can effectively resell the goods and transfer those rights to another party, which depend on whether the held transport document is regarded as a document of title at common law or not. A negotiable bill of lading, being a document of title at common law, without doubt can confer a bill of lading holder the right to dispose the goods as well as transfer the documents. Provided that the bills of lading are drawn to the order of the bank or are indorsed to the order of the bank, the bank holding the bill of lading can easily take possession of the goods and sell them by transfer of the bill of lading. Where the bills of lading are drawn in favour of the buyer or other consignee without endorsement to the bank, as we will see as follows, the bank may still benefit from transfer of a bill of lading by the law merchant but its power of sale will be ineffective.

The security arising from possession of documents of title operates a pledge.[635] The bill of lading becomes pledged to the bank when it is delivered in pursuance of the terms of a credit.[636] 'The bank's security by way of pledge does not, however, depend on the contract between the buyer and his bank. It depends on the ability of the seller to pledge the documents of title on behalf of the buyer or with his consent.'[637] It is

[634] It should be noted that COGSA 92 has a double edge. Although conferring the contractual rights against the carrier does not impose contractual duties on the bill of lading holder, the excise of those rights will trigger the claimant's liabilities under carriage contract. See COGSA1992 s.3. If the bank takes or demands delivery of goods or makes a contractual claim in respect of those goods, the bank will become liable on the contract of carriage towards the carrier.

[635] Normally the actual possession of the goods by the pledgee is required, but the bill of lading as a document of title, which can transfer the possession of the goods, is one exception to this rule. See *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53

[636] The pledge is usually expressly stated in the agreement between the issuing bank and the applicant contained in the application form. For the intermediary bank, it normally has an implied pledge when it pays or negotiates documents presented to it by the seller. See *The Stone Gemini* [1999] 2 Lloyd's Rep 255

[637] Richard King, *Guttidge & Megrah's Law of Bankers' Commercial Credit* (8th edn, Europa Publications 2001) para 8-04 See *Ross Smyth Co Ltd v TD Bailey, Son Co* (1940) 67 Ll L Rep 147 (HL) 156

therefore essential that the seller retain the general property in the goods at the date of presentation and only if he does the bank can have a pledge.[638] A power of sale is inherent in the pledge and if a bank would not receive reimbursement, it can take possession of the goods and sell them pursuant to the right given by the pledge.[639] The bank can also get recourse from pledge when it is stuck with deficient documents which have been declined by the buyer.

It is clear that the pledgee has a special interest in the goods, which includes the right to take possession of the goods and the right of resale. However, can a bank which holds the possessory title as a pledgee prevent the buyer in the first place from claiming delivery of the goods from the carrier? The pledge does not seem to add anything further to the bank's security when the bank is already qualified as a lawful bill of lading holder under COGSA1992 s.5 (2).[640] The problem is whether the bank still has the right of delivery and the right of disposal as a pledgee where the bill is to the order of a party other than the bank and the bank is not an endorsee. Since there is no evidence on the bill of lading itself that the bank is the right party to get the delivery, it is unlikely that the bank will be able to convince the carrier that he is entitled to have possession of the goods. In the carrier's point of view, COGSA1992 is probably a more reliable route to follow to determine the right of delivery. In those circumstances, the bank's security provided by a pledge is largely restricted by COGSA1992. Unless the bank is able to persuade the carrier and defeat the potential competing party whose name is shown on the bill of lading, it is difficult to realise its security by reselling the goods.[641]

From the above analysis, it is evident that a negotiable bill of lading, being a document of title at common law, can provide the bank a great deal of security against the carrier

[638] *The Future Express* [1993] 2 Lloyd's Rep 542 (CA)
[639] *Rosenberg v International Banking Corp* (1923) 14 Ll L Rep 344 (CA) 347, in which Scrutton LJ held that the pledge would give bankers an independent right of sale so as to secure the amount which they have advanced.
[640] That is when the bank as a consignee or endorsee of a "to order" bill of lading, or holder of a "to bearer" bill of lading.
[641] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) 252

and the unpaid party, including rights of delivery and rights of resale. The UCP600 regime, by contrast, does not pay much attention in emphasising the bank's security provided by the bill of lading. The drafting of the UCP aims to deliver a set of standards for mechanical documentary examination rather than concern much on the security issue behind the screen. Taking account of Article 20 requirements in Part 5.2.3, the UCP600 has well demonstrated the bill of lading's function as a receipt of the goods and incidentally mentioned its function as evidence of carriage contract. Nevertheless, the characteristic of bill of lading being a document of title has been hardly touched by the UCP provisions. The UCP seems to push banks to look for the creditworthiness of the parties with whom they deal, and to further arrange the security in funds, rather than to seek the security provided by the documents to be presented under the credit. This trend will become more obvious in respect of the alternative forms of transport documents that the author will look into next.

5.3 Sea Waybills

Sea waybills look remarkably similar to bills of lading. A sea waybill is not a bill of lading, but it shares the characteristics of bills of lading as a receipt for goods and evidence of the carriage contract.[642] Different from the traditional bill of lading, a sea waybill is not regarded as document of title at common law and cannot represent constructive possession of the goods. Therefore, the consignee on sea waybills obtains delivery upon proof of identity rather than production of the original document.[643] A sea waybill is not a negotiable (i.e. transferable) document, so it normally directly identifies the person to whom delivery of the goods is to be made by the carrier, rather than marked "to order".[644] Hence, sea waybills are often used in trades involving short

[642] The description of the goods on a sea waybill however cannot bind the carrier as that applies to bills of lading. See COGSA 1971 s 1(6) (b) and COGSA 1992 s 4

[643] This is only likely to work if the identity of the consignee is unlikely to change, or if it does change the carrier can reliably be informed of the change, and can satisfy himself as to the identity of the person to whom he is to make delivery, without the need for a document of title to be presented.

[644] However, according to COGSA 1992 s 5 (3), the identity of the person to whom the goods are deliverable can be varied in accordance with the terms of the document after its issue. Therefore, a shipper of goods described in a sea waybill can, prior to discharge, instruct the carrier to deliver the goods to someone other than the person named on the sea waybill. See COGSA 1992 s 2 (5)

sea voyages and there is no likelihood of the goods being re-sold during transit.[645] The advantage of resorting to a sea waybill is that it overcomes a major problem arising from using bills of lading, i.e. when the vessel arrives at the port of discharge before the arrival of the documentation.

5.3.1 Requirements under UCP600 Article 21

Responding to "an increasing commercial trend towards the non-negotiable sea-waybill", requirements for sea waybills were introduced by ICC Banking Commission into UCP500 Article 24 for the first time, which are mostly succeeded by UCP600 Article 21.[646] UCP600 Article 21, however, is essentially identical to the provisions for bills of lading in UCP 600 Article 20, except for the substitution of the words "non-negotiable sea waybill" for "bill of lading".[647] The new ISBP No.745 also for the first time explains the UCP requirements for sea waybills, although it literally repeats every item stated in the section for bills of lading.[648] The reason for separating a "non-negotiable sea waybill" article in the UCP is because the ICC National Committees felt it unwise to combine two documents into one article under UCP, in which sea waybills are not negotiable and bills of lading are most likely to be negotiable.[649] The origin of separating the two documents by judging whether the document is a document of title, however, has not been expressly presented in the UCP.[650] Moreover, under UCP, the bank is supposed to value substance of a document

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[645] Even twenty-five years ago, Lloyd L.J. observed that on the North Atlantic route, perhaps 70 per cent of all liner goods were carried on sea waybills. See Sir Anthony Lloyd, 'The Bill of Lading: Do We Really Need It?' [1989] LMCLQ 47, 49

[646] It does not seem that the banking community has taken to them wholeheartedly; rather, they have had to respond to events, especially concerning the less security offered to banks by sea waybills comparing with that under bills of lading. See Paul Todd, *Bills of Lading and Bankers Documentary Credits* (4th edn, Informa Publishing 2007) para 8.21

[647] It may have been assumed that a sea waybill was simply a non-negotiable bill of lading, a proposition that must now be regarded as questionable in the light of the recent House of Lords decision in *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 AC 423

[648] ISBP No.745, section F

[649] Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 97. The author feels the word "non-negotiable" adding in front of sea waybill is superfluous, since sea waybills are not qualified as documents of title without contrary proof of custom at common law and should always be non-negotiable.

[650] The UCP does not contain the delivery requirement which would link to the concept of document of title.

rather than form and has to accept a document "however named".[651]

It is suspected that the ineffective division between bills of lading and sea waybills in the UCP may cause difficulties to the bank in the process of examination. Assuming the applicant specifically requires a bill of lading in the credit due to its nature of being a document of title, tendering a sea waybill should be rejected by the bank. Nevertheless, based on the identical requirements stipulated in the UCP, the bank cannot in essence distinguish between the bill of lading and the sea waybill. The most obvious differences between those documents may lie in their forms and titles.[652] A document made out "to order" is apparent to be negotiable and hence a bill of lading.[653] Comparatively, a document made out to a named consignee is non-negotiable but it may be either a straight bill of lading as we will discuss in the next part or a sea waybill. While, the easiest way to distinguish those two types of non-negotiable documents is to look at their titles marked as a bill of lading or a sea waybill.[654] However, if the bank is instructed neither to look at the title of a document nor to concern the issue of document of title outside UCP, how is the bank supposed to distinguish between a straight bill of lading and a sea waybill?

Identical to Article 20, a sea waybill under Article 21 covering a port-to-port shipment, needs to be signed by the same parties as to the bill of lading and must indicate all the shipment details. By mirror-imaging Article 20, some provisions however have lost the original sense and been inappropriate to set out in Article 21.[655] For example, Article

[651] UCP600 Articles 20 (a) and 21 (a)

[652] This difference in form even applies between a straight bill of lading and a sea waybill, which in most times are distinguished by their titles.

[653] The words "to order" are not necessarily shown on a negotiable bill of lading. The bill of lading will still be regarded as a negotiable bill if it states analogous wording such as "consignee or to his or their assigns" or be made out "to bearer". See Stephen Girvin, 'Bills of Lading and Straight Bills of Lading: Principles and Practice' [2006] JBL 86

[654] See *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 AC 423 [5] and *Voss v APL Co Pte Ltd* [2002] 2 Lloyd's Rep 707 [48] Another way to distinguish between a straight bill and a sea waybill is to consider their nature and delivery rules, i.e. a straight bill is most likely to be required to be presented in order for delivery to take place whereas a sea waybill is not needed. However, this feature is not expressed by the UCP and likely to be regarded as carriage terms which should be ignored by the bank.

[655] The same issue occurs in the ISBP No.745 section F, which literally repeats all the provisions in section E for bills of lading.

21 (a) (iv) requires the full set of sea waybills if more than one copy has been issued. Different from bills of lading, sea waybills are not regarded as documents of title and no physical possession of the document is actually needed to get access the goods. The person who asks for the goods need only prove his identity as the named consignee on a sea waybill. Reservation of sea waybills cannot protect the parties' delivery rights and therefore, there is absolutely no necessity for Article 21 to set up the same "full set" requirement as that under bills of lading.[656] Another example can be seen from Article 21 (a) (vi), which requires that a sea waybill contains no indication to subject to a charterparty. The corresponding article can be found in Article 20 (a) (vi) for bills of lading. If a bill of lading contains a reference to a charterparty, the bank will examine it under Article 22 "Charter Party Bill of Lading", unless the credit prohibits presenting a charterparty bill. What is the outcome for a sea waybill then if it contains a reference to a charterparty? Should it be checked under Article 22 as a bill of lading or be rejected and left out of the UCP? Clearly, blindly copying requirements for bills of lading is not a correct way to regulate sea waybills and some provisions in Article 21 need to be reviewed.

5.3.2 Bank's security upon sea waybills

Since sea waybills share the characteristics of bills of lading as a receipt for goods and evidence of the carriage contract, it is possible for banks to obtain reasonable security.[657] However, as waybills are not documents of title, a bank which advances money against a waybill will not, merely by virtue of holding the document, obtain the security of either property or constructive possession of the goods. Therefore, possession of a full set of waybills by the bank (which is not a consignee) cannot stop the unpaid parties from taking delivery of the goods, since the carrier will make delivery to the named consignee whether or not the document is presented. The

[656] Although sea waybills are not needed for getting access to the goods, the bank or the applicant may still want one copy in order to have a record of what was shipped and of the terms upon which they had been carried. However, there is definitely no need to ask for a full set.

[657] The description of the goods on a sea waybill however cannot bind the carrier as that applies to bills of lading. See COGSA 1971 s 1(6) (b) and COGSA 1992 s 4

delivery obligations are contractually enforceable by the named consignee, by virtue of the Carriage of Goods by Sea Act 1992. COGSA 1992 s.2 (1) (b) confers the person for the time being[658] named as consignee on a sea waybill all rights of suit and rights of delivery despite the fact that he does not hold a document giving him a bailor's right to possession at common law.[659]

Since the named consignee can obtain delivery of the goods without production of the waybill, the bank who wants to prevent an unpaid buyer taking possession of the goods, will normally require itself to be named in the waybill as the consignee and the buyer as the notify party.[660] Being named as consignee would not, of itself, make the bank liable towards the carrier for any obligations under the carriage contract, unless the bank makes a contractual claim in respect of those goods.[661] However, on closer examination, being named as a consignee cannot adequately secure the bank against non-payment, since the bank's right to claim delivery against the carrier exists only as the consignee for the time being.[662] Unless the carriage contract prohibits, the consignor of a sea waybill can alter the identity of the consignee at any time until discharge.[663] Hence, it is suggested that a bank who does not want his contractual right to be defeated by alternative delivery instructions given by the seller/consignor is better off taking certain precautions.

If the bank makes itself as the consignor of a sea waybill, it will ensure its status as the consignee as well as hold the right to alter the identity of the consignee. Nevertheless, it is unrealistic to achieve approval from the seller and the buyer, who also wants to ensure their own security. Moreover, the bank as the consignor of a sea waybill will

[658] The person can be the original consignee or the person to whom the shipper later instructs the carrier to deliver the goods. See COGSA 1992 s 5 (3)
[659] COGSA 1992 s 2 (1) (b) However, the Act has not made the sea waybill a document of title at common law.
[660] The bank can then assign its rights as consignee to the buyer on receipt of payment and notify the carrier enabling the buyer to obtain delivery. See Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.106
[661] COGSA 1992 s 3
[662] COGSA 1992 s 5 (3)
[663] COGSA 1992 s 2 (5)

become a direct party to the contract of carriage, with rights and liabilities at the same time. For these reasons, the bank may prefer to seek a way to restrict the consignor's right of alteration, rather than become a consignor by itself. 'This may be done by inclusion of a non-disposal clause in the waybill (often called a NODIP clause) where by the consignor irrevocably gives up the right to vary the identity of the consignee during transit.'[664] Alternatively, a clause may state that one change of identity is permitted. The advantage of allowing one change is that a bank advancing money under a documentary credit can initially be made as a consignee and a change to the purchaser can be made after the bank has been reimbursed. 'From the bank's point of view, this would avoid the risk of an untimely alternation by the shipper without incurring contingent liabilities towards the carrier through assuming the status of consignor.'[665]

The above measures taken by the bank can only guarantee its security in terms of rights of delivery; however, as the sea waybill is not regarded as a document of title, the bank cannot transfer the rights of delivery to an on-buyer through mere transfer of the document. Furthermore, the delivery of the sea waybill to the bank will not constitute a pledge of the goods – it will at most constitute a pledge of the documents and an equitable pledge of the goods.[666] The bank may become the pledgee of the documents so long as the documents are in its possession, but it cannot prevent the carrier from delivering the goods to the named consignee nor get the power of resale over the goods. Clearly, the transfer of a sea waybill launches no legal consequences to the bank, so in this respect the security provided by a sea waybill is much inferior to that under a bill of lading.

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[664] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.106 However, The position might not be so acceptable to the other parties. The seller, who would be left in a difficult position if the documents are rejected under the credit, often, wants to restrict the effect of the clause upon the acceptance of the waybill by the bank.

[665] Charles Debattista, 'Banks and the Carriage of Goods by Sea: Secure Transport Documents and the UCP500' (1994) 7 JIBFL 329, 334

[666] Richard King, *Guttidge & Megrah's Law of Bankers' Commercial Credit* (8th edn, Europa Publications 2001) paras 8-05, 8-06

In summary, the UCP600 Article 21, copied from Article 20 in UCP 500, although a little inappropriately, only focuses on the documentary functions of being a receipt and binding the carrier to representations therein. There is nothing in UCP600 Article 21 addressing the security issue and the form of a sea waybill, for example requiring the bank to be named as consignee. It is difficult to see how a bank not named as consignee can retain security until it is paid. It is suggested that the bank should put special instructions relating to its security in the application form and subsequently turn them into the documentary credit terms.[667] In absence of these terms, a bank is still obliged to accept a sea waybill stating the seller as consignor and the buyer as consignee under UCP600, which hardly provides any security to the bank.

It seems that the sea waybill is ideal where security is not a major concern and there is no intention to re-sell. It is especially useful for short voyages where documentary delays would cause problems. However, with respect to the bank's security in a documentary credit, the sea waybill is not a good substitute for the traditional bill of lading. A bank should only accept a waybill either if reimbursement is unlikely to be a problem, or if some of special instructions are inserted.

5.4 Straight Bills of Lading

Apart from the traditional negotiable bills of lading dealt with in Part 5.2, there is an alternative type of bills of lading which are made out to a named consignee, so called non-negotiable bills of lading or straight bills of lading.[668] The straight bills are commonly used today where a negotiable document is not required, for example where the identity of the consignee is known from the outset, and the goods are not likely to be re-sold. The straight bill of lading however is not separately listed in the main content of UCP600. In terms of its unique nature and controversial status, the author believes it is necessary to create a separate part in this chapter for it. In this part, the

[667] However, there is a problem concerning how to force these terms. The term may be categorised as a carriage term and condition so as not to be checked by the bank. See UCP600 Article 21 (a) (v)

[668] For a general introduction of a straight bill, see Guenter Treitel, 'The Legal Status of Straight Bill of Lading' (2003) 119 LQR 608

author will not delve into the carriage debates to consider whether straight bills of lading should be documents of title or not and the corresponding revisions to carriage of goods by sea. Instead, the author will only focus on two questions surrounding the day-to-day letter of credit transactions relating to the bank's security: firstly, which UCP Article should be applied to examine a straight bill of lading, and secondly, how to deal with the delivery clause in a straight bill of lading?

5.4.1 Finding the right UCP Article for straight bills of lading

A straight bill of lading is not expressly mentioned in the main content of the UCP; however, there has been a clue in the ISBP considering it. The ISBP No.745 section E12 stipulates, when a credit requires a bill of lading to evidence that goods are consigned to a named entity, i.e. a straight bill of lading, the bill of lading should not contain the expression "to order" preceding or following the named entity, whether typed or pre-printed.[669] Section E13 (b) provides, when a credit requires a bill of lading to evidence that goods are consigned to "order of (named entity)", it is not to indicate that the goods are straight consigned to that named entity. Clearly, the ISBP indicates that UCP600 Article 20 covers both negotiable bills of lading and straight bills of lading.

It is supposed to be easy to distinguish between a negotiable bill and a straight bill by virtue of the different format set out in the consignee box. However, the problem lies in how to differentiate a straight bill from a sea waybill. In respect of the identical provisions laid out in Article 20 and Article 21, it probably does not matter if the credit does not specifically request a straight bill of lading. Where a credit expressly asks for a straight bill of lading, the bank has to reject a sea waybill. As analysed in the part concerning sea waybills, the superficial way to distinguish between the two is to look at what title has been used. Nevertheless, as a test of substance, the bank should also concern the matters connecting with the root of the nature, such as whether the

[669] The same provision is shown in the ISBP No.681, para.101

document is issued in more than one original, and whether it states expressly that delivery is to be made only against its production.

5.4.2 Delivery issue and bank's security

Since there are no corresponding provisions considering delivery issues in the UCP, we will still start from the common law position and then reflect on the outcome on the UCP. It is advisable to divide the delivery issue into two aspects, namely who is entitled to claim delivery and how to claim delivery. The first question is quite straightforward. A straight bill of lading is traditionally considered to be non-negotiable (i.e. non-transferable) since it is incapable of transfer by endorsement or, as a bearer bill, by delivery.[670] The COGSA 1992 therefore does not treat it to be a bill of lading, but as construed by the Law Commissions, the Act confers the consignee under straight bills of lading a contractual right to delivery of the goods through COGSA1992 s.2 (1) (b), i.e. the section dealing with sea waybills.[671] Hence, the bank who makes itself as the consignee on a sea waybill obtains a right of delivery and a right of suit against the carrier.[672]

The second issue considering how to claim delivery under a straight bill of lading is far more complicated due to linking with the concept of document of title. The House of Lords decision in *The Rafaela S*[673] has held that a straight bill should be considered as a bill of lading rather than a sea waybill for the purposes of the COGSA 1971 and is a document of title since its rights are transferred by delivery, albeit only once. The question of whether a consignee in a straight bill of lading was entitled to obtain delivery by simple proof of identity without presentation of the bill of lading was only

[670] COGSA 1992, s 1 (2) (a)
[671] See Law Commission, *Rights of Suit in Respect of the Carriage of Goods by Sea* (Law Com No 196, 1991) para 2.50
[672] The bank may face with the same risk concerning the consignee as the time being, since the consignor can still reserve the right to alter a consignee before discharge as that under sea waybills. See COGSA 1992 s.2 (5). However, similar to the position under a sea waybill, this consequence might be avoided by appropriate contractual stipulation.
[673] *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 AC 423

raised in *obiter*. The straight bill in question contained an attestation clause requiring delivery upon presentation and the court confirmed that one bill must be presented in order to obtain delivery of the goods. Further than that, Lord Bingham held that:[674]

> '*I have no difficulty in regarding it* [the straight bill] *as a document of title, given that on its express terms it must be presented to obtain delivery of the goods. But like Rix LJ (para 145)*[675] *I would, if it were necessary to do so, hold that production of the bill is a necessary pre-condition of requiring delivery even where there is no express provision to that effect.*'

Singapore courts went even further than the *obiter* support for this proposition in the English courts.[676] In *Voss Peer v APL Co Pte Ltd*,[677] the Singapore Court of Appeal decided that production of a straight bill is necessary for delivery of the goods, regardless of whether there is an attestation clause. It held that although the characteristic of transferability was absent, there was no reason why one should thereby infer that the parties had intended to do away with the other main characteristic, i.e. delivery upon presentation.[678] 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.

An issue left by the courts is the effect of a delivery clause which specifies that where the bill is used in its straight, non-order form, the carrier can deliver the goods to the named consignee without presentation of the bill on reasonable proof of identity. Such a clause would be contractually valid, although the presence of such a clause might

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[674] *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 AC 423 [20] also see [45] (per Lord Steyn)

[675] *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2003] EWCA Civ 556, [2004] QB 702 [145] (per Rix LJ), in which Rix LJ stated that "it seems to me to be undesirable to have a different rule for different kinds of bills of lading."

[676] This viewpoint appears to be supported by 'Provisions of the Supreme People's Court on Several Issues concerning the Application of Law during the Trial of Cases about Delivery of Goods without an Original Bill of Lading' (PRC, 2009)

[677] *Voss v APL Co Pte Ltd* [2002] 2 Lloyd's Rep 707

[678] *Voss v APL Co Pte Ltd* [2002] 2 Lloyd's Rep 707 [48]

have the consequence of affecting the status of the bill of lading as a document of title.[679] However, this clause will inevitably endanger the bank's security and make the boundary between a straight bill and a sea waybill ambiguous. Clearly, if the goods can be delivered upon proof of identity, the bank holding the full set of bills of lading will not stop the unpaid party from delivery. Therefore, the requirement of tendering a full set of bills of lading in the UCP600 Article 20 (a) (iv) will completely lose its security effect.

In addition, the bank will probably face with an unsolved dilemma if the credit expressly states that "bills of lading indicating that goods may be released without presentation are not acceptable", which obviously conflicts with the delivery clause in the bill of lading permitting delivery upon proof of identity. Exactly the same issue occurred in the ICC Opinion R758,[680] in which the ICC Banking Commission considered the delivery clause in the bill of lading as "terms and conditions of carriage" so as not to be examined according to the UCP600 Article 20 (a) (v). Moreover, since the delivery clause in that case was only addressed to non-negotiable bills and the bill of lading actually issued was a negotiable bill, the ICC Banking Commission held that there was no discrepancy for this specific bill. Nevertheless, one may wonder what the result should be if the bill of lading in question was a non-negotiable bill. Should the bank reject the straight bill in that it contains a delivery clause which is inconsistent with the credit terms, or should the bank ignore the inconsistency since the delivery clause belongs to terms and conditions subject to article 20 (a) (v)? These questions however are awaiting further consideration by the ICC.

It is at least clear at the current stage that unless the credit expressly prohibits it, bills of lading, whether negotiable or straight, with a delivery clause permitting delivery without presentation, can be validly tendered under a letter of credit governed by the

[679] *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2003] EWCA Civ 556, [2004] QB 702 [142] (per Rix LJ)
[680] *ICC Opinions 2009-2011*, R759

UCP600. The ICC Drafting Group refused to stipulate that the bill of lading must be a document of title, because it is a legal issue and the UCP are voluntary rules of contract.[681] It is also concerned with the setup of international uniform practice without causing huge conflict with domestic laws.[682] However, in the meantime, the bank has to sacrifice its own security provided by bills of lading as documents of title and only obtain the same level of security as with sea waybills. In the author's opinion, it should not be too difficult to solve the delivery issue in Article 20 by stating that: '*Bills of lading indicating that the carrier may give delivery of the goods without production of an original bill of lading is not acceptable*'.[683] As the UCP itself claims, they are voluntary rules and the parties can still contract out as appropriate. The new provision will bring a slight effect on Article 20 (a) (v), but the bank still does not examine the carriage terms and conditions save for anything already required by the UCP, i.e. delivery clause. Stoppage or innovation, it is hard to predict which choice is better, but the latter definitely is beneficial for the bank's security.

5.5 Charter Party Bills of Lading

Charterparty bills of lading are marine bills of lading which are issued subject to the terms of a charterparty. The frequent use of bills of lading referring to charterparties, particularly in the commodity trades, persuaded the ICC to introduce the provisions for charterparty bills in the UCP 500 Article 25, which has been reproduced in the UCP 600 Article 22. It is necessary to clarify here that a bill of lading seeks to incorporate terms from charterparty that does not affect the nature of the bill of lading as a document of title and consequently a bank's security at common law remains at the same level as that under bills of lading.[684] Hence, in this part, the author will mainly focus on the UCP Article 22 requirements and reveal the UCP terms which may have impacts on a bank's security.

[681] Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 89

[682] Not all states recognise straight bills of lading as documents of title, e.g. US. See also Janet Ulph, 'The UCP 600: Documentary Credits in the 21st Century' [2007] JBL 355, 369

[683] As analysed above, Article 20 covers both negotiable and straight bills of lading.

[684] However, the bank's contractual position *vis-à-vis* the carrier may be affected by the terms incorporated from the charterparty.

5.5.1 Requirements under UCP600 Article 22

5.5.1.1 Application of Article 22

Under UCP600, if the credit calls for a charterparty bill of lading, the bill must contain an indication that it is subject to a charterparty. However, charterparty bills are not acceptable unless the credit expressly calls for or permits them to be presented.[685] This position follows the banking practice as established in the common law case *Enrico Furst & Co v W E Fischer Ltd*,[686] which held that on the evidence of banking witness, where the credit called for payment against bills of lading, banks did not treat as a good tender for bills of lading incorporated the terms of a charterparty.

A transport document, however named, containing any indication that it is subject to, or any reference to, a charterparty is deemed to be a charterparty bill of lading under UCP600.[687] For example, freight payable as per charterparty will be an indication that it is subject to a charterparty.[688] Comparatively, a transport document only with an associated name, e.g. Congenbill, without any indication or reference to a charterparty is not a charterparty bill of lading.[689] Having analysed the bill of lading under Article 20 extensively, here the author only makes a few points concerning the differences between Article 20 and Article 22.

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[685] ISBP No.745 section G1. The position remains the same with UCP500 article 25 (a). For a different voice, see Charles Charles Debattista, 'Banks and the Carriage of Goods by Sea: Secure Transport Documents and the UCP500' (1994) 7 JIBFL 329, 335

[686] *Enrico Furst & Co v W E Fischer Ltd* [1960] 2 Lloyd's Rep 340 (QB) 345-346 By contrast, the position under a c.i.f. contract is that a charterparty bill of lading must be accepted by the buyer, even if the charterparty is not tendered, at any rate if it is on an unamended standard form commonly used in the trade. See *SIAT Di Del Ferro v Tradax Overseas SA* [1978] 2 Lloyd's Rep 470 (QB) 492

[687] ISBP No.745 section G2(a) It should be noticed that the definition in the UCP covers both "true" charterparty bills, i.e. household name bills of lading for use with particular charterparties and any other bills of lading which incorporate charterparty terms. However, in the shipping market, charterparty bills only refer to the former rather than the latter. See Charles Debattista, 'The New UCP 600 - Changes to the Tender of the Sellers's Shipping Documents under Letters of Credit' [2007] JBL 329, 350

[688] ISBP No.745 section G2(b) The same decision can be found in the *ICC Opinions 2005-2008*, R647 (2)

[689] ISBP No.745 section G3 The same decision can be found in the *ICC Opinions 2005-2008*, R648. Based on the same point, in the author's opinion, the *ICC Opinions 2005-2008*, R647 (3) is supposed to be a wrong decision.

5.5.1.2 Specific requirements under Article 22

Different from Article 20 for bills of lading, Article 22 does not require charterparty bills to identify the carrier, since 'the identification of the carrier [is] unnecessary when the contract of carriage is concluded under a charterparty contract'.[690] Apart from signature by the master, owner or agent as stated in the UCP500 Article 25, UCP600 Article 22 newly recognises a new way of signing a charterparty bill, i.e. signed by or on behalf of the charterer. It should be noticed that the bank's security may be weakened for holding a charterer's bill of lading, since under a c.i.f. sale, the seller who as the beneficiary of the credit is likely to be a charterer and he can easily fabricate a clean bill of lading even without shipping any goods on board. However, as stated in Chapter 2, it is not the UCP's job to defend against fraud. If the bank wants to prevent the risk, it must expressly prohibit the bill of lading signed by charterers in the credit and modify the UCP600 Article 22 (a). Another significant difference from Article 20 regarding bills of lading is that the provisions relating to transhipment are omitted in Article 22, due to normally one vessel under a charterparty.[691] It has been suggested that just as under bills of lading, charterparty bills should also cover the whole of the carriage, although no express requirement under Article 22 and it is unrealistic for bank to examine the term.[692]

5.5.2 Charterparty under Charterparty bills

Rather surprisingly, there is no restriction as to the terms of the carriage contract in the UCP600 Article 22, perhaps because they cannot realistically be inspected, but UCP600 Article 22 (b) precludes banks from examining the charterparty contracts even

[690] Charles del Busto, *UCP500 & UCP400 Compared* (ICC Publication No.511, ICC 1993) 74 Nevertheless, when the banks seek to realise the security represented by the bill of lading, it would discover that identification of carrier where goods are carried on a chartered vessel is a far more complicated issue. See *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 AC 715

[691] However, the justification may not be suitable for the second type of charterparty bills, i.e. bills of lading which only contain a reference to charterparty terms rather than used together with a charterparty.

[692] See Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.109 The same problems exist here as those under bills of lading, such as how to examine the requirement without looking into the carriage terms.

if they are required to be presented by the terms of the credit. ISBP No.745 section G27 newly provides a further clarification that 'unless UCP600 sub-Article 22 (b) is specifically excluded and the credit specifically indicates the data that are to be examined and to what extent, banks do not examine any content of a charter party contract, even when such contract is required as a stipulated document under the credit.' It is justifiable for relieving the bank's responsibility in examining charterparties, since different from the position under sale contracts, there is no reason for a bank to be aware of the terms of even commonly-used charterparties without amendment, nor of which charterparties are used for particular trades.[693] Yet the terms of the carriage contract, which the bank may not examine, can obviously affect its security.[694] Charterparty terms incorporated into the bill of lading, e.g. demurrage terms, may also be material to the unpaid bank decision as to whether or not to claim delivery of the goods. It is a pity to let the opportunity pass without examination. However, the UCP leaves the issue in dark if the bank does examine the carriage terms and find discrepancies in them.

In conclusion, UCP600 Article 22 is not badly drafted. It basically follows the structure of UCP 500 Article 20 concerning bills of lading with some necessary changes to accommodate the characteristics of a charterparty bill, but it shares the deficiencies in common with UCP 500 Article 20. The charterparty bills of lading themselves have not weakened the bank's security; however, the bank's security has been slightly restricted by the UCP provisions in respect of not examining carriage terms.

5.6 Multimodal Transport Documents

With the modern trade development, the traditional bill of lading which only covers the port-to-port shipment is not well suited to combined transport operations, where the

[693] Position under sale contracts can be found in *Finska Cellulosaforeningen v Westfield Paper Co Ltd* (1940) 68 Ll L Rep 75 (KB) and *SIAT Di Del Ferro v Tradax Overseas SA* [1978] 2 Lloyd's Rep 470 (QB)

[694] Since the bank does not check the carriage terms contained in the charterparty under the letter of credit, the buyer may wish to reserve his right of recourse against the seller.

transport is from an inland terminal in one country to an inland terminal in another.[695] Meanwhile, the development of containerisation has significantly increased the importance of combined transport operations. Parties who are played in modern international trade also desire to hold a single document covering the entire carriage, regardless of which mode of transport or means of conveyance is involved during the journey. Therefore, multimodal transport documents which can envisage the entire carriage of the goods by more than one means of transport are more and more popular nowadays. With the purpose of emphasising the increasing use of multimodal transport documents in the trade community, the Drafting Group has placed Article 19 as the first transport document article in the UCP600. However, the provisions in Article 19 are mostly mirror imaged with the provisions under Article 20 regarding bills of lading. For this reason, the author decided to discuss the requirements for the bills of lading in the first part of this chapter, and now focuses on the differences between Article 19 as a derivative and Article 20 as an original.

5.6.1 Requirements under UCP600 Article 19

In UCP 600, multimodal transport documents are covered by Article 19, which is headed as "Transport Document Covering at Least Two Different Modes of Transport".[696] The article applies to a document, however named, that appears to cover transportation by at least two different modes of transportation. The requirements under Article 19 share many features in common with Article 20 regarding bills of lading. For example, the document must indicate the name of the carrier and be signed by the carrier, master or agent as the same as under bills of lading.[697] Article 19 (a) (iv) also requires to tender the full set of transport documents if more than one is issued. Similar to Article 20, Article 19 (a) (vi) does not permit a

[695] It usually involves three or more carriage in the total operation, namely, one sea and two land legs.

[696] According to the UCP Drafting Group, this type of transport document is a relatively new concept and still lacks specific name recognition, so that the Drafting Group feels reluctant to give a fixed name for this type of document. See Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 81; ISBP No.745, section D2

[697] See Article 19 (a) (i). It is still possible for the freight forwarder to issue and sign a multimodal transport document, but he has to act as the agent of the carrier rather for the shipper.

multimodal transport document containing an indication that it is subject to a charterparty.[698] However, there are two important aspects, reflecting the essential differences between multimodal transport documents and bills of lading.

The first difference is that UCP 600 Article 19 accepts the document indicating that the goods being dispatched, taken in charge or shipped on board. Unlike Article 20, Article 19 does not require an on board notation as a default position for most of the time due to the feature of multimodal transport operations. Nevertheless, a dated on board notation is clearly required when the credit so requests.[699] Moreover, in line with the bill of lading, the on board notation is also required when the document evidences the first leg of the carriage as a sea shipment from the place stated in the credit.[700] In this event, the criteria for an on board notation under a bill of lading as previously discussed in Part 5.2.2 will apply to a multimodal transport document.[701] Therefore, except from an express requirement in the credit and evidence of the first part of journey by sea carriage, a combined transport document will be accepted even if it does not state that goods are shipped on board a named vessel.

The second aspect is regarding transhipment. Unlike the transhipment from one vessel to another at sea under bills of lading described in Article 20 (b), transhipment in Article 19 (b) envisages a wider coverage, which means unloading from one means of conveyance to another means of conveyance (whether or not in different modes of transport) during the whole carriage. Based on the needs of transhipment under multimodal carriage, Article 19 (c) stipulates even if the credit prohibits transhipment, the document showing that transhipment will or may take place is still acceptable,

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[698] It is not often to see the relevance of charterparty terms in a multimodal document though. However, it is unclear when the credit does not prohibit charterparty bill of lading, or even permits the reference to charterparty, whether the bank is obliged to reject a multimodal transport document containing a single reference to the charterparty under Article 19. Surely, the bank cannot use Article 22 concerning charterparty bills as a backup article and resort to it.

[699] *ICC Opinions 2005-2008*, R641

[700] *ICC Opinions 2005-2008*, R641, which decision has been incorporated into ICC Banking Commission, *Recommendations of the Banking Commission in respect of the Requirements for an On Board Notation* (Document No 470/1128 rev final, 22 April 2010) 8 and ISBP No.745, section D7.

[701] ISBP No.745, section D7, D8

provided that the entire carriage is covered by one and the same transport document. Comparing with the transhipment provisions in Article 20, the wording of Article 19 (c) is much clearer. Even though there is still no clarification for the meaning of entire carriage as previously discussed under the section of bills of lading, since the multimodal transport document is conceptually developed from the through bill of lading,[702] it has been strongly argued that the contractual carrier needs to undertake the entire liability under a multimodal transport document.[703] The inference of entire liability is definitely favourable for the traders; however, once again, the bank will face with an unsolved puzzle, namely, how to assess the carrier's entire liability without examining the carriage terms.

5.6.2 Bank's security upon multimodal transport documents

Due to the massive legal issues involved in this new developing area, in this part, the author will only develop discussion on multimodal transport documents which clearly involve a part of sea carriage and a bill of lading. It is normal for the multimodal transport document to state that the goods have been received rather than shipped on the date which the document is issued. The ISBP No.745 requires an on board notation only for the circumstance when the first leg of the carriage is a sea shipment. Therefore, the bills of lading, issued for the second or later leg of the journey in combined transport operations, are usually in "received for shipment" form. From the above discussion regarding to bank's security, it has been clear that the shipped bills of lading, which are recognised as documents of title at common law, can offer the bank the maximum security guarantee. However, the received bills of lading were treated very differently at common law since they could not be regarded as documents of title

[702] The essence of the through bill of lading is that one carrier (probably the ocean carrier) takes on obligations for the whole voyage, but with a liberty to sub-contract on-carriage from the port of transhipment. The carrier who undertakes obligations for the entire voyage will be the contracting carrier. The cargo-owner will be able to sue him in contract, if there is a breach of carriage contract, whether or not he is the actual carrier of the goods at the point of the breach. See Paul Todd, *Bills of Lading and Bankers Documentary Credits* (4th edn, Informa Publishing 2007) para 3.13 and para 3.24

[703] See Paul Todd, *Bills of Lading and Bankers Documentary Credits* (4th edn, Informa Publishing 2007) para 8.26

without proof of custom.[704]

Prior to COGSA1992, it was doubtful whether the named consignee or the endorsee of a received bill can obtain a right of delivery against the carrier. Since COGSA 1992 s.1 (2) (b), which categorised received bills of lading into bills of lading in the Act, the lawful holder of the bill of lading, i.e. the named consignee or the endorsee of a received bill, has obtained a contractual right of delivery and a title of suit against the carrier. However, COGSA 1992 makes no express provision for multimodal transport documents. Assuming the same rule under received bills of lading applies to multimodal transport documents, a lawful holder of a bill of lading envisaging transport by more than one mode of transport will have the right of suit and the right of delivery whether the document states that the goods have been shipped or received for shipment.

Since *Lickbarrow v Mason*[705] established that only shipped bills of lading which can confirm the shipment status are documents of title at common law, it is consequently said that combined transport documents would not be considered as documents of title without proof of custom.[706] However, the conclusion seems difficult in modern carriage, especially taking account of the widespread use of multimodal transport. If the multimodal transport document is not a document of title, holding a full set of documents as required by Article 19 (a) (v) will become worthless to the bank, since other parties can claim delivery without presentation of the document. It will also conflict with COGSA1992 which requires the bill of lading holder with possession of the document.[707] Moreover, the ISBP No.745 section D16 covers both a "straight" multimodal transport document and "to order" multimodal transport document, which

[704] *Lickbarrow v Mason* (1794) 5 TR 683 and *Diamond Alkali Export v Bourgeois* [1921] 3 KB 443
[705] *Lickbarrow v Mason* (1794) 5 TR 683
[706] The issue of whether a received for shipment bill of lading is a document of title was treated as an open question. See Richard King, *Guttidge & Megrah's Law of Bankers' Commercial Credit* (8th edn, Europa Publications 2001) para 8-05 fn 11; Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 21-074; Paul Todd, *Bills of Lading and Bankers Documentary Credits* (4th edn, Informa Publishing 2007) para 7.110
[707] COGSA1992, s 5(2)

clearly recognises the possibility of transfer of multimodal transport documents.

In summary, it is still not entirely clear to what extent a multimodal transport document can provide the bank's security. COGSA 1992 has granted the holder of a received bill of lading a title to sue the carrier and rights to claim delivery; however, it does not mention the position under multimodal transport documents at all. The UCP600 together with the new ISBP, to some degree, has strengthened the bank's security by copying provisions from the bills of lading. It might have a leeway to argue that multimodal transport documents are transferable in modern views and offer the bank the same level of security as under traditional bills of lading.[708]

5.7 Conclusions

In this chapter, the author has examined the most important "specific" documents in the documentary credits examination – transport documents which are wholly or partly involved with sea carriage. The author has started from the bill of lading as a standard base to analyse the UCP requirements and review the various aspects of banks' security it can offer. Other alternative forms of transport document, including sea waybills, straight bills, charterparty bills and multimodal transport documents have all been analysed for their specific problems and the different levels of security provided to the bank.

Generally speaking, the UCP600 and its affiliation including the new ISBP No.745 have provided detailed guidance for the bank to examine the transport documents, especially concerning their functions as the receipt of the goods and the evidence of shipment. However, there are a few historical problems still remaining in the current UCP, such as not examining the carriage terms and conditions. The boundary between the "special terms" which are supposed to be checked by the bank and the "general terms" which are supposed to be disregarded by the bank is very vague, sometimes

[708] Charles Debattista, *Bills of Lading in Export Trade* (3rd edn, Tottel Publishing 2009) para 3.12

even impossible to set up. The attitude for transhipment clauses is a good example to demonstrate the struggle within the UCP system. Comparing with UCP500 and the previous version of ISBP, the current status is much better, but more efforts still need to be continuously made by the ICC.

As we can see, in recent years, changes in commercial practice have forced banks under documentary credits to accept documentation apart from the traditional shipped bill of lading. The use of alternative forms of documentation, in certain types of trade, may benefit to the trading parties; however, they were not devised in the interests of the banking community. A bank that accepts any document other than a traditional shipped bill of lading is thereby accepting a lesser degree of security offered by the document.

The author admits that nowadays banks are more likely to look for the creditworthiness of the parties and to arrange extra security in funds, than to rely on the security provided by the tendered documents under the credit. However, in the author's opinion, the original documentary security provided to banks cannot be regarded as unimportant, especially where the bank has mistakenly paid on documents. In those circumstances, the bank will have no right of indemnity apart from utilising the documents stuck in its hands. With respect to banks' security, the UCP600 pays little attention, especially referring to rights of delivery and rights of resale. The individual bank may therefore seek to insist that the credit stipulates presentation of a transport document in a form that gives it maximum security.

Chapter 6 Rejection of Presented Documents

6.1 Introduction

The previous chapters have dealt with the initial obligation upon banks with regard to the presented documents, i.e. examination of documents, which includes general examinations and special requirements. After examining the presented documents, the bank must honour or negotiate the conforming documents.[709] On the contrary, if the bank determines that the documents are not compliant, it may think of refusing to honour or negotiate the presentation.[710] This will trigger the next stage of obligations on the bank in relation to dealing with the presented documents, i.e. obligations concerning rejection, which will be focused on in this chapter.

Before starting the main chapter, it is necessary to clarify the specific banking parties involved into the obligations concerning rejection. At a glance of the current UCP600 Article 16, it is clear that three types of banks are mentioned, including the issuing bank, the confirming bank and the nominated bank. However, if one goes through carefully, it is easy to find that only the issuing bank has been referred to in Article 16 (b)[711] for seeking a pre-refusal waiver. Moreover, only the issuing bank and the confirming bank have expressly fallen into the scope of preclusion rule in Article 16 (f)[712]. It seems the legal parties might be frequently changed under different circumstances. Nonetheless, in this chapter, the author aims to cover all the banks' obligations dealing with the rejection of discrepant documents. Therefore, when a bank is mentioned, it can be any one of the three banks. Naturally, the author will also

[709] UCP600 Article 15
[710] UCP600 Article 16 (a) provides: 'When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank determines that a presentation does not comply, it may refuse to honour or negotiate.'
[711] The UCP600 Article 16 (b) only mentions 'when an issuing bank determines that a presentation does not comply…'
[712] The UCP600 Article 16 (f) stresses that 'If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article…'

specifically analyse the legal situation faced by an individual bank concerning different scenarios when there is a need to distinguish them either in the UCP or in practice.

The structure of this chapter will follow the practical measures taken for rejecting a documentary presentation and the stipulations in UCP600 Article 16 will be addressed respectively. The initial step for the bank is to determine whether a non-compliant presentation will lead to refusal or dishonour. As stipulated in the UCP600 Article 16 (b), the bank may in its sole judgement approach the applicant for a waiver after determining non-compliance. Therefore, the discussion in Part 6.2 will centre on evaluating the role of the bank, as well as analysing in what degree the bank should be permitted to consult with the applicant for a waiver. After the refusal has been determined, the bank must subsequently serve a notice of refusal to the presenter. As required in UCP600 Article 16 (d), the notice must be sent within a strict time limit by the specified mode, which will be considered in Part 6.3. Consequently, the requirement for the content and formalities of a notice of refusal in Article 16 (c) will be carefully reviewed in Part 6.4. More importantly, the most controversial provision, Article 16 (c) (iii), which relates to the specific statements in a notice of refusal, will be examined by verbatim in this part. In addition, further actions following a notice of refusal, which may also fall under the ambit of the bank's obligations on rejection, are necessarily analysed in Part 6.5. Last but not least, the draconian consequence of breaching provisions under Article 16, i.e. the preclusion rule drawn in the UCP600 Article 16 (f), will be tested in Part 6.6 concerning different scenarios.

6.2 Consultation with the applicant

Since applicants are prepared to waive discrepancies in the majority of cases in practice, consultation with the applicant for seeking a pre-refusal waiver is an extremely important step.[713] The UCP600 Article 16 (b) provides that 'when an

[713] Professor Mann's survey indicated that 'documentary compliance was woefully low (as low as 27%), but that applicants were waiving discrepancies at a high rate (well over 90%).' in 'The strict compliance rule in a recession' DCInsight 10-12/2009, vol.15 No.4, p.8; also see Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-173, fn 594 and Ali Malek and David Quest,

issuing bank determines that a presentation does not comply, it may in its sole judgment approach the applicant for a waiver of the discrepancies.' Clearly, Article 16 (b) only grants the issuing bank a choice to seek for a waiver from the applicant before serving a notice of refusal. The fate of the presentation is still up to the bank's sole determination even if the bank has received a pre-refusal waiver from the applicant. Although in appearance, Article 16 (b) is a choice offered to the bank; in reality, it may contain a double-edged effect on the bank, since Article 16 (b) requires the bank to make an independent determination. That means a bank is obliged to use its sole judgement to examine and determine a presentation in the whole process of seeking a pre-refusal waiver from the applicant. In addition, the bank is restricted by the time limit of approaching the applicant, which allows a maximum of five banking days in the UCP600. In a word, the bank has its discretion, but in the meantime it has to fulfil the obligations indicated in the UCP.

6.2.1 Legal capacity of approaching an applicant

The UCP600 Article 16 (b) expressly states that an issuing bank is entitled to approach its applicant after determining a non-compliant presentation but before sending a conclusive notice of refusal. However, the UCP600 does not mention whether a confirming bank or a non-confirming nominated bank is entitled to approach the issuing bank or the applicant for a pre-refusal waiver.

Concerning the case law position, there are not English cases highlighted drawing on this specific issue; while, the judge in a recent Hong Kong case did touch the point. In *Total Energy Asia Ltd v Standard Charted Bank (Hong Kong) Ltd*[714], the plaintiff beneficiary contended that the defendant confirming bank wrongfully refused to make payment pursuant to an irrevocable letter of credit. The core issue in the case is whether the confirming bank had complied with its obligations of refusal under

Jack: Documentary Credits (4th edn, Tottel Publishing 2009) para 5.54

[714] *Total Energy Asia Ltd v Standard Charted Bank (Hong Kong) Ltd* [2007] 1 HKLRD 871; [2006] HKCU 2134

UCP500 Article 14 (d). The thorny questions before the Court were whether the confirming bank was entitled to approach the applicant to ask for a pre-refusal wavier, and moreover whether the rejection served was unequivocal as required. The judge recognised that an issuing bank was the only legal party to approach the applicant for a pre-refusal waiver in the UCP500; however, the judge further held that '*there appears to be no reason in principle why in practice a confirming bank is unable to, or is otherwise precluded from, seeking/suggesting the procuring of a waiver from the applicant, however inappropriate or practically risky this course may be…*'[715] Subsequently, the judge proposed a concomitant question that the confirming bank who sought a pre-refusal waiver would render a risk of equivocal refusal.

The author tentatively believes that, there is no difference in nature for a nominated bank which directly seeks a pre-refusal waiver from the presenter, although it is not a party concerned by UCP600 Article 16 (b).[716] Unlike the arguments in *Total Energy Asia*, the author cannot see any conditional or equivocal situations if a nominated bank would have followed the procedures of giving a notice of refusal as the issuing bank did. The essential question in the *Total Energy Asia* case should be whether the nominated bank had sent an unequivocal notice of refusal, rather than whether the nominated bank was entitled to approach the applicant for a pre-refusal waiver. Nonetheless, the only significant distinction compared with the status of an issuing bank is that a nominated bank has to seek a pre-refusal waiver from both the applicant and the issuing bank within the time limit.[717] The reason is that the issuing bank may still be entitled to refuse the presentation even on the basis of those discrepancies already waived by the applicant.[718] Therefore, from this point, the judge was right to

[715] *Total Energy Asia Ltd v Standard Charted Bank (Hong Kong) Ltd* [2007] 1 HKLRD 871; [2006] HKCU 2134 [110]

[716] The nominated bank in this part includes two kinds of bank, which are confirming bank and non-confirming nominated bank.

[717] If the nominated bank cannot fulfil the requirement for time limit, it will trigger the preclusion rule. Thus, a nominated bank must get access to both the applicant and the issuing bank within five banking days. The author considers that the time limit will be the most difficult barrier to a nominated bank in practice.

[718] The issuing bank is not bound by the waiver of applicant and the view of nominated bank. It has separate obligation to make its sole determination. See detailed explanation in Part 6.2.2.

conclude in *Total Energy Asia* that there would be an inherent risk for a nominated bank which sought a pre-refusal waiver directly with the applicant.

Even if a nominated bank cannot get access to the applicant directly for a waiver of discrepancies, it can still send the issuing bank an advice of discrepancies and request the issuing bank to approach the applicant for a waiver.[719] Since the terms in which it communicated the waiver may well constitute consent to amendment of the credit, the issuing bank is not entitled to put forward the discrepancies which have been waived.[720] Nevertheless, the applicant and the issuing bank are still likely to reject the documents based on other grounds.[721] In respect of ambiguous documents, a nominated bank is better to choose payment under reserve or against an indemnity, which can secure his position against rejection of the issuing bank.

From another perspective, it is probably safer for a nominated bank to seek a post-refusal waiver from the applicant instead of struggling with the pre-refusal situation. A post-refusal waiver is that the applicant would waive the found discrepancies after the nominated bank sends out a refusal notice, which is illustrated in the UCP600 Article 16 (c) (iii) (b)[722]. Apart from different time allowance given for seeking the two types of waiver, a nominated bank, which sends a notice of refusal with a statement of waiting for a post-refusal waiver, is also granted by the UCP600 Article 16 (c). According to Article 16, a nominated bank would be deemed to send a satisfactory refusal, if it has unequivocally expressed its refusal intention and then sent a notice of refusal with the option of seeking a post-refusal waiver as Article 16 (c) (iii) (b). As stated in *Total Energy Asia*, '*since the documents have already been refused, it does not operate under the shadow of the preclusion rule...*'[723] More interestingly, the

[719] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-196
[720] ibid
[721] Gary Collyer and Ron Katz (eds), *Unpublished Opinions of the ICC Banking Commission 1995-2004* (ICC Publication No.660, ICC 2005) R547
[722] The UCP600 Article 16 (c) (iii) (b) states 'that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver.'
[723] *Total Energy Asia Ltd v Standard Charted Bank (Hong Kong) Ltd* [2007] 1 HKLRD 871; [2006]

party addressed in Article 16 (c) (iii) (b) only relates to the issuing bank, which implies that the nominated bank is only obliged to forward the discrepant documents to the issuing bank and the issuing bank will hold the documents pending for a post-refusal waiver or any prior instructions. Therefore, the nominated bank will not be involved into seeking a post-refusal waiver since the issuing bank has to deal with the further actions. Consequently, if a nominated bank chooses Article 16 (c) (iii) (b) to seek a post-refusal waiver, it will be easy to achieve an unconditional notice of refusal. That is why in *Total Energy Asia* the judge insistently suggested the nominated bank should change from seeking a pre-refusal waiver in Article 16 (b) to waiting for a post-refusal waiver in Article 16 (c) (iii) (b).

In practice, '*it is unlikely that in these circumstances any rational confirming bank would seek a pre-refusal waiver.*'[724] The reason is not only that seeking a pre-refusal waiver across the chain of transmission is time-consuming, but also that a nominated bank normally does not have the same interest as the issuing bank towards the success of the transaction or relationship with the applicant. Therefore, it is better practice for the nominated bank to promptly refuse the presentation and put them back into circulation as soon as possible, so that the beneficiary may have an opportunity to put them right within the period of the credit.[725] Alternatively, the nominated bank can make payment conditionally, which means to choose payment under reserve or against indemnity.

Nonetheless, in principle, the UCP does not expressly prohibit a nominated bank approaching the applicant for seeking a pre-refusal waiver. Moreover, it is still worth mentioning the question, since in most cases a nominated bank would be the first stop to deal with the documents presented by the beneficiary. If a nominated bank is going

HKCU 2134 [129] The sentence desires to state the importance of the time and format of serving a notice of refusal. Actually, as decided in *Fortis Bank v Indian Overseas Bank* [2011] EWCA Civ 58, [2011] 2 All ER (Comm) 288, the preclusion rule also includes bank's further actions which should be in accordance with the statement in the notice of refusal.

[724] *Total Energy Asia Ltd v Standard Charted Bank (Hong Kong) Ltd* [2007] 1 HKLRD 871; [2006] HKCU 2134 [122]

[725] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 5.57

to seek a pre-refusal waiver from the applicant, it would also need to consider the issuing bank's opinion by sending an advice of discrepancies. Since the chain of transmission would be time-consuming and a nominated bank's position is also restricted by the time limit, it is better for the nominated bank to unequivocally reject the discrepant documents and to wait for receiving a post-refusal waiver under Article 16 (c) (iii) (b).

6.2.2 Bank's discretion and restriction to approach an applicant

6.2.2.1 Sole judgement

The UCP600 Article 16 (b) expressly confers a right on the issuing bank to approach the applicant for a waiver of the found discrepancies after it has determined a non-complying presentation.[726] The issuing bank "*may*" approach the applicant for a waiver of the discrepancies signifies that the bank has discretion to choose whether to approach the applicant or not. Approaching the applicant for a waiver is a right rather than an obligation on the bank, as long as the determination is based on its sole judgement. Hence, the bank is not obliged to approach the applicant for a waiver at the request of whomever.[727] Furthermore, the bank has rights to deal with the presentation based on its sole judgement, even receiving a pre-refusal waiver from the applicant. 'In previous opinions, the ICC Banking Commission has decreed that the receipt by an issuing bank of a waiver from the applicant does not bind the issuing bank to honour the documents.'[728] 'If an issuing bank chooses not to agree to the waiver granted by the applicant, it would be entitled to request a refund of the amount that has already been reimbursed and any associated interest…'[729] Obviously, there are no obligations

[726] As analysis in Part 6.2.1, the author tentatively thinks that UCP600 Article 16 (b) can also apply to other types of bank, such as the confirming bank and the non-confirming negotiated bank.
[727] The status of discretion has been confirmed by *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA) under the UCP400, and then been introduced into the UCP500 and UCP600.
[728] *ICC Opinions 1995-2001*, R327
[729] ibid

on the bank to issue a reminder or communicate with the applicant in the light of an approaching deadline.[730]

Apparently, consultation with the applicant in the bank's sole judgement is a privilege granted by the UCP600. However, the conferred right also places thorny obligations on the bank, and meanwhile the bank's discretion is always accompanied with implied restrictions set out the UCP600 Article 16 (b). Firstly, a condition precedent for consultation with the applicant in Article 16 (b) is that the bank has determined a non-complying presentation, i.e. bank's independent examination and determination must be in a prior place. Consultation is different from delegation, so that the bank cannot delegate a right to the applicant to further examine documents. According to Article 14 (a) of the UCP600, the responsibility of independent examination should lie on the banks. Moreover, with respect to the autonomous spirit of the UCP, the bank should determine a presentation in its sole judgement, rather than on the basis of an applicant's wishes.[731] The only purpose to approach the applicant is to query for a waiver concerning the discrepancies which have been found by the bank. '*While the bank may consult the customer for the limited purpose set out, it is still the bank which has to make the decision whether to reject.*'[732] As Benjamin analyses, 'abrogation of that responsibility by delegating examination or decision-making to the applicant will incur preclusion.'[733] Therefore, the bank should be extremely cautious when approaching the applicant to ask for a waiver.

[730] *ICC Opinions 1995-2001*, R410; See also *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep.443 (CA) 456 (per Sir John Megaw)

[731] Gary Collyer and Ron Katz (eds), *Collected DOCDEX Decisions 2004-2008* (ICC Publication No.696, ICC 2008) No.254 See *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep.443 (CA) 455; *Credit Agricole Indosuez v Credit Suisse First Boston* [2001] All ER (Comm) 1088 (QB) [15] See also *Bayerische Vereinsbank AG v National Bank of Pakistan* [1997] 1 Lloyd's Rep 59 (QB) 69 in which held that the bank was only as a post-box to convey the applicant's decisions to the beneficiary.

[732] *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA) 455

[733] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-189 Delegating determination will infringe Article 16 (b) which requires independent determination. Moreover, further examination taken by the applicant will be in a great possible to over the time limit in Article 16 (b). Both of them will possibly trigger the preclusion rule.

Obviously, in the vast majority of cases, consultation can be done quickly by a telephone call or fax transmission, so that in theory there is no need to send all the documents to the applicant for inspection. 'In practice, however, banks will often go further and forward all, or at least the offending, documents to the applicant.'[734] It is unclear to what extend this can be justified since there is no clue in the UCP to prevent forwarding documents for consultation. However, most of the courts would be very sensitive as to whether there is any chance for the applicant to examine the documents once they have been forwarded.[735] In the *Bankers Trust*[736] case, the Court of Appeal recognised that in some unusual circumstances, documentation would be submitted to the applicant for seeking the applicant's opinion. Nevertheless, such a submission was only for the applicant to consider the found discrepancies in the whole context of documents, rather than to retake a further examination.[737] As a result, how to recognise the "unusual circumstances" and define the complexity of found discrepancies will be the key issues to justify the bank's actions in forwarding the documents. If the discrepancy is only a matter of wording, quoting the relevant words appears to be sufficient. Alternatively, if the discrepancy cannot be discovered without looking into the context of documents, forwarding the relevant documents or even the documents in their entirety will be necessary.

It is self-evident that establishment of reasonable standards should be fallen into a matter of fact and would be varied from case to case. Arguably, this matter may be beyond the consideration of the UCP600. Although it seems to come across a bottleneck to identify to what extent should the bank release documents to the applicant, in author's view, the UCP system endeavours to solve this problem through

[734] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-175 For security reason, the bank may forward the annoying documents to the applicant, in case the applicant finds the new discrepancies later and refuses to reimburse it.

[735] In *Cooperative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank (The Royan)* [1987] 1 Lloyd's Rep 345 (QB), Gatehouse J inferred that 'the buyers would conduct a further examination of the documents when the evidence only supported a finding that the buyers *might* conduct a further examination.' Cited and distinguished by *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443

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

[737] ibid 455

detouring from the other side, i.e. providing the time limit for consultation. Learning from the case law, in *Bankers Trust*[738], the judge based his decision on the reasonable time criterion to conclude that the issuing bank had breached its obligations for independent determination. It is much more advisable to quantify the time limit than to categorise the various discrepancies by judging each fact. That is probably the reason that after the UCP400, the restriction for consulting time was involved instead of distinguishing between conducts of consultation.[739]

6.2.2.2 Time limit

As analysed above, the first implied obligation on the bank in Article 16 (b) concerns independent determination in the whole process of approaching the applicant for a pre-refusal waiver. While, the second requirement imposed on the bank in the Article 16 (b) is to follow the time limit set out in the UCP600 Article 14 (b), which signifies that consultation with the applicant will not extend the limit of five banking days. The author would like to deal with two following issues with respect to the time limit. First and foremost, what is the nature of consultation time and what should not be done during this period? Secondly, the UCP only gives the outer limit to the bank, but how long precisely should be taken as the consultation time?

Dated back to UCP400, apart from a general reasonable time for examination and determination, there was nothing mentioning about the consultation time.[740] Nonetheless, as a landmark case under UCP400, in *Bankers Trust v State Bank of India*,[741] based on the practical importance and high value of consultation, a majority of judges concluded that consultation with the applicant for a pre-notice waiver should belong to the process of making a determination.[742] Thus, a reasonable time for consultation should be permitted within the ambit of the reasonable time required by

[738] ibid. It will be analysed in the following time limit part.
[739] UCP500 Article 14 (c) and UCP600 Article 16 (b)
[740] UCP400 Article 16
[741] *Bankers Trust Co v State Bank of India* [1991] 1 Lloyd's Rep 587, affd [1991] 2 Lloyd's Rep 443
[742] Only Lloyd LJ disagreed with this conclusion, while other judges in the Court of Appeal as well as Hirst J in the first instance court supported this point.

determination provided that the consultation would be necessary in its nature. Moreover, all the judges defined the nature of consultation and reached an agreement that '*Article 16* [under UCP400] *did not contemplate a period of time for the applicant to go through the documents to see if it could find further discrepancies.*'[743] The court confirmed that it was the bank's responsibility to examine documents alone and make an independent determination, even if the bank may consult the applicant for the limited purpose allowed by practice.

Clearly, the *Bankers Trust* case not only stressed the necessity of consultation, but also affirmed that the consultation time should be permitted during the process of determination, which has then been expressly introduced into the UCP500 and the UCP600. Furthermore, the case defined that the nature of consultation time should be spent for discrepancies already found rather than for further examination. Therefore, it is not too difficult to assess whether the issuing bank has breached its obligations through analysing the nature of the time taken for consultation. Obviously, judging whether the consultation time has been reasonably spent could be easier than analysing the necessity of forwarding the documents through categorising different types of discrepancies as analysed above. In consequence, the outer time limit for consultation has been subsequently involved into the UCP500 and the UCP600.[744]

However, as the only regrettable point left in the *Bankers Trust* case, both the UCP system and the case law did not state a set of standards to measure how long the consultation time should take. In the UCP400, '*the reasonable time allowed to the issuing bank is composed of two components, namely, (i) time for the bank to examine the documents and (ii) time for the bank to determine whether to accept or reject the documents.*'[745] As mentioned above, one of the most important contributions in

[743] *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA)
[744] The outer time limit in the UCP500 Article 14 is seven banking days, while in the UCP600 Article 16 is five banking days.
[745] *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA) 450 UCP400 Article 14 (c) and Article 14 (d) It seems that there was a separate standard with time for sending a notice, which called "without delay" in the UCP400. However, the nature of without unreasonable delay is to make

Bankers Trust is to clarify that the time spent on consultation should belong to the time of determination. Without doubt, "reasonable time" was the only criterion to measure the consultation time in the UCP400. Regarding to UCP500, the most significant change was to establish an outer time limit for banks, which was seven banking days. Banks should examine all the documents, determine the presentation and send a notice if refused within seven banking days following the day of receipt.[746] Nevertheless, the UCP500 did not state the time division for each action and still kept the "reasonable time" and "without delay" as the criteria to measure the time taken. In addition, the UCP500 initially recognised that the pre-notice consultation should be a part of determination and it cannot extend over the seven banking days limit. Essentially, the standard to measure the time of consultation was still "reasonable time" in the UCP500, with adding seven banking days outer limit.

'(Since) the determination in individual cases of whether a bank had acted within a "reasonable time" or "without delay" gave rise to considerable uncertainty and much litigation, the introduction of a fixed period is therefore a welcome development.'[747] In the UCP600, a "reasonable time" and "without delay" have been totally omitted. Instead of them, as the only measurement, a fixed five banking days following the day of presentation has been involved.[748] Meanwhile, UCP600 Article 16 (b) expressly stipulates that the time for consultation should not extend the period mentioned in Article 14 (b), i.e. a maximum of five banking days. Unexpectedly, the words "maximum" added before the five banking days has caused confusion and controversies in academia. As already discussed in Chapter 3,[749] the core issue centres on whether "a maximum of five banking days" stands for a fixed period or signifies a shorter reasonable period. Thus, as a tandem sequence, the time for consultation would be affected by this uncertain situation. It is suspicious that whether the consultation

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sure sending a notice of refusal within a reasonable time.

[746] UCP500 Article 13 (b); Article 14 (b), (c) and (d)

[747] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 5.49 See also elements concerned about "reasonable time" in Chapter 3 of this thesis.

[748] UCP600 Article 14 (b); Article 16 (b) and (d)

[749] See Part 3.5.2 above

time under the UCP600 should be based on the previous criterion of "reasonable time". Simultaneously, it is also arguable whether the bank should be immune from being penalised with delay in the process of consultation as long as it could complete all the procedures within five banking days.

According to the author's reasoning provided in Chapter 3, the author is prone to adopt a proper quantified period instead of an uncertain reasonable time as the criterion for timing rules. In the author's view, the word "maximum" does not aim to legally involve a potential shorter time as contested by some commenters. The UCP600, which endeavours to eliminate the uncertainty brought by the criterion of reasonable time, just adopts a way of precise statement by means of "maximum", so as to indicate that there are still some other obligations taken into account by the bank within the allowed five banking days. Essentially, a maximum of five banking days allows five banking days for the bank to fulfil its obligations, even if there may be a little room for latent delay occurred in theory. Such theoretical delay could be caused by bank's own negative actions. Nevertheless, the delay cannot be tolerated even within the ambit of five banking days if it is caused by delegating the applicant to re-examine the documents, since the act of delegation would obviously breach the bank's obligations concerning independent examination and determination.[750]

Since there are no specific expressions in the UCP600 concerning how to divide the permitted time for examination and sending a notice of refusal, the bank might negligently abuse the remaining time. It is clear that the UCP600 has tried to avoid some adverse impact by virtue of reducing the time limit to five banking days, but it cannot totally eliminate the latent risk in theory. Based on the importance of pre-refusal consultation in modern documentary credit transactions and its tricky practical application, the author tentatively suggests that the ICC Banking Commission should set out a more specific instruction to guide the action of consultation and supplement the gap in the UCP600, especially in the aspect of time division.

[750] *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA)

According to the international market practice, consultation time spent with the applicant in 24 hours, under some unusual circumstances no more than 48 hours, would be regarded as reasonable.[751] Moreover, this length would be also suitable for the proportion taken in the existing five banking days. However, without doubt, until the ICC Banking Commission serves further clarifications, the safe route for the bank is to fulfil the consultation as soon as possible within the ambit of five banking days.

6.3 Time and mode of giving a notice of refusal

After consulting the applicant with found discrepancies, if the bank insists on dishonouring the presentation, it is obliged to send a notice of refusal to illustrate the rejection. Before digging into the substantial content of a notice of refusal provided by UCP600 Article 16 (c), the author would like to describe and discuss the external conditions for serving a notice of refusal, including time and mode of sending a refusal notice, which are stipulated together in the UCP600 Article 16 (d). Article 16 (d) stipulates that 'the notice required in sub-article 16 (c) must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation.'

6.3.1 Time for giving a notice of refusal

One of the most controversial issues in the UCP system centres on the timing rules. As a component, the time for giving a notice of refusal belongs to the timing group in the UCP system. There is no need to elaborate the importance of time limit for each party, including banks and traders. In a word, time means money. The bank would successfully get reimbursement by virtue of fulfilling its obligations within the time limit. The beneficiary may increase the opportunity to present the compliant documents within the time allowance and get payment. When the bank determines to dishonour a presentation, it should serve a notice of refusal to notify the presenter

[751] In *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA), Sir John Megaw agreed that 24 hours for the consultation with the applicant was regarded as being reasonable. In special circumstance, it could be extended to 48 hours.

within a certain period of time. This practice has been stipulated since UCP400 Article 16 (d), which stated that the bank should give a notice of refusal "without delay" after making a determination. In UCP500 Article 14 (d) (i), it expressed that if the bank decided to refuse the documents, it must give a notice to that effect "without delay but no later than the close of the seventh banking day". While in UCP600 Article 16 (d), it has deleted the criterion of "without delay" and requires giving a notice of refusal "no later than the close of the fifth banking day following the day of presentation". Obviously, the criterion for time of notification has changed and developed from time to time. Up to now, it is still one of the most ambiguous and controversial issues in the UCP system and in practice.

As a leading case under UCP400, in *Seaconsar (Far East) Ltd v Bank Markazi Jomhouri Islami Iran*,[752] the judge interpreted the meaning of "without delay" to give a notice of refusal. The Court held that:[753]

> '*where a decision to reject documents is made at or about the close of business on a Friday…we would expect the obligation to give notice without delay to require that it be given on the Monday, which was the next banking day… It may well be that in other cases the obligation requires notice to be given on the same day as the decision is taken.*'

Surprisingly, in this case the judge held that the defendant bank had given the notification without delay even though it was sent out on Tuesday. The reason was that the plaintiff could not prove any unreasonable delay from the time of determination to notification. Arguably, the true criterion supported by the Court was "without unreasonable delay".[754] In other words, it means the bank should duly fulfil its obligations in a reasonable time, even if there is any delay caused beyond its control.

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[752] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA)
[753] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA) 42
[754] That criterion was also held by *Rafsanjan Pistachio Producers Co-operative v Bank Leumi (UK) plc* [1992] 1 Lloyd's Rep 513 (QB) 531

Although the criterion to judge "without delay" is quite similar with the method of "reasonable time", giving a notice of refusal "without delay" is still a separate and additional obligation on the bank from that of examining and determining presentation within reasonable time.[755] Therefore, the bank which has rapidly done examination cannot be exempt from the liability caused by an unreasonable delay in notification. It is for the party alleging delay, normally the beneficiary, to prove it.[756] However, in practice, it is extremely difficult for the beneficiary to master the evidence to prove it. Since the beneficiary does not have information about when examination and determination has been completed, naturally the beneficiary is not clear from what time to start calculating the time only for notification. Consequently, in theory, the criterion of "without delay" has clarified separate obligations on the bank referring to different procedures. Nonetheless, it seems impracticable to the alleged beneficiary, who is in an adverse position, to prove the delay in notification.

The UCP600 Article 16 (d), which manages to eliminate the disadvantages of "without delay", stipulates that the notification should be given no later than the close of the fifth banking day following the day of presentation. It is suggested that Article 16 (d) should be read in tandem with the UCP600 Article 14 (b) and Article 16 (b), which are sharing the same time limit to take examination and make a decision.[757] Adopting this interpretation, these three provisions dealing with the common subject should be connected together, which means the bank should examine the presented documents, decide whether to accept or refuse the presentation, and send a required notice of

[755] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA) 42 This view was also supported under UCP500 by *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] 1 All ER (Comm) 172 (CA)

[756] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA) 42 For the second presentation in this case, the plaintiff could not prove why the unreasonable delay had occurred, so that he lost this point even if the time of notification was the one business day after, rather than the same day or the following business day.

[757] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 242

refusal if it decides to reject the documents, within a maximum of five banking days or no later than the close of the fifth banking day.[758]

While omitting the criterion of "without delay", the UCP600 does not express whether sending a notice of refusal should constitute a separate obligation from examining the documents as its previous versions. In the author's opinion, the answer should be affirmative, in that there are different actions taken by the bank and in each action there is possibility to cause delay or act negligently. Nevertheless, the time division within the maximum five banking days for each action is the point to be considered. With omission of "without delay", it reinforces the argument that the bank would fulfil its obligations as long as it sends a notice of refusal before the close of the fifth banking day.[759] The implication is that five banking days are the safe harbour for the bank. By contrast, the words "no later than" in the Article 16 (d) have brought the same effects as "maximum" in the Article 14 (b). Therefore, it goes back to the above discussion concerning whether the five banking days constitute the safe harbour for the bank.[760] It is an unexpected result of development in the UCP600, because it has brought a new part of uncertainty in academia while trying to get rid of the other.[761]

6.3.2 Mode of giving a notice of refusal

The other external requirement focused by the UCP system concerning serving a satisfactory notice of refusal lies in the mode of notice. The mode of sending a notice under UCP600 Article 14 (d) is telecommunication, or if that is not possible, by other

[758] See Figure 4 in Part 3.5.2

[759] *Jack* suggests that 'in the context of Article 16 it is sufficient that the bank refusing the documents should complete the acts which it has itself to carry out to give notice not later than the close of the fifth banking day…' Thus, there is no need to guarantee that the notice should be received before the close of the fifth banking day when using non-telecommunication methods. See Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 5.60

[760] See Part 3.5.2 and Part 6.2.2 above. In addition, if the five banking days are not safe harbour and the bank should send a notice of refusal within some reasonable time, the burden of proof concerning delay in notification remains to be seen. As above analysis, it is extremely difficult for the alleged beneficiary to prove a delay in the bank transactions. Therefore, the author tentatively concerns inversion of burden of proof, which the bank will give evidence to explain why there is no unreasonable delay.

[761] It will be a thorny task for the ICC Drafting Committee to clarify the meaning of "maximum" and "no later than" in theory. However, as Professor Ellinger suggests above, in practice, five banking days is a very short time for the bank to complete so many actions and fulfil all the obligations.

expeditious means.[762] Clearly, the aim of adopting telecommunication or other expeditious means is to make sure the beneficiary could know his position as soon as possible, so that the beneficiary would have more opportunity to correct discrepancies and make a representation before the expiry date of a documentary credit. The preferred mode is telecommunication, and if not possible, the bank must choose some other expeditious means without delay.

The case law also emphasised that a notice by post or by courier should not be permissible if the method of telecommunication was available.[763] Nevertheless, it has also given latitude regarding the mode of sending a notice. In *Rafsanjan Pistachio Producers Cooperative v Bank Leumi (UK) Ltd*,[764] Hirst J stated that '*... it would be undesirable to construe Article 16 (d)* [in UCP400, equivalent to UCP600 Article 16] *in a manner which obliged a bank to use a particular form of telecommunication. A telephone call might sometimes be the best mode.*'[765] Moreover, considering the importance of authentication, the judge suggested it would be better to follow up with a written communication as a record. However, it is necessary to note that the written confirmation cannot be used to cure defects in the previous telephone notice, for the reason of requiring a single notice of refusal with all discrepancies.[766]

Moreover, in *Seaconsar Far East Ltd v Bank Markazi Jomhour Islami Iran*,[767] it was implied that the notice can be given via voice instead of informing another person at distance. There is no need to send a further notice by telecommunication, '*if a senior official of the beneficiary, under whose aegis the documents were presented, is present*

[762] See also UCP400 Article 16 (d) and UCP500 Article 14 (d) (i)
[763] *Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd* [1991] 2 HKLR 35; *Bayerische Vereinsbank AG v National Bank of Pakistan* [1997] 1 Lloyd's Rep 59 (QB) 70 In *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA) 39, the judge held that 'the bank must first decide whether telecommunication is possible, and if not must choose some other expeditious means, and in either case the bank must act without delay.'
[764] *Rafsanjan Pistachio Producers Cooperative v Bank Leumi (UK) Ltd* [1992] 1 Lloyd's Rep 513 (QB)
[765] *Rafsanjan Pistachio Producers Cooperative v Bank Leumi (UK) Ltd* [1992] 1 Lloyd's Rep 513 (QB) 531
[766] See *Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd* [1991] 2 HKLR 35 This will be discussed in the next part.
[767] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA)

at the bank to receive notice.'[768] While, apart from failures caused by *force majeure*, 'the risk of the bank's chosen form of telecommunication malfunctioning lies with the refusing bank.'[769] Hence, it is suggested that a prudent bank should allow sufficient time for resorting to an alternative mode of communication within the maximum time limit.[770] In addition, a prudent bank should leave certain written records to prove that there is no fault or negligence of the bank to send the refusal notice.[771]

6.4 Format and content in a notice of refusal

After considering the external conditions set out by the UCP600 Article 16 (d), the author in this part considers the format and content of a notice of refusal, which are specifically stipulated in the UCP600 Article 16 (c).[772] The reason for the UCP providing every detail of a refusal notice is derived from the guarantee of conscientiousness. Since the rigor in the documentary credits is a double-edged sword, it not only requires the bank to examine the presented documents with strict compliance, but also aims at the bank to precisely fulfil its obligations. Generally speaking, the nature of Article 16 (c) lies in overseeing the conducts of banks and protecting the benefits of traders. It can not only counterbalance the rigorous impacts brought by the doctrine of strict compliance during examination, but also further guarantee the proper operation of documentary credits.

Analogous to the principle of irrevocability under opening of a documentary credit, the principle of irreversibility functions in serving a notice of refusal, i.e. there is only one

[768] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA) 39
[769] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-179 See the UCP600 Article 36 concerning *force majeure*.
[770] *ICC Opinions 1995-2001*, R262
[771] The bank might use the UCP600 Article 35 para.1 'Disclaimer on Transmission' as a defence.
[772] UCP600 Article 16 (c) stipulates: 'When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter. The notice must state: i. that the bank is refusing to honour or negotiate; and ii. each discrepancy in respect of which the bank refuses to honour or negotiate; and iii. a) that the bank is holding the documents pending further instructions from the presenter; or b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or c) that the bank is returning the documents; or d) that the bank is acting in accordance with instructions previously received from the presenter.'

chance for a bank to state its view. As required in the UCP600 Article 16 (c), when the bank decides to refuse to honour or negotiate, it must send a single notice of refusal with each discrepancy found in the documents. Moreover, the bank must state in a notice of refusal which option of conduct is chosen. After that, the bank has to irreversibly act in accordance with the disposal statement in a notice of refusal.[773] On the basis of provisions in the UCP600 Article 16 (c), in the following parts the author will sequentially interpret each aspect of the bank's obligations regarding serving a notice of refusal.

6.4.1 A single notice

When the bank decides to honour or negotiate, it must give a single notice to the presenter as required by UCP600 Article 16 (c). The essence of "a single notice" is to provide the bank only one opportunity to state its view in respect of each presentation. The significance of requiring a single notice is to avoid unnecessary confusion and troubles caused by the following notices, so that the beneficiary can correct the found discrepancies as soon as possible and make a representation rapidly. Although there was no express requirement for "a single notice" in the UCP500, the case law has illustrated that a single notice would be in accordance with the purpose of certainty under documentary credits.[774] Similar to the principle of irrevocability analysed in Chapter 2, the principle of irreversibility, which takes effects in the process of documentary credit operation, can effectively prevent the bank to add further discrepancies or cure previous invalid points by a subsequent notice of refusal. *A fortiori*, the bank which has initially accepted the presentation cannot change its mind and issue a notice of refusal later, even if there is enough time left to do so under Article 16 (d).[775]

[773] *ICC Opinions 1995-2001*, R421, R429 See also *Fortis Bank v Indian Overseas Bank* [2011] EWCA Civ 58, [2011] 2 All ER (Comm) 288
[774] Gary Collyer (ed), *More Queries and Responses on Documentary Credits - Opinions of the ICC Banking Commission 1997* (ICC Publication No.596, ICC 1998) R27
[775] *United Bank Ltd v Banque Nationale de Paris* [1991] SGHC 78, [1992] 2 SLR 64, 76

When the bank has sent several notices of refusal, the subsequent notices including further discrepancies will be ignored, and the refusing bank would only be entitled to rely on the first notice.[776] Without doubt, a second notice cannot supersede the first one even if the first one has been disregarded or garbled in transmission.[777] However, if a second notice just clarifies the content of the first notice and the first notice itself is fully valid on its original terms even without the benefit of the subsequent notice, the second notice is probably permissible.[778]

It is worth noting that not every communication from a refusing bank will constitute a refusal notice of Article 16 (c) and some of them are merely advice of discrepancies.[779] It is difficult to identify what should precisely constitute a relevant notice. In *Total Energy Asia Ltd v Standard Charted Bank (Hong Kong) Ltd*,[780] Stone J held that an initial fax which listed all discrepancies, combined with a following telephone call which expressed refusal and disposal of documents was sufficient to constitute a valid rejection under UCP500. However, the judge stressed that '*this was acceptable only if the one, the conversation, unequivocally referred to and incorporated the other, that is, the faxed 2nd advice.*'[781] Admittedly, if the bank has to choose this method, 'it is suggested that very clear words of incorporation would be required.'[782] Without doubt, it is advisable for the bank to send a single notice of refusal in order to avoid any risks and disputes arising from separate communications, especially under the express requirement of "a single notice" in the UCP600.

[776] *ICC Opinions 1995-2001*, R271; *ICC Unpublished Opinions 1995-2004*, R530
[777] *Cooperative Centrale Raiffeisen-Baerenleenbank BA v Bank of China* [2004] HKC 119 [66]
[778] *Kumagai-Zenecon Construction Pte Ltd v Arab Bank Plc* [1997] SGCA 41, [1997] 2 SLR (R) 1020 [29]-[31]
[779] *Agricole Indosuez v Credit Suisse First Boston* [2001] All ER (Comm) 1088 [15]; *Cooperative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank (The Royan)* [1988] 2 Lloyd's Rep 250 (CA) 254
[780] *Total Energy Asia Ltd v Standard Charted Bank (Hong Kong) Ltd* [2007] 1 HKLRD 871; [2006] HKCU 2134 [94]
[781] ibid [90]
[782] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 5.64

6.4.2 Express statement of refusal

The UCP600 Article 16 (c) (i) expressly requires that a notice of refusal 'must state that the bank is refusing to honour or negotiate.' It is an additional formality compared with the UCP500, which contained no such explicit requirement. 'Under UCP500 Article 14 (d), it was sufficient that the notice unambiguously communicate that the documents were being refused.'[783] It is suggested that the refusing bank should express its own intention of refusal rather than simply report the decision of the applicant who declines to be a waiver.[784] However, without an express statement of refusal, the intention of the refusing bank is always controversial and disputable.

In *Voest-Alpine Trading USA Corp v Bank of China*[785], the bank did not explicitly state that it was rejecting the documents. Instead, it sent the following statement: '*We are contacting the applicant of the relative discrepancies. Holding documents at your risks and disposal*.' The Court concluded that this statement was merely "a status report" rather than a valid notice of refusal, in that it left an open possibility that the allegedly discrepant documents might have been accepted in future.[786] Nonetheless, the ambiguous and uncertain circumstances above would not happen under UCP600 by virtue of involving a distinct requirement of express refusal. It is not necessary to state the exact word of "refuse", but the minimum requirement is that the intention of refusal should be expressed in the notice. Without doubt, the onus should lie on the refusing bank to communicate its intention in explicit and unambiguous terms to signify the refusal. It is a popular development of the UCP600, since it has removed uncertainty and clarified the practical situation.

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[783] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 147

[784] *Bayerische Vereinsbank AG v National Bank of Pakistan* [1997] 1 Lloyd's Rep 59 (QB); *ICC Opinions 2005-2008*, R694

[785] *Voest-Alpine Trading USA Corp v Bank of China* 288 F 3rd 262 (5th Cir 2000) 266

[786] The post-refusal waiver was not permitted before the UCP600, so that there was no excuse of waiting a post-refusal waiver for the refusing bank. By contrast, in *Cooperative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank (The Royan)* [1987] 1 Lloyd's Rep 345 (QB), the refusing bank stated: '*Please consider these documents at your disposal until we receive our Principle's instructions concerning the discrepancies mentioned in your schedules*.' The Court of Appeal reversed the award of the first instance and concluded that this notice constituted a rejection of the documents.

6.4.3 Each discrepancy

The UCP600 Article 16 (c) (ii) requires that a notice of refusal 'must state each discrepancy in respect of which the bank refuses to honour or negotiate.'[787] "Each discrepancy" in the UCP600 does not make any significant differences with "all discrepancies" in its previous edition.[788] The essence of "each discrepancy" is to highlight that the bank has only one chance to state discrepancies in its notice of refusal. This provision shares the same purpose with the requirement of "a single notice', which is to improve the efficiency of documentary transactions and to leave more opportunities for the beneficiary to make a representation.[789] Obviously, the principle of irreversibility is applied to the statement of "each discrepancy", so that '*a bank will be estopped from subsequent reliance on a ground for dishonour if it did not specify that ground in its initial dishonour.*'[790] Similarly, the bank has to be responsible for wrongful refusal in respect of initially ill-founded discrepancies, even if there are other genuine discrepancies in the presented documents. Should the rejected documents be represented, the bank is only entitled to claim the uncured discrepancies which are previously listed in the notice of refusal rather than any fresh discrepancies absent from the original notice.

In addition, there is an implied obligation on the bank that the identified discrepancies must be stated with sufficient clarity and precision. Although the UCP600 has not expressly mentioned this point, the requirement is actually in accordance with the spirit of stating "each discrepancy", which aims to clearly communicate all the discrepancies

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[787] The Common Law position is different from the UCP. Under Common Law, a bank would be able to rely on subsequent discrepancies unless the beneficiary shows he has relied on the first communication to take some actions. (See *Kydon Compania Naviera Co v National Westminster Bank Ltd (The Lena)* [1981] 1 Lloyd's Rep 68 (QB))

[788] UCP600 Article 14 (d) (ii) See also Gary Collyer, *Commentary on UCP600: Article by Article Analysis by the UCP600 Drafting Group* (ICC Publication No.680, ICC 2007) 145

[789] In some exceptional circumstances, the Court may allow the bank to send a second notice to confirm the first communication. However, the second notice cannot add more discrepancies and make a benefit for the first notice.

[790] *Kerr-McGee Chemical Corp v Federal Deposit Insurance Corp* 872 F 2D (11th Cir 1989) See also *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443; *Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd* [1991] 2 HKLR 35

with the presenters and let them rectify the discrepancies as soon as possible. In *Korea Exchange Bank v Standard Chartered Bank*,[791] the court held that the notice of refusal stating that "*Certificate of origin Form A presented and shows content inconsistent with other documents*" was inadequate, because the presenter was not clear what would need to be rectified.[792] It is worth noting that the obligation to state each discrepancy with precision should lie on the refusing bank. Arguably, the requirement of "a single notice" will prevent the bank from sending a subsequent communication with clarification to make up the ambiguities in the original notice.[793] As a result, the refusing bank should carefully list each discrepancy with precision on a single notice of refusal.

An exceptional circumstance regarding the statement of discrepancy is when the presentation is out of time. It has been established that a presentation after the expiry date of the credit is not a discrepancy which must be stated in the notice.[794] Late presentation after the expiry date is a matter dealt separately in the UCP, which does not belong to provisions regarding documentary examination.[795] However, Professor Ellinger doubts that the situation might be changed under UCP600 since 'the definition of "a complying presentation" [in the UCP600] is wide enough to cover documentary requirements and other terms of the credit which are not documentary in nature, such as expiry date.'[796] Therefore, 'to be safe, a bank that decides to reject a presentation should state all the discrepancies, whether documentary or otherwise, so as to avoid any risk of being prejudiced by the preclusion in Article 16 (f).'[797] Although Professor

[791] *Korea Exchange Bank v Standard Chartered Bank* [2005] SGHC 220, [2006] 1 SLR 565 [12]
[792] By contrast, for example, "Documents show gross weight inconsistent with each other" suffices. See *ICC Opinions 2005-2008*, R672; *ICC Unpublished Opinions 1995-2004*, R578
[793] See *ICC DOCDEX Decisions 1997-2003*, No.223; *ICC Opinions 2005-2008*, R272
[794] *Bayerische Vereinsbank AG v National Bank of Pakistan* [1997] 1 Lloyd's Rep 59 (QB) 67
[795] For example, the UCP500 Articles 43-45dealt with a presentation after the expiry date, which fell apart from Articles 13-14 stipulated examining and determining presentation. In the UCP600, Article 29 also deals with presentation out of time.
[796] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 244
[797] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 121

Ellinger puts forward his point on the grounds of bank security, with full respect, the author still doubts the practicality.

The author still proposes that the late presentation does not belong to the scope of discrepancy covered under Article 16. If the bank receives a presentation out of date and agrees to examine the documents, then the bank will be deemed to have applied a waiver and should be estopped from using the expiry date as a defence during the period of examination and determination. In addition, as analysed above, the purpose of stating each discrepancy is to leave more opportunities to the beneficiary to make a new presentation which could rectify all the found discrepancies. After the credit has expired, there should be no more representation under the credit. Thus, regarding the out of time presentation as one of discrepancies is not in accordance with the intention of UCP600 Article 16. Furthermore, the expiration of a presentation is so evident to the beneficiary that mentioning it in the notice of refusal is not even necessary. Therefore, in the author's opinion, a presentation out of time should not belong to a kind of discrepancy that falls under the scope of UCP600 Article 16 (c) (ii).

6.4.4 Disposal of rejected documents

UCP600 Article 16 (c) (iii) offers four options for the bank concerning disposal of documents stated in a notice of refusal.[798] Among them, Options (a) and (c) follow the previous version provided in the UCP500 Article 14 (d) (ii),[799] while Options (b) and (d) are new developments in the UCP600 based on practical needs. Essentially, the presented documents after rejection should belong to the property of the presenter, so that 'the bank is required to act in a manner that respects the ownership of the

[798] Article 16 (c) (iii) states: 'a) that the bank is holding the documents pending further instructions from the presenter; or b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or c) that the bank is returning the documents; or d) that the bank is acting in accordance with instructions previously received from the presenter.'

[799] UCP500 Article 14 (d) (ii) states: 'Such notice must state all discrepancies in respect of which the bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presenter.'

documents by the beneficiary.'[800] Clearly, since the beneficiary can easily control the refused documents, major controversies will not be incurred by choosing Options (a), (c) and (d), which respectively relate to returning documents, following the presenter's instructions and holding the documents pending instructions from the presenter.

Nonetheless, Option (b), which stipulates that the bank will hold the documents pending a decision of the applicant as the post-refusal waiver, may not be constituted as an unconditional disposal of the documents. In this case, the bank will refuse the immediate payment first and leave the door open for the applicant who might become a post-refusal waiver. This method was previously considered as "a continuing threat of conversion of documents" by the case law.[801] However, as analysed below, the assertion is contrary to the best practice and market expectations, since in the majority cases the applicants prefer to give up the discrepancies. Moreover, it is much easier and far more secure for the bank to ask for a post-refusal waiver than to approach a pre-refusal waiver.[802] As Professor Byrne analysed, to conclude that the bank cannot hold the documents pending a post-refusal waiver would be a regrettable interpretation, which places formality over substance.[803] Consequently, in the author's view, it is a significant development in the UCP600 which formally recognises that there is an option for the bank to hold the documents pending for a post-refusal waiver.[804]

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[800] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 148

[801] *Credit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm) In this case, the notice stated "Should the disc being accepted by the applicant, we shall release the docs to them without further notice to you unless yr instructions to the contrary received prior to our payment". The judge decided that the notice fails to indicate that the documents are being returned to or held at the disposal of the presenter. Moreover, the conditional nature of this rejection cannot be saved by the potential acceptance. See also *ICC Unpublished Opinions 1995-2004*, R540; *ICC Opinions 2005-2008*, R634

[802] The reasons for "much easier and securer" are from two aspects. Firstly, the Court will not be suspicious that whether the bank has taken its sole determination or delegated the obligation of examination to the applicant, since the bank who seeks a post-refusal waiver has to consult with applicant after its sole determination. Secondly, the time limit for approaching a pre-refusal waiver is no later than five banking days, and the bank which is over the time limit will be precluded to alleging any discrepancies. By contrast, there is no time limit for the bank who is approaching the applicant for a post-notice waiver

[803] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 148

[804] The legal party in the Option (b) to approach the applicant for a post-refusal waiver is only the issuing bank. Though the other nominated bank might be entitled to seek a post-refusal waiver in theory, the optimal party is the issuing bank because it can make a conclusive decision concerning the payment. Meanwhile, there is no time limit to approach a post-refusal waiver, so that the barrier for a nominated bank which skips an issuing bank to directly approach the applicant will be eliminated.

In addition, similar to other elements in a notice of refusal, such as "express refusal", "a single notice" and "each discrepancy", the principle of irreversibility is also applied to the disposal statement. If the bank desires to change from Option (a) to Option (b) due to receiving a subsequent waiver from the applicant, it must obtain an approval from the presenter before releasing the documents to the applicant; otherwise, it will constitute inconsistence with the statement in the previous notice and will suffer the liability associated with that action.[805] Nevertheless, Article 16 (e), as a new development in the UCP600, is trying to solve the practical problem met by the bank which has selected to hold the documents. Art. 16 (e) stipulates that the bank which has chosen Option (a) or (b) is entitled to return the documents to the presenter at any time. It resolves the previous difficulty that there was no international practice concerning the length of time for a bank to return the documents unless receiving further instructions from the presenter.[806] Thus, in the author's view, Article 16 (e) has effectively solved the dilemma, since the bank would not be obliged to get permission before returning the retained documents to the presenter anymore.[807]

It is obvious that the bank should cover the status of all the presented documents whichever option has been chosen. Failing to include one set of presented documents in the statement will constitute a deficient notice.[808] More importantly, the presented documents must be disposed unconditionally in a notice of refusal. In *Bankers Trust* case, the issuing bank sent a notice which stated "*The documents will be at your disposal when you have paid*".[809] Lloyd LJ held that the notice was discrepant, because it was contrary to the purpose of Article 16 (d) [equivalent to Article 16 (c)] which aimed to put back the rejected documents in circulation as soon as possible.

[805] *ICC Opinions 1995-2001*, R421, R429, also see Part 6.5.1 below.
[806] *ICC Opinions 1995-2001*, R429
[807] Due to principle of irreversibility, the rule is clear that any disposal option cannot be changed without permission from the presenter. Article 16 (e) therefore seems to cause an exceptional situation from the rule. With Article 16 (e), the bank can easily change from the "hold" option to the "return" option, i.e. changing from Option (a) or (b) to Option (c). However, the statement in Article 16 (e) does meet with the commercial needs.
[808] *Bayerische Vereinsbank AG v National Bank of Pakistan* [1997] 1 Lloyd's Rep 59 (QB)
[809] *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA) 452

Lloyd LJ further clarified that '*neither Article 16 itself, nor the special terms of this credit, entitled the issuing bank to retain the documents as security for repayment by the defendants.*'[810] Meanwhile, Lloyd LJ compared this case with *The Royan*[811], in which the bank had unconditionally disposed the documents. The statement of "*These documents at your disposal until we receive our Principal's instructions…*" just expressed the hope to come to an agreement between traders in the future, and actually the documents were still at the disposal of seller until reaching an agreement. Therefore, Lloyd LJ concluded that,[812]

> '*the difference between a telex saying that documents are being held at the disposal of the sellers* until *something happens, and a telex saying that documents will be at the disposal of the sellers* when [or after] *something happens may seem narrow. But the difference is critical. In the one case the documents are held unconditionally at the disposal of the sellers. In the other case, not.*'

Clearly, the position of UCP600 Article 16 (c) (iii) Option (b) is in line with the above justification, since Option (b) indicates that the bank is holding the rejected documents at the disposal of the seller until the applicant agrees to accept the discrepancies. Moreover, Option (b) also stipulates that the bank is obliged to act according to the presenter's instructions prior to agreeing to accept a waiver. It actually grants the presenter a choice in respect of whether to remain in the same transaction. Therefore, the documents are still held unconditionally at the disposal of the seller up to the moment that the applicant waives the discrepancies. The presenter, which has been fully informed the situation by the disposal statement in the notice of refusal, can promptly instruct the bank of his decision. It should be noted that apart from waiting for a post-refusal waiver as stated in Option (b), the bank has to send a notice with

[810] *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA) 452
[811] *Cooperative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank (The Royan)* [1988] 2 Lloyd's Rep 250 (CA)
[812] *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443 (CA) 452

unconditional disposal statement, by either holding the documents on the presenter's behalf or return the documents to the presenter.

6.5 Post-notice obligations on the bank

The points mentioned above concentrate on the disputes arising from the disposal statements on a notice of refusal itself. However, the bank is still obliged to comply with its disposal statement and fulfill its post-notice obligations, i.e. taking actions or inactions in accordance with the statements on a notice of refusal. The reason is that the rejected documents, especially those functioning as the document of title, are tightly connected with the beneficiary's rights and security. Thus, if there are any divergence between further actions taken by the bank and the disposal statement, the beneficiary might lose opportunities to re-present the conforming documents before the credit expiry date or suffer huge economic loss. Based on the practical needs and market expectations, the author will endeavor to analyse the existing situations and interpret each aspect of post-notice obligations on a bank with regard to the most recent case, so as to achieve the goal of supplementing this incomplete area in the current UCP system.

6.5.1 Compliance with statements in the notice of refusal

After serving a notice of refusal, the bank must act in compliance with the disposal statement on its notice, no matter which option the bank has chosen. Taking the UCP500 as an example, Article 14 (e) expresses that the preclusion rule will be triggered when the bank "fails to hold the documents at the proposal of, or return them to the presenter". In *Credit Industriel et Commercial v China Merchant Bank*,[813] the preclusion rule in the UCP500 took effect on the post-notice obligations. Based on a security suspicion, the issuing bank refused to release the documents to the presenter's officer, even though it had received the "return" instruction from the presenter. The court concluded that the consideration of security was not a legitimate justification,

[813] *Credit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm)

and the issuing bank had failed to act in accordance with the disposal statement on its notice. As a result, the issuing bank was precluded from relying on any alleged discrepancies by virtue of the UCP500 Article 14 (e).

Another illustration can be found in one of the ICC opinions under the UCP500.[814] The issuing bank had provided a qualified notice of refusal, which stated "Documents at your disposal, we await instructions". However, after the "return" instruction, the presenter only received part of the presented documents with the omission of 1/3 bills of lading and two invoices. The ICC Banking Commission concluded that the issuing bank was required to return the documents in the same number and content as received. Failure by the issuing bank to hold documents at the disposal of the presenter would preclude the issuing bank from claiming that the documents were not in compliance with the terms and conditions of the credit. Therefore, the issuing bank was obliged to honour the documents and indemnify the loss caused to the presenter.

Compared with the UCP500 Article 14 (e), the preclusion rule in the UCP600 Article 16 (f) has deleted certain words for achieving conciseness. It merely refers to the effect of failing to act in accordance with the provisions stated in the Article 16. However, there are no words in the UCP600 Article 16, which have specifically mentioned the effect of failing to hold the documents at the proposal of, or return them to the presenter. Unexpectedly, the deliberate omission of the words causes unnecessary controversies and various suspicions in academia. Professor Ellinger argues that 'the omission could be due to the inclusion of two additional options in Article 16(c) (iii) and in any event, the language of Article 16 (f) is wide enough to cover any failure…'[815] By contrast, Professor Byrne infers that 'the removal of this provision arguably takes it outside the scope of the UCP600 preclusion rule.'[816]

[814] Gary Collyer & Ron Katz (eds), *Unpublished opinions of the ICC Banking Commission 1995-2004* (ICC Publication No.660, 2005) R546
[815] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 245
[816] James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) 151

The English courts just solved this confusion by virtue of interpretations in *Fortis Bank & Stemcor v Indian Overseas Bank*,[817] in which the court for the first time clarified the bank's post-notice obligations under the structure of UCP600. In *Fortis Bank*, the issuing bank had duly served a qualified notice of refusal, but in fact it failed to arrange the return of documents with reasonable promptness to the presenter in accordance with its disposal statement. Based on "the best practice and the reasonable expectations of experienced market practitioners",[818] both the court of first instance and the Court of Appeal concluded that the actions or inactions of the issuing bank subsequent to a "return/hold" notice should fall under the obligations imposed by Article 16. Therefore, the issuing bank, which failed to act in compliance with its disposal statements, would "be precluded from claiming that the documents do not constitute a complying presentation"[819]. It is clear that both courts have provided a right conclusion, which would satisfy the market expectations, as well as properly follow the spirit of the UCP600. The conclusion also reflects the application of the principle of irreversibility, namely, the bank which only has one chance to make an unambiguous choice when rejecting the documents under Article 16 is required to act on it.

However, the methods adopted by each court to interpret the UCP600 seemed a little divergent. The Court of Appeal was reluctant to recognise the method of implication adopted by Hamblen J in the first instance. Thomas LJ held that '*there would be real difficulties in using a rule of national law as to the implication of terms (if distinct from a method of construction) to write an obligation into the UCP.*'[820] He emphasised that an obligation to act in accordance with the statement of refusal notice should be as a matter of necessity, either through interpreting the UCP600 or in respect of the

[817] *Fortis Bank v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 All ER (Comm) 28 affd [2011] EWCA Civ 58, [2011] 2 All ER (Comm) 288
[818] Suggested by Sir Thomas Bingham in *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA) 148
[819] UCP600 Article 16 (f)
[820] *Fortis Bank v Indian Overseas Bank* [2011] EWCA Civ 58, [2011] 2 All ER (Comm) 288 [55]

commercial needs.[821] Therefore, the Court of Appeal decided to choose a less intrusive way, the purposive interpretation, to achieve the same result. In the author's opinion, the method adopted by the Court of Appeal did give much more certainty than the way of implication. Since the UCP aims to provide a practical and efficient framework to assist parties involved in documentary credits, banks are required to reasonably act on the wording of the UCP rather than to behave as a lawyer to evaluate the implication of each term.

In conclusion, there is no doubt that the issuing bank has the obligations to act in accordance with its disposal statement in Article 16. Clearly, for UCP600, omission of reference words from the preclusion rule under UCP500 is hardly reaching the impact of precision and certainty. Conversely, it has brought judicial creation of obligations within the UCP framework, which may give rise to uncertainty and excessive speculation. For this reason, the omission of words in the UCP Article 16 (f) may become one of "unsatisfactory deletions" and causes unnecessary misunderstanding.[822] Since 'interpretation must be the exception rather than the rule',[823] the author tentatively suggests that express words should be inserted into the article to ensure the performance of the post-notice obligations. The express wording for imposing post-notice obligations can be added into Article 16 (c), i.e. "… it must give a single notice to that effect to the presenter *and precisely act in accordance with this notice with reasonable promptness.*" Alternatively, the express wording can be kept in Article 16 (f), i.e. "... *fails to hold the documents at the disposal of or return them to the presenter*, it shall be precluded from claiming…"[824]

[821] ibid [37] The Court of Appeal proved that Article 16 (e) is only necessary when an obligation to act in accordance with the notice has been imposed by Article 16 (c).
[822] James Byrne and Lee Davis, 'New Rules for Commercial LCs under UCP600' in James Byrne (ed) *2008 Annual Survey of Letter of Credit Law & Practice* (IIBLP 2008) 33-37
[823] Andrea Lista, 'The Need for Speed: Court of Appeal Interprets UCP 600' (2011) 11(4) STL 1, 3
[824] UCP500 Article 14 (e)

6.5.2 Time and mode to perform the post-notice obligations

There are no express provisions in the UCP600 concerning the time and mode to perform the post-notice obligations. It is suggested that the refusing bank needs to return the presented documents or follow the further instructions from the presenter within a period of time according to its disposal statements. However, '*where there is a contractual obligation which needs to be performed within a period of time but that period has not been expressed it will generally be implied that it is required to be performed within a reasonable time.*'[825] Moreover, a reasonable time means the documents should be returned "with reasonable promptness" in the international banking context.[826]

Timeous performance is considerably important to international trade. '*As the documents are property of the beneficiary before the issuing bank accepts them/pays under the L/C, it is perfectly legitimate for the beneficiary to demand return of the documents and to make re-presentation, so long as the relevant time limits permit it.*'[827] Hence, returning documents within reasonable promptness will provide more opportunities for the beneficiary to rectify and re-present the documents. Meanwhile, it may avoid the beneficiary's financial losses for demurrage or storage costs and promote the business efficiency to resell. Consequently, this requirement indeed "*reflects the best practice and reasonable expectations of market practitioners*".[828]

In addition, timeous performance does comply with the spirit of the UCP600 and succeeds with the established principles in the past. Referring to the ICC DOCDEX Decision No. 242 subject to UCP500, the experts suggested that 'the timely return of dishonoured commercial documents required priority processing.'[829] Meanwhile,

[825] *Fortis Bank v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 All ER (Comm) 28 [72]
[826] ibid [71]
[827] *Rafsanjan Pistachio Producers Cooperative v Bank Leumi (UK) Ltd* [1992] 1 Lloyd's Rep 513 (QB) 531
[828] *Fortis Bank v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 All ER (Comm) 28 [43]
[829] ibid [73]

experts maintained that the issuing bank was obliged to act in accordance with the "minimal standard", namely, "documents should be returned without delay and by expeditious means" once the "return" notice was sent.[830] The *Fortis Bank* case essentially affirmed the expert opinions and applied them to the bank's obligations under UCP600. Hamblen J concluded that the issuing bank had an obligation to comply with its disposal statement to return the presented documents with "reasonable promptness" under UCP600 Article 16. In addition, Hamblen J defined the scope of performing the post-notice obligations in relation to a "return" or "hold" notice. 'Whilst the statement made is that the issuing bank "is" returning the documents that would not be understood as meaning that it is already in the process of doing so.'[831] Similarly, the "hold" notice is only limited to the obligation that the issuing bank will comply promptly with further instructions and dispatch the documents by expeditious means, rather than that 'the issuing bank has established the means for prompt compliance with any future instruction for the return of the documents.'[832]

Subsequently, Jonathan Hirst in the High Court made a breakthrough concerning this point.[833] Considering the expert's views within the context of UCP600, he suggested that '*the obligation to return the documents within reasonable promptness must be considered in the context where UCP 600 set a five banking day limit for the paying bank to decide whether to accept or reject the documents – a more onerous task than making arrangements to return the documents – and in the light of the commercial importance of getting the documents back to the presenter. On the other hand an obligation to act with reasonable promptness is not the same as a duty to act immediately, and it implies some flexibility before a bank is to be treated as precluded from taking an important point.*'[834] Therefore, balancing these factors, Jonathan Hirst

[830] ibid [74] However, the experts do not have the authority to establish a standard for an exact time period to return documents once the notice is sent.
[831] ibid [78]
[832] ibid [79]
[833] *Fortis Bank & Stemcor v Indian Overseas Bank* [2011] EWHC (Comm) 538, which is the latest trial regarding to the damage issue.
[834] ibid [34] Obviously, the post-obligations should be separate from the obligations of examination and determination, so that the time limit should be calculated separately against the time limit in Article 14(b)

held that '*in the absence of special extenuating circumstances, a bank which failed to despatch the documents within three banking days would have failed to act within reasonable promptness.*'[835]

Obviously, the implication of above judgement is that the bank should fulfil the post-notice obligations to return the documents or follow the further instructions from the presenter within three banking days. Meanwhile, the "special extenuating circumstances" mentioned by the judge will leave certain reasonable latitude for variation and flexibility. However, the burden of proof would lie on the refusing bank which asserts "special extenuating circumstances". Compared with the previous situations, the presenter, who claims that there was an unreasonable delay caused by the refusing bank, would normally bear the burden of proof. Currently, the time criterion for performing the post-notice obligations is self-evident, so that it turns to the refusing bank to illustrate the circumstances causing delay. Furthermore, in the author's view, the refusing bank still needs to prove that it has fulfilled due diligence even under special circumstances. It appears to constitute a balanced position between the refusing bank and the presenter. More responsibility will be taken by the refusing bank which controls the process of performance, and more protection will be given to the presenter which comparatively stands in a weak position.

Although the *Fortis Bank* case has made a significant improvement regarding the time issue of the post-notice obligations, it did not clearly emphasise the means to return the documents or the ways to follow the further instructions. In the author's opinion, the means of despatch can be analogous to the manner of serving a rejection notice. Thus, the issuing bank should fulfil the obligations *by courier or if that is not possible, by other expeditious means*. However, the refusing bank is not bound by whether the documents will safely arrive within the period of time.[836] Under the particular

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and Article 16(d).

[835] ibid [35]

[836] The issuing bank does not have an obligation to guarantee the documents will arrive with reasonable promptness. The only obligation imposed on the bank is that it should choose the most expeditious

circumstances, the bank is entitled to use the *force majeure* clause in the UCP600 Article 36 as a legitimate excuse for the circumstances beyond its control.

6.5.3 Conditions of the returned documents

The condition of the refused documents is a crucial point for both traders and banks, in that their interests and security are highly connected with these documents, especially certain documents which represent documents of title, such as bills of lading. Although both the UCP and the English Courts did not particularly stress the condition of the returned documents, it is self-evident that the bank should return all the presented documents at the same time and the minimum limit is to return the documents in the same manner as they were received.[837] It is clear that the authorisation of instructions from the presenter cannot be a legitimate excuse for the bank to retain the documents, especially after the UCP600 Article 16 (e) expressly states that the bank choosing a "hold" notice is entitled to return the documents to the presenter at any time.[838] However, whether there is a necessity to re-endorse the refused documents is still a controversial issue at the moment. There is no express requirement under Article 16 as to whether the refusing bank should re-endorse the bill of lading back to the presenter when returning it, which has been previously endorsed in favour of the refusing bank. Apparently, absent from re-endorsement, the presenter may suffer practical difficulties, because he is not a legal party to ask for delivery of goods from the carrier and he is also not entitled to claim any loss caused by the carrier.[839]

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means to return or despatch the discrepant documents within reasonable promptness.

[837] *Credit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm) [77] See also *ICC Opinions 2009-2011,* R744. In this case, the Banking Commission pointed out that the bank which privately endorsed the rejected bill of lading to the applicant had breached the obligation under the UCP600 Article 16 (c) (iii), since it could not return the rejected documents in the same form as received.

[838] In *Credit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm), the judge stressed the inconsistent actions taken by the issuing bank and concluded that the authorisation was not a legitimate point for the issuing bank to retain the documents.

[839] By virtue of the Carriage of Goods by Sea Act 1992 (COGSA 1992) s 2 (1) (a), the lawful holder of a bill of lading has been transferred all rights of suit under the contract of carriage.

The reference concerning the conditions of the returned documents can be reflected from the ICC Opinions R214. The confirming bank argued that 'although the documents have been physically remitted to the confirming bank, they were, from a legal point of view, not returned (documents were not endorsed by the issuing bank back to the confirming bank).'[840] Nevertheless, the expert gave the opinion that 'the confirming bank has no right to object to the procedure followed by the issuing bank, and the confirming bank cannot expect the issuing bank to endorse documents which it has not agreed to take up under the documentary credit.'[841] Moreover, since the refused documents are recognised as the property of presenter, the refusing bank has no authority to make any changes to them. As *Benjamin's Sales of Goods* suggests, 'the obligation is physically to return the documents; there is no concept of "return in law".'[842] In respect of Opinion R214, the author in *Jack in Documentary Credits* also recognises that 'if the issuing bank rejects the documents, it is under no obligation to indorse them over to the presenter, even though this may cause difficulties to the presenter in recovering the goods.'[843] Furthermore, based on the very harsh consequences that would be borne out without re-endorsement, 'it might be argued on the contrary that a term for re-endorsement could be implied into the issuing bank's contract with the beneficiary.'[844] In *Fortis Bank v Indian Overseas Bank*[845], Hamblen J endeavoured to distinguish the current situation with the facts of Opinion R214. He acknowledged that the presenting bank cannot complain for non-endorsement after receiving the documents in respect of the Opinion R214; however, for the current case, Hamblen J held that the presenter was entitled to get re-endorsed documents since the request was sent prior to the return of the documents.

Regrettably, the Court inferred this conclusion through analysing the facts of the individual case and it did not strongly affirm that the bank was obliged to re-endorse

[840] *ICC Opinions 1995-2001*, R214
[841] ibid
[842] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-184
[843] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 5.75
[844] ibid
[845] *Fortis Bank v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 All ER (Comm) 28 [86]

the refused documents according to the presenter's instructions. Meanwhile, in the author's opinion, it is a thorny task to construe re-endorsement as an implied term in the contract between the beneficiary and the issuing bank, since uncertainty will be generated without evaluating the intention of parties. Nonetheless, it is true that 'the UCP is designed to facilitate the making of payment against documents in international trade; it should not be construed as encouraging the paralysis that would result from a bill of lading remaining endorsed in favour of a party with no interest in either claiming the goods the bill represents or negotiating the bill with a party that has such an interest.'[846]

It is impossible for the UCP to include all the existing controversies in practice, although the UCP was designed to be a complete self-contained code. As a result, on the basis of current UCP provisions, the author tentatively proposes a solution to the dilemma between the certainty and efficiency. In the author's opinion, the solution could be found from modifying contracts. On the one hand, the bank can insert a clause into the letter of credit, which declares that the bank has no liability or responsibility for the legal effect of re-endorsement according to the presenter's instructions. That clause is fit for the principle of autonomy under documentary credits, in that the bank is presumed as an innocent third party without any knowledge to the debates resulted from the underlying facts of re-endorsement.[847] On the other hand, the beneficiary, who may meet with difficulties without endorsement, should insert a re-endorsement clause into the sale contract, so that the applicant has to follow the sale contract and make a re-endorsement clause into the contract of application involved with the issuing bank.[848] Consequently, the certainty of contract can be guaranteed, as well as the goal of facilitating transactions can be achieved.

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[846] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para.23.184

[847] For example, sometimes the beneficiary is a different person from the presenter when the presenter has transferred his right to get the deferred payment to another person in order to obtain financing immediately. Thus, in this circumstance, the re-endorsement back to the presenter rather to the actual beneficiary is likely to trigger a controversy.

[848] The confirming bank also needs to be cautious because sometimes the confirming bank may negotiate the documents without recourse prior to forwarding the documents to the issuing bank for reimbursement. If the issuing bank refuses the documents, the problematic documents will belong to the

6.6 The preclusion rule

As the UCP600 Article 16 (f) stipulated, 'if an issuing bank or a confirming bank fails to act in accordance with the provisions of this article [Article 16], it shall be precluded from claiming that the documents do not constitute a complying presentation.' Obviously, the consequence of the preclusion rule is rather powerful since an issuing or confirming bank is obliged to honour or negotiate regardless of whether the presentation is compliant, and also regardless of whether it has a right to ask for reimbursement. 'In the absence of any real detriment to the presenting party, one may wonder whether a court would give this provision a rigid, literal interpretation such that even a minor, technical breach is fatal to the bank's right to rely on the non-compliance of the presentation.'[849] One reason is that the preclusion rule as "a fitting pro-beneficiary rule" could 'counterbalance the usually pro-issuer rule of strict compliance'.[850] Moreover, in the context of international trade, the nature of international transactions is dealing with documents which represent for the contracted goods. The application of the preclusion rule will force the bank to obey the UCP provisions precisely and create more opportunities for the presenters to re-present the cured documents. Even if the discrepancies pointed out by the bank cannot be cured, the application of the preclusion rule can still hasten the speed to release the refused documents to the presenter.[851] Therefore, from a commercial perspective, the preclusion rule with draconian consequences has perfectly satisfied the needs of markets.

However, two issues concerning the preclusion rule need to be analysed here. Firstly, the preclusion rule does not take effect on any other UCP600 provisions apart from

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confirming bank and the dilemma of re-endorsement will be faced by the confirming bank. Therefore, it is advisable for the confirming bank to insert the analogous clause into a bank-to-bank contract with the issuing bank.

[849] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) p.245

[850] John F. Dolan, *The Law of Letters of Credit: Commercial and Standby Credit* (4th edn, A S Pratt 2007) Vol.1, p.6-83

[851] See *Fortis Bank v Indian Overseas Bank* [2010] EWHC 84 (Comm)

Article 16. The only criterion to attract the preclusion rule is that an issuing or confirming bank fails to comply with the provisions in Article 16. Therefore, in order to determine the scope of the preclusion rule, it is extremely essential to clarify the content of obligations under UCP600 Article 16. Secondly, the legal party which is bound by the preclusion rule stated in the UCP is either an issuing bank or a confirming bank. A non-confirming nominated bank, since it makes no promise to honour or negotiate the documents, is not subject to the preclusion rule. Nonetheless, the legal consequence caused by a non-confirming nominated bank still requires discussion, especially at the time of failing to perform the obligations under Article 16. These issues will be discussed in the following parts.

6.6.1 Scope of the preclusion rule

It is self-evident that each express point under the UCP600 Article 16 (c) and (d) is bound by the preclusion rule, which covers timing, mode of communication, form and content of a refusal notice. Since a minor breach is sufficient to trigger the preclusion rule with draconian consequences, the bank should be extremely cautious to fulfil its obligations and follow the suggestions given in the above parts respectively. However, there are still several questions left in relation to the scope of the preclusion rule, especially for those which cannot be easily observed from the appearance of the words.

6.6.1.1 Residual issues covered by the preclusion rule

The first issue is whether the default of independent determination should belong to the scope of the preclusion rule. It is clear that the bank, which breaches the obligation to examine and determine the compliance of a presentation as required by Article 14 (a), would not attract preclusion. Although Article 16 does not directly stipulate such provision, it proceeds on the basis that a bank has independently determined a non-compliant presentation. In particular, Article 16 (b) states that an issuing bank may in its sole judgement approach the applicant for a waiver of the discrepancies. It seems to imply that the bank should perform its obligation of determination independently

and the purpose to approach the applicant is only for seeking a waiver. Arguably, if the bank invites the applicant to play any role in the process of determination or blindly follows an instruction from the applicant to refuse documents, the bank defaults on its obligations under UCP and the actions commit further infringements to Article 16. Accordingly, in the author's opinion, the action of relegating an issuing bank to the status of "post office" should fall into the scope of preclusion rule.[852]

The second problem is whether the wording of the preclusion rule in the UCP600 Article 16 (f) should extend to the failure to handle documents in accordance with the notice of refusal. This controversy is derived from an unsatisfactory deletion of the words compared with the preclusion rule under the UCP500 Article 14 (e)[853], which expressly includes both the failure of acting in accordance with the provisions of Article 14 and the failure of taking further actions following a disposal statement. 'This omission could be due to the inclusion of two additional options in Article 16(c) (iii) and in any event, the language of Article 16(f) is wide enough to cover any failure to hold documents at the disposal of or to return the documents to the presenting party if either of these options is indicated in the notice of refusal.'[854] Furthermore, in the *Fortis Bank*[855] case, the judge affirmed that the omission in wording was not intended to change the scope of the preclusion rule, since this decision would reflect the best practice and the expectations of practitioners. '*The effect of not returning the documents or doing as the presenter instructs has very similar consequences to a delay in making a decision on the documents – the presenter cannot deal with the goods.*'[856] Consequently, despite the fact that the preclusion rule is considerably more abridged than its previous version, the failure to handle documents in accordance with the statement in a notice of refusal should definitely be covered.

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[852] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para.23.189

[853] The UCP500 Article 14 (e) states: 'If the Issuing Bank and/or Confirming Bank, if any, fails to act in accordance with the provisions of this Article and/or fails to hold the documents at the disposal of, or return them to the presenter, the Issuing Bank and/or Confirming Bank, if any, shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the Credit.'

[854] Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) p.245

[855] *Fortis Bank & Stemcor v Indian Overseas Bank* [2011] EWCA Civ 58

[856] *Fortis Bank & Stemcor v Indian Overseas Bank* [2011] EWCA Civ 58, para.44

6.6.1.2 Issues not covered by the preclusion rule

The most significant controversy centred on the scope of preclusion rule is whether the examination time in the UCP600 Article 14 (b)[857] should be covered. Apparently, under UCP600, the time of examination in Article 14 (b) co-exists with the time rules in the Article 16. Due to sharing the same maximum five banking days, it is suggested that Article 14 (b) should be read in tandem with Article 16 (b) and Article 16 (d). Surprisingly, the express wording in the preclusion rule has already defined its application within "the provisions of this article", i.e. Article 16 itself. However, this issue has only emerged since the UCP500 revision, because under UCP400 the time rules were not divided into two articles and partially separated from the preclusion rule.[858] Even though the provision regarding the time of examination had been moved out from the ambit of the preclusion rule in the UCP500, the remaining effect of the UCP400 was still overwhelming.[859] Moreover, the UCC Revised Article 5, which followed similar time frames as those under the UCP500, clearly indicated that late examination should be covered by the scope of the preclusion rule.[860] Hence, the majority of commenters believed that there was a glitch in the UCP500 drafting and the preclusion rule was still entitled to be triggered by late examination set out another article.[861] Nonetheless, even assuming that late examination would be covered by the preclusion rule in the UCP500, the only scenario for applying this argument was when the late examination occurred over a permitted reasonable time but no more than the outer limit of seven banking days.

[857] The UCP600 Article 14 (b) stipulates: 'A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.'

[858] The UCP400 Article 16 (c) stipulated that the bank should examine documents within a reasonable time, and the UCP400 Article 16 (d) provided that the bank was obliged to send a notice of refusal without delay to the presenter when there was a rejection. The preclusion rule in the UCP400 Article 16 (e) expressly included both of above aspects.

[859] The provision concerning time of examination was set out in the UCP500 Article 13 (a); however, the time for sending a refusal notice was provided by the UCP500 Article 14 (d) and the preclusion rule was settled down in the Article 14 (e).

[860] UCC Revised Section 5-108 (b) and (c). See John F. Dolan, 'Letters of credit: a comparison of UCP 500 and the new U.S. Article 5' J.B.L. 1999, Nov, 521-537, p.530-531

[861] John F. Dolan, *The Law of Letters of Credit: Commercial and Standby Credit* (4th edn, A S Pratt 2007) Vol.1, para.6.88

Furthermore, the situation was not fixed or improved in the UCP600, and conversely it has become more ambiguous since the concept of "reasonable time" was replaced with the word of "maximum". The continuous use of singular reference to "this article" in the UCP600 Article 16 (f) indicates that the drafters are not intended to apply the preclusion rule to Article 14.[862] In other words, it is hardly to see that the remaining effect from the UCP400 is still overwhelming after the dramatic changes in time rules through UCP500 and UCP600. Furthermore, in the author's opinion, the new time frame in the Article 14 (b) provided less room to apply the preclusion rule. Failure to take examination within five banking days would also breach the following procedure with respect to sending a notice of refusal under Article 16 (d), so that the preclusion rule will be automatically triggered. Therefore, the only arguable scenario is whether the preclusion rule should arise when the delay of examination occurs within the five banking days, provided the word of "maximum" implies the documents examination should be taken within a "reasonable time" in nature rather than a fixed five-banking-day period. However, as analysed above, the author is reluctant to accept that the criterion of "reasonable time" is still involved into the UCP600 time rules. The word of "maximum" only indicates that the drafters tend to adopt a tactful way to illustrate the allowed time limit. As a result, in the author's view, the only hypothesis for applying the preclusion rule to Article 14 (b) cannot be verified with absolute certainty. Meanwhile, the author believes that the application of the preclusion rule to the same five banking days in the UCP600 Article 16 (d) has re-affirmed the drafter's intention regarding a fixed period. The UCP may endeavour to distinguish the duty of examination with the following procedures by separating the examination time from Article 16 covered by the preclusion rule. Consequently, Article 14 (b) would not fall into the scope of preclusion rule under UCP600; however, arguably the same result will be achieved through taking effect of breach the same time limit in the Article 16 (d).

[862] James E. Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) p.134

Apart from examination time in the Article 14 (b), it is arguable that the presentation out of time should not belong to the discrepancy covered by the scope of the preclusion rule.[863] Although the lateness of a presentation can be detected from the appearance of the documents, it is suggested that, once the last date for presentation has elapsed or the credit expires, the bank is released from all obligations arising under the documentary credit, including those under Article 16.[864] However, even if the UCP does not apply, the bank can still honour or negotiate a late presentation under common law. Once the bank determines to waive its right, the doctrine of estoppel at common law will prevent the bank from relying on the lateness of the presentation anew, and the bank has to reasonably fulfil its obligations under the common law.[865]

6.6.2 Legal consequences concerning failures of a non-confirming nominated bank

On the basis of literal reading of the UCP600 Article 16 (f), the preclusion rule would not apply to non-confirming nominated banks, in that they make no promise to honour or negotiate the documents under UCP. By contrast, Article 16 (c)-(d) expressly imposes the obligations of sending a notice of refusal on a nominated bank. In practice, a non-confirming nominated bank is always delegated by an issuing bank to perform the obligations of examination and determination. In respect of the UCP600, the nominated bank should fulfil its obligations in accordance with Article 14 and Article 16; however, Article 16 (f) does not include the adverse consequences for a non-confirming nominated bank which fails to act in compliance with Article 16. In such a case, under English law at least, a nominated bank which does checking, accepting and payment is regarded as the agent of the issuing bank.[866] If the nominated bank fails to comply with the provisions under Article 16, 'the effect may be to bar the issuing bank from contending against the beneficiary that the documents

[863] See the detailed analysis concerning presentation out of time in the above part 5.4.3.
[864] *Bayerische Vereinsbank AG v National Bank of Pakistan* [1997] 1 Lloyd's Rep 59 (QB) 67, also supported by the US authority *LeaseAmerica Corp v Norwest Bank Duluth NA* 940 F 2D 345 (8th Circ 1991) and *Todi Exports v Amrav Sportswear Inc* 1997 US Dist LEXIS 1425
[865] *Kydon Compania Naviera Co v National Westminster Bank Ltd (The Lena)* [1981] 1 Lloyd's Rep 68 (QB); *Floating Dock Ltd v Hong Kong & Shanghai Banking Corp* [1986] 1 Lloyd's Rep 65 (QB)
[866] *Bank of Baroda* v *Vysya Bank Ltd* [1994] 2 Lloyd's Rep 87 (QB) 91

do not comply.'[867] Therefore, the issuing bank may incur preclusion under Article 16 (f) resulting from the failure of the non-confirming nominated bank. Although the issuing bank will be bound as against the presenter by the actions of the nominated bank, it is entitled to recover its ultimate loss from the nominated bank, which breaches the duty as the issuing bank's agent.

Nonetheless, it is worth noting that the rule of disclaimer in the UCP600 Article 37, which expresses that 'a bank utilizing the services of another bank for the purpose of giving effect to the instructions of the applicant does so for the account and at the risk of the applicant.'[868] Clearly, it cannot be a defence for the issuing bank to exempt from the liability as a principal under this circumstance. It is obviously unfair to impose all the liabilities, which are derived from the negligence of a nominated bank, on an indirect and innocent applicant. Moreover, the application of the disclaimer rule appears to conflict with the purpose of UCP which aims to place the obligations of examination and determination on the nominated banks. For those reasons, it is suggested that 'a solution may be construe Article 37 as confined to failures to follow instructions relating to the opening of a credit and not extending to the credit's realisation.'[869] Consequently, the preclusion rule in Article 16 (f) can be triggered by the failure of a non-confirming nominated bank; however, the issuing bank, as the principal of the nominated bank, will suffer this draconian consequence directly.

6.7 Conclusions

In this chapter, on the basis of the UCP600 Article 16, the author has endeavoured to analyse and clarify the bank's obligations on rejection of the presented documents. Compared with the previous UCP revisions and the case law, the author has detected certain merits and deficiencies concerning the existing UCP600 regime. Furthermore,

[867] Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 5.44, also supported by Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 120

[868] UCP600 Article 37 (a)

[869] Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 23-193; Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 5.44

the author has tentatively made suggestions towards the academic and practical controversies, in order to supplement the gaps between the UCP and the market expectations. Compared with its predecessors, the great progress made by the UCP600 has to be recognised. Nonetheless, in some aspects, the developments are still not sufficient and further improvements will still be needed.

Firstly, regarding consultation in Article 16 (b), issues involved with the consulting parties, the consulting time and consulting methods should be further considered. The bank should keep in mind that a condition precedent for consultation with the applicant in Article 16 (b) is its independent examination and determination, so that in the author's opinion, the bank which delegates examination or decision-making to the applicant will incur preclusion. Moreover, since the ICC Banking Commission did not issue guidance for the time of consultation, the safe route for the bank is to fulfil the consultation as soon as possible within the ambit of five banking days. The author tentatively suggests that the ICC Banking Commission would set out an express instruction in its opinion for the consultation time, such as 24 to 48 hours. In addition, although the UCP does not express it, the author cannot see reasons in principle why the rational nominated bank cannot be a party to approach the applicant for a pre-refusal waiver. However, the nominated bank which chooses to approach the applicant will bear a high legal risk and consume the limited time available for documentary rejection. Comparatively, the more advisable method in practice for the nominated bank is to unequivocally reject the discrepant documents and forward the documents to the issuing bank, which is entitled to wait to receive a post-refusal waiver as outlined in Article 16 (c) (iii) (b).

Secondly, the outstanding issue concerning the external conditions to serve a refusal notice in Article 16 (d) still centres on the time rules. The ambiguity remains on whether the five banking days are a safe harbour. Due to sharing the same subject with Article 14 (b), the exact situation in Article 16 (d) also needs to be urgently clarified by the ICC. Until the ICC Banking Commission clarifies, the bank should send a notice of

refusal promptly within five banking days, as long as it has concluded non-compliance. Furthermore, since the risk of choosing a mode lies with the refusing bank, a prudent bank should leave sufficient time for resorting to an alternative mode within the maximum time limit.

Thirdly, the content in Article 16 (c) and Article 16 (f) does not seem sufficient enough to cope with the practical market needs. For instance, there are no express words with respect to bank's post-notice obligations, although these obligations are fatal to the parties involved in documentary credits. The English courts have confirmed that the bank which failed to act in compliance with its disposal statement would be precluded from claiming discrepancies in the documents. The author tentatively suggests that at least one sentence concerning timely fulfilment of disposal statements should be added either in the main content of Article 16 (c) or in the preclusion rule of Article 16 (f). Moreover, with regard to the time and mode for the bank to perform the post-notice obligations, it is suggested that the bank should choose the most expeditious means to return or despatch the discrepant documents and with reasonable promptness. While, with respect to the conditions of the returned documents, the minimum limit is to return all the presented documents in the same manner as they were received. Whether or not there is a necessity to re-endorse the refused documents is still a controversial issue which urgently needs some official opinions from the ICC. In the author's opinion, until receiving the clarification from the ICC, the parties would also be able to temporarily escape from this dilemma by modifying their contracts so as to achieve the position in line with their expectations.

Last but not least, since a minor breach is sufficient to trigger the preclusion rule with draconian consequences, the bank should be extremely cautious to fulfil each obligation stipulated in Article 16. Meanwhile, in the author's view, the scope of preclusion should include the default of independent determination and the failure to handle documents in accordance with the notice of refusal. By contrast, the author proposes that, neither delay caused for pure document examination, nor the

presentation out of time should incur preclusion. In addition, although the non-confirming nominated bank is not an express party referring by the preclusion rule in the UCP600 Article 16 (f), its failure to act in accordance with Article 16 can still trigger preclusion, but the consequences will be with the issuing bank which acts as its principal.

Chapter 7 Way Forward

7.1 Overview of the thesis

Letters of credit as the life-blood of international commerce have bridged the international trade between different countries, while the UCP, which is often regarded as "soft regulation" has provided a solid backing for the operation of documentary credits and nowadays has been universally incorporated into nearly all letters of credit. Since the first version published in 1933, the UCP has been generally revised every decade, so as to keep track of modern developments and reflect the best market practice. The current revision, UCP600 published in 2007, has achieved a great success and to some degree improved significantly compared with its predecessors. Nevertheless, as mentioned in Chapter 2 of this thesis, there are still historical residuals which deter the smooth operation of documentary credits, and there are also ambiguous statements which are inconsistent with the goal of certainty. Therefore, the author believes that it is the right time to review the performance of UCP600 and contribute sensible suggestions for the next UCP revision.

Needless to say, reviewing and revising all the UCP600 rules is a daunting task and unrealistic to achieve within one thesis. As a recognised means of settlement, it is clear that the most important role for documentary credits is to provide payment assurance for international traders. Document examination and rejection, as two vital but controversial parts in a documentary credit operation, not only directly influence the cash flow but also closely link with bank's obligations under the credit. Hence, the author has particularly concentrated on the issues of document examination and rejection under documentary credits in this thesis, and further examined whether the provisions of UCP600 regarding these two areas are satisfactory and sufficient. The main question that subsequently arises in this thesis is: On what standards does a bank need to examine the presented documents so as to make a right decision, and if the

documents were deficient, what requirements does a bank need to meet for making a valid rejection? By virtue of analysing this question, the gaps between the UCP600 provisions and the market expectations for the area of documentary examination and rejection have become obvious.

In order to answer this question, this thesis has brought the aid of other ICC sources which are frequently used and referred by the court to solve the documentary credit disputes, such as the latest revision of ISBP, the ICC Opinions and DOCDEX decisions. Moreover, the author has also borrowed the experience from the English case law, which can supply dynamic and vivid examples for the documentary credit practice. Therefore, after a general introduction in Chapter 1, the author has illustrated the sources used for interpretation of UCP600 and also reviewed the relationship between the UCP and common law in Chapter 2. Meanwhile, Chapter 2 has also revealed the contractual relationship related to a documentary credit transaction and two fundamental principles in a documentary credit operation. As we have seen, the contractual relationship and fundamental principles have significantly affected the bank's position in the process of document examination and rejection.

Chapter 3, 4 and 5 of this thesis aims to answer the first research question: on what standards should a bank examine the presented documents so as to make a right decision? Chapter 3 has started with what constitutes a complying presentation under UCP600 Article 14 (a) and further analysed the overall requirements laid down for document examination under letters of credit, including doctrine of strict compliance, reasonable care and time for examination. On the basis of the different treatments provided by the UCP, the thesis has divided the presented documents into two categories, namely, generic documents mainly regulated by the UCP600 Article 14 and special documents specifically listed in other articles. In the interests of conciseness, this thesis has only selected to deal with the most important type of special documents in international trade, i.e. transport documents which are wholly or partly involved with sea carriage under UCP600 Article 19-22. The standards for examining general

documents have been discussed in Chapter 4, while the standards for examining transport documents as well as relevant bank's security have been scrutinised in Chapter 5.

After analysing the standards for document examination, a second question has become apparent: If the presented documents cannot constitute a complying presentation, how can a bank effectively and validly reject the documents? Chapter 6 has investigated bank's obligations on rejection of documents under documentary credits, which are primarily paralleled with the provisions in UCP600 Article 16. Up to here, the issues concerning document examination and rejection under UCP600 have been adequately addressed. Through describing the current rules and examining their practical performance, the loopholes in the UCP600 system have been clearly observed. Nevertheless, the merits of this thesis are not limited in finding the problems, but in endeavouring to solve the problems through providing certain feasible suggestions. As we will see in the following part regarding the way forward, some of the suggestions remain minor, which only refer to wording clarifications or interpretations, while others may involve fundamental changes for the ICC to consider in future reform.

7.2 Summary and the way forward

7.2.1 General requirements for document examination

7.2.1.1 Document examination and autonomy

The basic duty of any bank participating in a letter of credit transaction arises when it examines the documents and determines whether it will honour or negotiate those presented documents. According to the general rule for document examination laid down in the UCP600 Article 14 (a), the bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation. Clearly, the rule has effectively linked bank's documentary examination with the principle of autonomy, which was discussed in

Chapter 2 as a fundamental principle throughout the documentary credit operations. It is long established both in the UCP and at common law that a bank should independently examine the documents without concerning any extraneous matters. The autonomous nature of letters of credit is proclaimed in UCP600 Article 4 (a) and UCP600 Article 5 declares that banks deal with documents rather than goods, services or a performance to which the documents may relate. The only debatable point is UCP600 Article 4 (b), under which 'an issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like'. Although Article 4 (b) drives in the right direction, it has been drafted in a very subtle way and it is difficult to use as an enforceable contractual term, especially in front of applicants who are in a strong bargaining position. Therefore, the author suggests that the ICC Banking Commission re-consider the purpose behind Article 4 (b) and redraft it in an effective manner.

As a result of autonomy, a bank bears no responsibility for the accuracy or genuineness of tendered documents, provided that the documents appear on their face to be compliant. The expression "on their face" in Article 14 (a) should not be literally interpreted as only examining the front of any document and overlooking the back of a document without a justification.[870] On the other hand, the bank is not entitled to examine the documents beyond their appearance and the issue of discrepancy should not depend upon the degree of inquisitiveness within the bank. In the author's opinion, the commercial approach should only be applicable for the purpose of interpreting the contractual terms, rather than judging the acceptability of a presented document. Analysing the commercial purpose behind a document in order to measure the materiality of the discrepancy will inevitably jeopardise the principle of autonomy. The bank is obliged and restricted to assess the documents on their appearance, irrespective of any underlying facts and extraneous matters. However, the distinction should be drawn between analysing the commercial purpose behind the scene and holding a

[870] For example, terms and conditions of carriage as stipulated in Article 20 (a) (v), which is usually contained on the back of the bill of lading.

general common sense approach based on a bank's expertise and experience. The test can be extracted from the case law: *'a tender of documents which, properly read and understood, calls for further inquiry or are such as to invite litigation is clearly a bad tender.*'[871]

7.2.1.2 Reasonable care and strict compliance

The key for initiating the payment mechanism under a documentary credit is that the presented documents have constituted a complying presentation. As UCP600 Article 2 stipulates, 'complying presentation means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.' It should be noted that the definition avoids a direct reference to the ISBP and arguably any appropriate international banking practice has a chance to be referred to here. It is clear though the definition of being a complying presentation has laid the foundation for the test applied in Article 14, respecting the bank's duty to examine the documents. However, two questions arise here concerning the historical essentials which have taken place in the process of document examination. Firstly, does the notion of reasonable care still take a part in bank's document examination and how can it fit into the UCP regime? Secondly, does the traditional common law doctrine of strict compliance still affect document examinations and how can it accommodate to the UCP objectives?

Concerning the first question, the author believes that the notion of reasonable care still exists in the UCP system, but it has been indicated in an implicit way so as not to interrupt the general document examination. The deletion of "reasonable care" from UCP600 must be interpreted as emphasising and clarifying a strict duty on bank's examination, rather than a duty to exercise due care. The omission of express words in the UCP600 does not lead to any substantial difference in the way of performance. The reasonable care stipulation will be called for when the bank needs to exercise its

[871] *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc (The Galatia)* [1980] 1 WLR 495 (CA) 510, applied the rationale from *Hansson v Hamel & Horley* [1922] 2 AC 36 (HL) 46

professional judgment to decide an ambiguous or indefinite point in the presented documents. Therefore, in the author's opinion, the deletion of express words in Article 14 (a) aims to clarify that, '"reasonable care" is simply the degree of care that would be exercised in particular circumstances by a bank in handling the presented documents, rather than an effective defence that would excuse the bank's liability for accepting a non-compliant document.

In respect of the second question, the author suggests that the doctrine of strict compliance, which has been traditionally articulated by common law to govern the law of letters of credit, largely remains intact under the UCP system. Although there is no express reference in the UCP, observing from the established cases incorporated the UCP, the doctrine still has a determinative influence on judging the compliance of a document as well as deciding the fate of document presentation. The doctrine of strict compliance has been tested in three different scenarios, namely, technicalities, the *de minimis* rule and typographical errors. Technical discrepancies seem not be tolerated by the rule of strict compliance, although insisting strict compliance would give little scope for recognising the merits. Regarding the *de minimis* tolerance, the UCP600 has publicly inserted the provisions to allow certain differences concerning the credit amount, quantity and unit prices.[872] Apart from these express terms, it is arguable that the maxim of *de minimis non curat lex* still cannot apply in other aspects, such as the situation regarding temperature description in the *Soproma SpA*[873] case. As to typographical errors, the ISBP arguably is not sufficient to solve the mess and different courts have delivered various rulings.

It is clear that '*the requirement of strict compliance is not equivalent to a test of exact literal compliance in all circumstances and as regards all documents.*'[874] Some margin must and can be allowed. By contrast, the approach of substantial compliance, which measures the discrepancies by their commercial materiality, would be conducive

[872] See UCP500 Article 39 and UCP600 Article 30
[873] *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep 367 (QB)
[874] *Kredietbank Antwerp v Midland Bank plc* [1999] CLC 1108 (CA) 1112

to uncertainty and incompatible with the autonomous tenets of documentary credits. The application of strict compliance can not only effectively support the process of document examination, but also provide certainty for the system. Hence, rather than rejecting the rule of strict compliance, both the English courts and the UCP drafters have fashioned rules that counterbalance the somewhat harsh results out of strict compliance.[875] The approach of wider strict compliance has succeeded the nature of strict compliance, but provides tolerance on certain trivial variations from the requirements of the credit, for instance, an obvious typographical error, an imperceptible divergence or a trivial discrepancy which would be unmistakably recognised by a reasonable banker.

Both the English courts and the UCP provisions have recognised that a slight margin must and can be allowed as mentioned above. In the author's opinion, the UCP system has absorbed the essence of strict compliance but developed it in its own regime to counterbalance the harsh result of strict compliance. It requires "a complying presentation" as a whole rather than asking for a respective compliance of each document, and references of judging a complying presentation are not completely restricted. As we have seen in Chapter 4 for examining generic documents, the requirements for descriptions and data in the documents have been minimised to "no conflict" rather than "correspondence". Nonetheless, in order to validate those relaxations, the doctrine of strict compliance itself has to be maintained in the first place. Apart from the above tolerable situations, the bank still takes its own risk to make any deviations from strict compliance. While, the mission of courts lies in delivering a reasonable interpretation concerning the level of strictness, as well as leaving the doctrine of strict compliance unscathed, so as to correspond with the spirit of the UCP.

[875] John Dolan, *The Law of Letters of Credit: Commercial and Standby Credit*, vol 1 (4th edn, A S Pratt 2007) para 6-15

7.2.1.3 Time for document examination

The last point among the general requirements for document examination is the time issue, which has been stipulated in the UCP600 Article 14 (b) but jointly connected with Article 16 (b) and 16 (d). A significant change applies to the time given to banks for document examination. It has been changed from the "reasonable time not to exceed seven banking days" under UCP500 to "a maximum of five banking days" under UCP600. The notorious notion of "reasonable time" has been expressly cut off from the new rule; however, the word "maximum" triggers a new round of controversies in academia and ignites the last hope for involving "reasonable time". The author is not convinced by the arguments of unfairness and hidden delay in case of setting up a fixed period, especially while the UCP has been endeavouring to eliminate the uncertainty caused by the "reasonable time" test. Consequently, the author suggests that the ICC Banking Commission should take an urgent attempt to clarify the intention behind the Article 14 (b) and boldly confirm a fixed timeframe for document examination.

7.2.2 Standards for examining generic documents

Following the discussion of general requirements for document examination in Chapter 3, Chapter 4 focuses on analysing the standards for examining generic documents[876] in a documentary credit presentation. UCP600 Article 14 covers almost all the standards for examining the miscellaneous documents presented under a documentary credit transaction. Different from other academic works, the author has conducted a layer-by-layer analysis to reveal the standards covered by Article 14 and the relevant ISBP provisions. The chapter starts from illustrating the standards for examining a single document and then gradually drilling down to the interactions among documents. It has been divided into four parts, which include descriptions in a single document, the content of data in a generic document, the linkage issue and mismatched quantity of

[876] The generic document means those documents which have not been specifically listed and distinctively treated in the UCP600.

anticipated documents.

7.2.2.1 Description of the goods in a document

In respect of examining descriptions in a single document, the author has distinguished the two different standards provided by the UCP600, namely, "correspondence rule" specified in Article 18 (c) for a commercial invoice[877] and "no conflict rule" stipulated in Article 14 (e) for all the others. Clearly, "correspondence" is much stricter than the requirement of "no conflict", but it is still a test that values for substance rather than demanding a mirror image or duplication. From this perspective, the test of "correspondence" is in accordance with the spirit of strict compliance at common law, which does not require literal compliance either. Nevertheless, as we have seen, all the documents apart from commercial invoices are subject to the rule of "no conflict" in the UCP600, which to some degree reflects relaxation to the common law doctrine of strict compliance. It is suggested that a discrepancy in the description of the goods will be justified only to the situation where there is a true and positive conflict in the substance of the description, rather than an apparent and superficial inconsistency. Without doubt, the relaxation led by the "no conflict" requirement is benefit for reducing unnecessary inconsistencies, as well as decreasing the rate of rejection.

As Article 14 (e) stipulates, in documents other than the commercial invoice, the description of the goods, "if stated, may be in general terms" not conflicting with their description in the credit.' By using the words "if stated" in Article 14 (e), it emphasises that there is even no need for a description of the goods to appear on every document. By stating the descriptions "in general terms", it is unclear whether the permissible level of generality in wording is limited by the need for the wording still to function as a description of the goods. However, the author believes that Article 14 (e) gives

[877] Commercial invoices are supposed to belong to the category of special documents, but here the author uses them to compare and distinguish the different standards for description of the goods laid down by the UCP. Note that only description of the goods in a commercial invoice is subject to the correspondence rule, and other data in a commercial invoice are arguably subject to "no conflict" data rule in the UCP600 Article 14 (d) as follows.

"*latitude in description, but not in identification*".[878] As discussed in the following part regarding the linkage issue, if the description of the goods aims to serve as a linkage tying the document with the same transaction under the credit, the identification of the goods must be unequivocal however general the terms used in the description.

7.2.2.2 Data in a document

Concerning requirements for content in a generic document, UCP600 Article 14 (d) stipulates 'data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.' Although an obvious contradiction cannot be tolerated by the bank, the "no conflict" rule in Article 14 (d) does not call for the bank to pick up the inconsistent data mechanically, and on the contrary it requires the bank to properly examine the data in context with reasonable care. Furthermore, Article 14 (f) states that if a credit requires a generic document without stipulating its data content, banks will accept the presented document if its content appears to fulfil the function of the required document and otherwise complies with Article 14 (d). The requirement of fulfilling the function is, nevertheless, a question of substance rather than form or title of the document. It also depends on the view of a reasonable banker and the attitude of the judge. However, it is not clear whether the issue of linkage may be used as an essential element to judge "fulfilling the function".

7.2.2.3 The linkage issue

Obviously, the UCP600 has adopted a more relaxed regime than strict compliance to examine generic documents. It only requires no conflict between data and whatever the data contained in a document, it has to fulfil the function of the required document. Nevertheless, in the author's opinion, due to the nature of documentary sale, the

[878] *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 (CA) 732

relaxation should be restricted to a certain reasonable latitude and it is of great importance to insert the requirement of linkage into the current documentary compliance regime. The author suggests that the supposition of "no conflict" is built on the premise of linkage, which means either the goods with part (or general) descriptions in a single document can be identified as the goods from the same transaction with the credit, or a generic document with no descriptions of the goods bears the other necessary link to the same transaction.

Although the requirements for examining generic documents under Article 14 are intended to be less demanding than those under the doctrine of strict compliance, for the purpose of transaction security, the author still suggests at the minimum level, the presented document must contain "a sufficient link" with the credit or other presented documents so as to make the document identifiable for the specific transaction.[879] The sufficiency of linkage should be satisfied as long as the document in issue clearly forms part of a set of documents or unequivocally links to the subject of the credit. Therefore, the requirements for examining a generic document should be that there is no conflicting data in its content but the document must be able to unequivocally relate to the transaction. In any cases, the interpretation can only be the exception rather than the rule. Hence, there is an urgent need for the ICC Banking Commission to clarify the status of linkage in the UCP system. The author tentatively suggests that the linkage requirement can either be expressly illuminated in the UCP600 Article 14 (f) by supplementing the "function" rule, or be generated into a new ISBP provision which would widely apply to any generic documents other than to the certificate of origin only.

7.2.2.4 Mismatch in number of presented documents

Apart from examining the content of documents, the chapter also considers the mismatch of quantity between the documents which the credit has called for and those

[879] *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135 (CA) 145

actually tendered by the beneficiary. For the surplus document put into a presentation, the UCP600 Article 14 (g) stipulates that the document which is not required by the credit will be disregarded. Clearly, the surplus document cannot be used as a basis for curing a discrepancy or refusing a presentation. However, in practice, the controversies may be triggered in determining whether an unlisted document in a bundle of presented documents is a so-called "surplus" document or not. If the surplus document is considered as an integral part of the required document, it will be examined under the "no conflict data" rule in the UCP600 Article 14 (d) rather than be ignored under Article 14 (g). The emergence of combined documents can also trigger another quantity mismatch for the number of presented documents. If a credit asks for two separate documents, presenting a combined document instead will not be allowed in most cases. However, a requirement of a combined document might be taken over by presenting two separate documents as long as they have fulfilled the function of the required document.

Last but not least, a distorted mismatch can be triggered by the existence of non-documentary conditions. With such a term, the conditions in the credit will be more than the number of documents it has actually called for. The UCP measure is to cure such a mismatch by intentionally disregarding the non-documentary conditions as stated in Article 14 (h). Nevertheless, since the non-documentary condition might be fundamental to the operation of a credit or it might reflect the true intention of the parties, the courts have been reluctant to ignore such a term as the UCP expected. On the basis of difficulties met both in law and in practice, the "disregard rule" in the UCP600 Article 14 (h) hardly achieves its desired effect. Therefore, the author attempts to solve the issue of non-documentary conditions through improving the common law "evidence approach", i.e. requesting a documentary proof to satisfy the surplus condition in the credit. The core idea of "evidence approach" lies in effectively transferring the passive resistance to the positive reaction, and it can well balance the parties' interest as well as reflect the commercial expectations. The ideal outcome, of course, is that banks should not accept instructions to issue or to confirm credits

containing non-documentary conditions. However, the author believes the pathway to the ideal outcome should be achieved by the "evidence approach" rather than the "disregard rule" set out in the current UCP.

7.2.3 Standards for examining transport documents and impacts on bank's security

The overall standards for banks in a documentary examination and the requirements of examining generic documents under UCP600 have been analysed in Chapter 3 and Chapter 4 above. In Chapter 5, the author has transferred attention to the requirements set out by UCP for examining the "specific" documents – transport documents. The transport document is one type of the documents invariably required to be presented under a commercial letter of credit, and moreover, it is closely linked with the bank's security. Due to the length of the thesis, the author only focuses on the sea-carriage related transport documents stipulated in the UCP600 Article 19-22, including bills of lading, seaway bills, charterparty bills of lading and multimodal transport documents.

7.2.3.1 Bills of Lading

A bill of lading under UCP600 Article 20, however named, only covers a port-to-port shipment. It is indicated in the ISBP that Article 20 is to be applied to both negotiable and non-negotiable (straight) bills of lading. A bill of lading should not only state the carrier's name, but also identify such a name as the carrier. Nonetheless, a document checker will not be in a position to determine the real status of the signing company behind the scene. As long as a bill of lading which can pass through the two tests under Article 20 (a) (i), i.e. identifying the carrier and following the rule of signature, it will be accepted by banks. It is however not clear under UCP600 whether banks could reject documents which failed to identify the carrier on the front of the document, even though the identity of the carrier might be indicated on the back of the document.

A shipped on board bill of lading is required under Article 20 (a) (ii), which is in line with the position at common law. There are two ways to satisfy the requirement for a

shipped bill of lading, namely, by pre-printed wording or by an on board notation. The baseline is that unless the "shipped on board" statement on the bill of lading evidently applies to the vessel at the required port of loading, a specific on board notation is needed. The latest ISBP has established a set of rules to ascertain that the "shipped on board" statement is linked with the sea carriage at the required port of loading, rather than with the pre-carriage of the goods between a place of receipt and the port of loading. Nevertheless, it seems that as long as the on board notation can correct the inconsistent place of loading and make sure that the notated port is compliant with the credit, the bill of lading covering more than one mode of transport will still be accepted under Article 20. Arguably, in order to distinguish a bill of lading containing pre-carriage details with a multimodal transport document, the ICC Banking Commission shifts the emphasis to the on board statement. However, the mixture of different modes of transport covered by a bill of lading may undermine the scope of Article 20, and moreover the practical difficulty for judging the need for an on board notation may be triggered when the credit only draws a geographical area without specifying the port of loading. Consequently, the ISBP has mainly provided practical guidance for the bankers in the process of documentary examination, rather than solving the problem fundamentally.

The UCP600 Article 20 (a) (v) requires a bill of lading to contain terms and conditions of carriage, but those terms will not be examined by the bank. Unfortunately, the UCP does not specify whether the terms and conditions are to appear on the front or reverse of the document, nor does it provide guidance as to the scope of carriage terms and conditions under Article 20 (a) (v). Another issue arises when the general carriage terms contradict with the letter of credit terms or render the requirement of the credit meaningless. Nothing in the UCP has attempted to grant Article 20 (a) (v) paramount status over the bespoke terms in the credit. If the credit explicitly prohibits delivery without presentation of the bill of lading, can the bank accept a bill of lading with the term indicating delivery upon identity by claiming Article 20 (a) (v)? It sounds arbitrary if the bank is only to examine particular carriage terms mentioned within the

UCP regime, such as transhipment, and to ignore other carriage terms specially required by the credit, especially for the terms being vital to the parties' security. Clearly, radically contracting out Article 20 (a) (v) is not the best solution for solving the difficulties, since the bank is reluctant to waste time in scrutinising all the small print and to undertake any corresponding responsibilities. In author's opinion, the better approach is to tailor the scope of general carriage terms covered under Article 20 (a) (v). The proper interpretation of Article 20 (a) (v) should be that the content of carriage terms and conditions will not be examined, *unless the terms have been otherwise specified in the credit*. If the approach is adopted, the result of Article 20 (a) (v) can only mean that the bank does not look at the general terms and conditions of carriage save for anything addressed by the credit.

The UCP600 Article 20 (b) - (d) specifically deals with transhipment under a bill of lading. The default position of UCP600 is that transhipment is permitted unless expressly prohibited by the credit. Even though the credit has prohibited transhipment, it is still highly possible for the goods to be transhipped. However, the drafting of UCP600 transhipment provisions is somewhat complicated and inconsistent in many respects. Firstly, it is not clear for the true indication behind the requirement of "covering entire carriage". Does the requirement simply reiterate the entire route stipulated in Article 20 (a) (iii) or does it ask for the carrier to undertake the liability for the whole voyage as that at common law? It remains to be seen which of these two interpretations is held to be correct by the ICC. If the ICC chooses the later, it would have to concern the compatibility between this requirement and Article 20 (a) (v), in which the bank is supposed not to check the carriage terms and conditions. Secondly, the overlap between Article 20 (c) and Article 20 (d) concerning the liberty of transhipment causes great confusion and redraft of the section seems indispensable. Moreover, the UCP600 does not shed light on whether a bill of lading containing a liberty of transhipment clause can be accepted if the credit has expressly prohibited transhipment. Again, the situation triggers the tension with not examining the carriage terms and conditions under Article 20 (a) (v). However, there seems no good solution

to keep the transhipment section in the UCP regime without challenging Article 20 (a) (v), since transhipment terms are carriage terms *per se*.

Taking account of the above Article 20 requirements, it is evident that the drafting of the UCP600 seems aim to deliver a set of standards for mechanical documentary examination rather than concerning themselves much on the security issue behind the scene. The UCP600 has well demonstrated the bill of lading's function as a receipt of the goods and incidentally mentioned its function as evidence of carriage contract; however, neither the delivery issue nor the form of the bill of lading which are closely related to the bank's security have been addressed. In the author's opinion, the delivery issue in Article 20 can be fairly easily to fix by stating that: '*Bills of lading indicating that the carrier may give delivery of the goods without production of an original bill of lading is not acceptable*'. The UCP seems to push banks to look for the creditworthiness of the parties with whom they deal, and to further arrange the security in funds, than to seek the security provided by the documents under the credit. Stoppage or innovation, it is hardly to predict which choice is better, but the latter definitely is of benefit for the bank's security.

7.2.3.2 Other variants

Seaway bills are stipulated by UCP600 Article 21, which is essentially identical to the provisions for bills of lading under UCP 600 Article 20, except for the substitution of the words "bill of lading" to "non-negotiable sea waybill". It is suggested that the ineffective division between bills of lading and sea waybills in the UCP may cause the difficulty in process of examination. Moreover, by mirror-imaging Article 20, some provisions however have lost the original sense and been inappropriate to set out in Article 21, such as requiring a full set of seaway bills. Clearly, blindly copying requirements for bills of lading is not a correct way to regulate sea waybills and tailored provisions are needed for seaway bills in the next UCP revision. Similarly, there is nothing in the UCP600 Article 21 addressing the security issue and the form of

a sea waybill. Due to the different nature from the bills of lading, the seaway bills themselves can hardly provide any security to the bank in the absence of special arrangements.

For charterparty bills of lading, the UCP600 Article 22 has been reasonably drafted. It basically follows the structure of Article 20 concerning bills of lading with necessary changes to accommodate the characteristics of a charterparty bill, but it shares the common deficiencies as those under Article 20. The charterparty bills of lading themselves have not weakened the bank's security; however, the bank's security has been slightly restricted by the UCP provisions in respect of not examining carriage terms and conditions.

In respect of multimodal transport documents under Article 19, most problems are repetitive as those under Article 20 concerning bills of lading, namely the issue of on board notation and the meaning of entire carriage cover. Based on the current state, it is still not entire clear to what extent a multimodal transport document can provide the bank's security. The UCP600 together with the new ISBP, to some degree, has strengthened the bank's security by restating provisions for the bills of lading. Therefore, it might have a leeway to argue that multimodal transport documents are transferable in modern views and can offer the bank the same level of security as traditional bills of lading. The future development of multimodal carriage may necessitate the ICC Banking Commission refurbishing the provisions in the next decade.

7.2.4 Rejection of presented documents

The above chapters all concentrate on the requirements for document examination, whether generic documents or special documents. In the last main Chapter of the thesis, the attention has been placed on the result of examination and the further step after examination, namely, document rejection. The rejection regime is provided in UCP600

Article 16. The provisions in Article 16 have been constantly developed; however, there are still a few points need to be considered.

Firstly, regarding consultation of a pre-refusal waiver in Article 16 (b), the UCP only mentions an issuing bank's position to seek a pre-refusal waiver. The author cannot see the reasons in principle why a rational nominated bank cannot be a party to approach the applicant for a pre-refusal waiver, although in practice it is unlikely for a nominated bank to do so and in theory a nominated bank needs to seek pre-refusal waivers from both the issuing bank by sending an advice of discrepancies and the applicant. Moreover, the time for seeking a pre-refusal waiver is limited to five banking days as stated in Article 14 (b). However, without an official clarification concerning whether Article 14 (b) grant a definite fixed period, the safe route for the bank is to fulfil the consultation as soon as possible. In addition, the bank should keep in mind that a condition precedent for consultation with the applicant in Article 16 (b) is its independent examination and determination, so in the author's opinion, the bank which delegates examination or decision-making to the applicant will incur preclusion.

Secondly, the outstanding issue concerning the external conditions to serve a refusal notice in Article 16 (d) still centres on the time rules. The ambiguity remains on whether the period of five banking days is a safe harbour. Until the ICC Banking Commission responds to this issue, it is advisable that the bank should send a notice of refusal promptly, although the author supports the notion of a fixed period as stated in Chapter 3 above. Furthermore, since the risk of choosing a mode lies with the refusing bank, a prudent bank should leave sufficient time for resorting to an alternative mode within the maximum time limit. It appears that the case law has adopted a flexible interpretation regarding the modes for sending a refusal notice.

Thirdly, the content in Article 16 (c) and Article 16 (f) does not seem sufficient enough to cope with the practical needs of traders. For instance, there are no express words with respect to a bank's post-notice obligations, even though these obligations are fatal

to the parties involved in documentary credit transactions. The English courts have imposed the post-notice obligations on the bank and held that the bank which failed to act in compliance with its disposal statement would be precluded from claiming discrepancies in the documents.[880] The author suggests that at least one sentence concerning timely fulfilment of disposal statements should be added either in Article 16 (c) regarding the notice requirements or in the preclusion rule of Article 16 (f). Moreover, in respect of the time and mode for the bank to perform the post-notice obligations, it is suggested that the bank should choose the most expeditious means to return the discrepant documents within reasonable promptness. While, with respect to the conditions of the returned documents, the minimum limit is to return all the presented documents in the same manner as they were received. Whether there is a necessity to re-endorse the refused documents, is still a controversial issue so far which urgently needs official opinions from the ICC.

Last but not least, in the author's view, the scope of preclusion should include the default of independent determination and the failure to handle documents in accordance with the notice of refusal. By contrast, the author proposes that presentation out of time should not be counted as a discrepancy covered by Article 16 so as to incur preclusion. In addition, although the non-confirming nominated bank is not an express party referred to by the preclusion rule in UCP600 Article 16 (f), its failure to act in accordance with Article 16 can still trigger preclusion, and the consequence will be put on the issuing bank which acts as its principal.

It is worth noting that the ICC Banking Commission should be more cautious to modify the words previously written in the UCP, since unsatisfactory deletions might cause unnecessary misunderstanding. Moreover, the ICC Banking Commission should endeavour to clarify the ambiguous points and codify the best practice. Practical bankers cannot be treated in the same way as qualified lawyers who would be able to

[880] *Fortis Bank v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 All ER (Comm) 28, affd [2011] EWCA Civ 58, [2011] 2 All ER (Comm) 288

measure the legal implication and impact. Therefore, the ICC should continuously attempt to fit the reasonable expectations of market practitioners and draft the UCP provisions with certainty. In the last resort, at the current stage, the banks and traders can modify their individual credits and contract out the uncertain provisions in the UCP600.

7.3 Innovative proposals for future thinking

As mentioned above, most of the current imperfections that reside in the UCP600 can be cured by unequivocal clarifications and interpretations; however, some might need a thorough review and correspondingly more radical changes. In this part, the author will summarise the points analysed in this thesis which may provoke innovative reform of the current UCP provisions, and furthermore the author will propose a direction for the future draft.

Proposal 1: Add linkage test into generic document examinations

According to the literal interpretation of UCP600 Article 14, a generic document can be accepted by the bank whether it contains a description of the goods or not, as long as it does not contain any conflicting data compared with the documentary credit. Nevertheless, in terms of transaction security, the latitude of relaxation should be in description rather than in identification, so that the document must be identifiable for a particular letter of credit transaction via linkage, whether by adding certain descriptions to the goods or by containing the data specifically linked to the transaction. In the author's opinion, the linkage test is supposed to be regarded as a premise to the existing "no conflict" rule. Hence, the UCP should be redrafted to the effect that a generic document with no conflict data is acceptable but the document must be able to unequivocally relate to the transaction.

Proposal 2: Change the strategy towards non-documentary conditions

It is clear to see from the previous analysis that the "disregard rule" for non-documentary conditions in the UCP600 Article 14 (h) hardly achieves its desired effect, especially when the non-documentary condition is fundamentally important to the operation of a credit. Moreover, it can arouse a severe conflict in interpretations between a bespoke term and an incorporated term. The author in this thesis tentatively proposes to solve the dilemma of non-documentary conditions through a different strategy, i.e. the common law "evidence approach". The "evidence approach" can effectively transfer the passive resistance to the positive reaction via requesting documentary proof for the condition listed in the credit. This approach supposes to be a sensible pathway to eliminate the unsound practice of non-documentary conditions, since it can well balance the parties' responsibilities as well as reflect the commercial expectations. As a result, when a bank meets with a non-documentary condition in the process of document examination, it is supposed to check whether the corresponding documentary proof tendered by the presenter is satisfactory rather than blindly ignore the condition.

Proposal 3: Tailor the scope of carriage terms and condition in transport articles

In order to avoid the heavy burden of scrutinising all of the small print and taking unpredictable responsibilities, most of the transport articles in the UCP600, like Article 20 (a) (v), state that the bank will not examine carriage terms and conditions. However, there is nothing in the UCP which has granted this group of provisions a paramount status over the bespoke terms in the credit. Once again, the conflict between bespoke terms and incorporated terms needs to be reconciled. It also sounds rather arbitrary that the bank has to examine particular carriage terms mentioned in the UCP, such as transhipment clauses, and to ignore other carriage terms specifically required by the credit, especially for the terms reflecting the parties' intention. In the author's opinion, there is an urgent need to define and tailor the scope of carriage terms and conditions covered under the UCP transport articles. The author proposes that the content of

carriage terms and conditions will not be examined by the bank, *unless the terms have been otherwise specified in the credit*. If the approach is adopted, the result of Article 20 (a) (v) can only mean that the bank does not look at the general terms and conditions of carriage contained in a bill of lading save for anything specially addressed by the credit.

Proposal 4: Rethink the necessity and consistency of including transhipment provisions

It seems the UCP600 allows transhipment unless it is expressly prohibited by the credit; however, the provisions regarding transhipment in the UCP600 have not been clearly drafted and contain a lot of self-inconsistencies. Firstly, both Article 20 (c) and Article 20 (d) cover the situation that the goods may be transhipped. Secondly, it is not clear for the true indication behind the requirement of "covering entire carriage". Does it mean the entire coverage of liability under the common law or just geographically from the port of loading to the port of discharge? The problem is that, if the bank is going to check the liberty of a transhipment clause and the carrier's liability for the entire carriage, it will inevitably look into the content of carriage terms and conditions, which is disclaimed by Article 20 (a) (v). As the transhipment terms are carriage terms *per se*, the author feels incapable of proposing an ideal provision for addition into the UCP unless contracting out of the disclaimer clause in Article 20 (a) (v). In the author's opinion, future thinking must focus on whether it is truly necessary to insert transhipment provisions into the UCP and how to keep them reconciled with other provisions.

Proposal 5: Address delivery issue in the bills of lading articles

The UCP has well established that a full set of bills of lading must be presented if more than one copy was issued; however, due to the fear of conflicting with national laws, the issue of delivery has never been addressed in the UCP. Without setting up the rule

of delivery against production of bills of lading, the "full set" requirement arguably loses its sense. In the author's opinion, the delivery issue in Article 20 can be addressed by stating that: '*Bills of lading indicating that the carrier may give delivery of the goods without production of an original bill of lading is not acceptable*'. As mentioned in Proposal 3, the scope of Article 20 (a) (v) should be tailored so that the bank does not check the general carriage terms and conditions, unless specifically requested by the credit and the UCP. Therefore, the delivery issue which is particularly addressed by the UCP will not cause the conflict in the process of bank's examination.

Proposal 6: Consider incorporating maritime features into transport articles

Neither UCP500 nor UCP600 effectively distinguishes the different types of transport documents in its provisions. For example, provisions concerning sea waybills in Article 21 are nearly identical to those in Article 20 for bills of lading. By mirror-imaging Article 20, some provisions however have lost the original sense and been inappropriately set out in Article 21, such as requiring a full set of seaway bills. Therefore, the author suggests that extra care needs to be given with respect to the individual maritime feature in the next version's drafting.

Proposal 7: Clarify the scope of preclusion rule

The preclusion rule set out in the UCP can trigger a draconian consequence to the bank who has failed to perform their obligations under Article 16, namely, the bank will have to stop claiming any discrepancies in the presented documents and pay for them. Nevertheless, based on the ambiguous statements stipulated in Article 16, it is not clear what kinds of default are supposed to trigger the preclusion rule. The author proposes that the scope of the preclusion rule should include the default of independent determination and the failure to handle documents in accordance with the notice of refusal as the English courts suggested. By contrast, the author argues that presentation out of time should not be counted as a discrepancy covered by Article 16 so as to incur

preclusion. For the non-confirming nominated bank, although it is not an express party referred to by the preclusion rule in UCP600, its failure to act in accordance with Article 16 should still trigger preclusion, and the consequence will be put on the issuing bank which acts as its principal.

Concluding Remarks

The international nature of letter of credit transactions, coupled with the fact that the system has to operate speedily and smoothly throughout the modern business world, provides the drive required for harmonisation and unification of the applicable banking practice and of the relevant legal principles. The fact that the UCP constitute a set of standard terms and conditions rather than an independent source of law does not, however, diminish their effectiveness in transactions in which they are incorporated by reference. There is no doubt that the 2007 Revision – UCP600 – is progressive. In many regards, it has tightened the language and clarified obscurities left in the past. Nevertheless, concerning the subject-matter under this thesis - document examination and rejection, the UCP600 ought not to be regarded as innovative.

In general, the UCP600 adheres closely to the pattern and spirit of the earlier revisions. The latest ISBP revision has contributed significantly in terms of explaining the requirements for document examination, but it has not aimed to change the existing position under UCP600. The UCP600 and the corresponding ISBP constitute a step in the right direction but a great deal of work has been left for future clarification and redraft. Some improvements, undoubtedly, will be required in consequence of future developments in technology and business practice. However, many residual imperfections have not been tackled by the current UCP600. This thesis has therefore contributed in identifying the current loopholes and putting forward the corresponding suggestions for the issues regarding document examination and rejection.

In the first place, the draftsmen set out to proscribe certain practices but, regrettably, did not perfect the prohibitions by adding “teeth” to the respective provisions. A striking example is bank’s efforts in discouraging non-documentary condition terms in the credit. Secondly, the draftsmen have not properly dealt with the conflict between the credit terms and the UCP provisions. Since the UCP provisions in most cases have

not granted themselves a paramount status, how can a bank disregard a special term in the credit without hesitation? Thirdly, there is still ambiguous drafting and obvious gaps left by the UCP, such as the time for document examination and the bank's post-notice obligations. Last but not least, the UCP600 still leave chronic issues untouched, even they may closely relate to bank's security, such as the delivery problem under rules governing the transport documents and the linkage issue under document examination.

In summary, the UCP600 has achieved progressive merits, but it is still necessary to update the provisions in the light of the experience of world-wide practice. In order to quell the above controversies and effectively reflect the volatile field of commercial law, both innovation and progression is needed for the next UCP revision. Most problems addressed above need official clarifications and interpretations, but some of the provisions, such as those relating to non-documentary conditions and transshipment clauses, are better to be redrafted. Although the UCP is a compromising product based on a world-wide reach, there is no reason that experiences from case law which has reflected the dynamic market practice cannot be brought into the next UCP revision.

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