

UCP 500 TO 600: A FORWARD MOVEMENT

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Abstract

The 5th revision of the *Uniform Customs and Practice for Documentary Credits (UCP 500)* proved inadequate in facilitating the operation of letters of credit. The introduction of the 6th revision of the *Uniform Customs and Practice for Documentary Credits (UCP 600)* is therefore an initiative of the International Chamber of Commerce (ICC) designed to overcome certain inadequacies found in the previous revision. This paper critically analyses the key changes brought about by this transition from 500 to 600 giving the background, evolution, details and implications these changes have on bankers, importers, exporters, carriers and insurers. This paper argues that the UCP 600's ability to strike a balance between the interests of bankers on the one hand and the business fraternity on the other, is indeed a forward movement of the ICC in introducing positive changes to the UCP 500. However, whether UCP 600 will succeed in practice where UCP 500 proved unsuccessful remains to be seen.

1 Introduction

The objective of this paper is to examine the key changes from *Uniform Customs and Practice for Documentary Credits (UCP) 500* to *Uniform Customs and Practice for Documentary Credits (UCP) 600*.¹ Hence, the premise of and the analysis put forward in this paper are informed by a comparative analysis of the provisions in the UCP 500 and UCP 600 and a review of the relevant literature. This paper provides some background to the UCP. It outlines the causes that led to this transition from 500 to 600. The paper then examines the structural changes to the UCP and the provisions relating to the fundamental principles upon which letters of credit operate.²

With respect to the role of the banks and the documents that accompany a letter of credit, this paper examines the key changes to the role of the banks in deferred payment undertakings and new approaches and features for documents in the transport and insurance sectors. However, an examination of the other minor changes to the tender of various transport documents such as transshipment, non-negotiable sea waybill, charter

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¹ See UCP 600 <<http://www.internetlc.com/TradeRefs/UCP600text.pdf>>; UCP 500 <<http://www.internetlc.com/traderefs/ucp500pdf.pdf>>

² A letter of a credit is an undertaking of a bank (the issuing bank), which commits to pay the exporter (the beneficiary) a sum of money, usually the sales price or to accept a bill of exchange upon the delivery of certain documents. In practice, transport documents, insurance documents, a commercial invoice, and several other documents such as warehouse receipts, certificates of origin etc. are usually required to be tendered along with a demand for payment ;For a comprehensive definition of a letter of credit, see UCP 500 Article 2 and the identically numbered provision of the UCP 600; As some commentators have described, a letter of credit is a paper transaction, dealing entirely with documents; See, eg, Leo D'Arcy, Carole Murray and Barbara Cleave, *Schmitthoff's Export Trade, The Law and Practice of International Trade* (Sweet & Maxwell, 10th ed, 2000) 170; Agasha Mugasha, *The law of letters of credit and bank guarantees* (Federation Press, 2003); See also Donaldson and Ackner L.JJ in *Intraco Ltd. v Notis Shipping Corporation of Liberia*, *The Bhoja Trader* [1981]2 Lloyd's Rep. 256, 257.

party bill of lading, bills of lading, road, rail or inland waterway transport and courier receipt, post receipt or certificate of posting is beyond the scope of this paper.³

Following a critical examination of the key changes reflected in the UCP 600, this paper seeks to answer these questions: 1) is the introduction of UCP 600 a forward movement of the ICC in introducing positive beneficial changes? 2) Would UCP 600 strike a balance between the interests of bankers and traders, thereby establishing the letters of credit as a better and more secure way of financing an international trade contract?

1.1 Transition from 500 to 600

Historically, the banks have played a significant role in developing the practices and standards applicable to letters of credit as a payment mechanism.⁴ In 1933 ICC took the initiative to codify these practices through publication of the first version of the UCP which was updated several times throughout the years.⁵ Commenting on the development of the UCP provisions, one commentator said that these rules ‘were meant to be a tool and a technique for the settlement of trade transactions. But they were frequently misused and misinterpreted. This resulted in unwarranted disputes and disagreements between bankers and the traders. It was thought that UCP 500, the 5th revision of UCP, would arrest this trend.’⁶

The 1993 revision which is widely known as the UCP 500 came into operation on 1st January 1994. The rules introduced a number of novel provisions. Ellinger has expressed optimism that these rules would constitute ‘a further step in the right direction.’⁷ UCP 500 sought to answer many questions the bankers and traders have had to face with, including the definitions of terms such as “negotiation”, “reasonable time” and the appropriate number of days to check the documents. What followed was not what was expected, says, Taneja, a member of the ICC Banking Commission and UCP 600 Consulting Group.⁸ He opines that ‘the need to clarify several of the articles of UCP 500, highlighted several contentious issues that needed to be addressed. For example, there were issues relating to the term “negotiation”, what constituted an “original document” in the context of sub-article 20(b) and questions concerning ports of delivery and discharge, imprecise interpretative phrases like “without delay” and “on its face”.’⁹ Moreover, UCP 500 failed to provide satisfactory answers to the problems of non-documentary conditions and inconsistent data. This paper argues that these gaps in the UCP 500 have hindered the smooth operation of letter of credit transactions.¹⁰

³ See generally UCP 600 Articles 19 (b), 21, 22, 23, 28 and 29.

⁴ See Ayse G Eren ‘The settlement and Financing of International Trade’ in Andrew W. Mullineux, Victor Murinde, *Handbook of International Banking* (Edward Elgar Publishing Ltd., 2003) 259.

⁵ Previous Publications include; UCP Publication Number 151(1951 Revision), Number 222 (1962 Revision), Number 290 (1974 Revision), Number 400 (1983 Revision), Number 500 (1993 Revision); See also A L Tyree, *Banking Law in Australia* (Butterworths, 3rd ed, 1998) 386.

⁶ Pradeep Taneja, ‘UCP 600; A Document Restoring the Credibility of L/Cs’(2007) *Accounting and Tax Periodicals* 56.

⁷ See E P Ellinger, ‘The Uniform Customs and Practice for Documentary Credits- the 1993 Revision’ [1994] *Lloyd’s Maritime Commercial and Law Quarterly* 377.

⁸ Taneja, above n 6.

⁹ Ibid.

¹⁰ For example, a number of global surveys have indicated that, because of inadequate provisions for clarifying documentary discrepancies, approximately 70% of documents presented under letters of credit were being rejected on first presentation; See Introduction to UCP 600<<http://www.internetlc.com/TradeRefs/UCP600text.pdf>>.

With the objective of resolving some of these contentious issues, the ICC's Commission on Banking Technique and Practice established a Drafting Group and a Consulting Group to work towards another revision to the UCP. This process brought about the 6th revision of the UCP and was approved by the Banking Commission of the ICC at its meeting in Paris on 25 October 2006. This 6th version, called the UCP 600, formally came in to operation on 1 July 2007.¹¹

1.2 Structure, Definitions and Interpretations

The UCP 600 which contains 39 Articles, compared to its predecessor UCP 500 which contained 49 Articles. It is argued that this structural change along with the simple wording of the provisions will facilitate the interpretation and understanding of the new rules in the UCP 600.

Article 1 of the UCP 500 stated that it applied whenever the parties have incorporated it in to the text of the credit.¹² Article 1 of the UCP 600 has introduced a significant change to the applicability of the rules.¹³ Now the UCP 600 Articles are considered "rules". Accordingly, when the letter of credit expressly states that it is governed by the UCP 600 the contracting parties are bound by the rules set out in the UCP 600 and may exclude or modify its application by express wording to that effect in the credit document. Thus this provision will reinforce the legal status of the UCP 600.

The introduction of Article 2 on "definitions" to the new rules, contain the new concept of "honour". For example the meaning of "honour", "negotiation" and "presentation" has been defined among many other significant terms.¹⁴ This is an improvement of the previous version of the UCP, which failed to provide proper definitions of key terms and therefore resulted in disputes in the interpretation. This improvement in the UCP 600 should result in certainty in the interpretation and will aid in the simplification of the UCP provisions as a whole.

Thus, Article 3 of the UCP 600 is an entirely new section, which simplifies certain procedural matters and interpretation of important terms in use. . Some of the

¹¹ At the time UCP 600 came in to operation in July 2007, an updated version of the *International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP)* was also introduced to bring its contents in line with the substance and style of the new rules. see, Comments of the Drafting Group in the *ISBP for the Examination of Documents under Documentary Credits, 2007 Revision for UCP 600, ICC Publication 681 E* (ICC Services Publications Department, France) 3.

¹² See UCP 500 Article 1.

¹³ See comments of the UCP 600 Drafting Group in *Commentary on UCP 600, Article-by-Article Analysis by the UCP 600 Drafting Group, ICC Publication No 680* (ICC Services, Publications Department, France) 11.

¹⁴ UCP 600, Article 2 defines "honour" as (i) to pay at sight if the credit is available by sight payment (ii) to incur a deferred payment undertaking and pay at maturity if the credit is available by deferred payment (iii) to accept a bill of exchange ("draft") drawn by the beneficiary and pay at maturity if the credit is available by acceptance; "negotiation" as the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank; "presentation" as either the delivery of documents under a credit to the issuing bank or nominated bank or the documents so delivered; UCP 600, above n 1.

interpretations are not entirely new but the introduction of the “definitions” has ensured clarity and simplicity in the application of the UCP.

1.3 Revocable Vs Irrevocable Credits

The literature identifies two categories of letters of credit- revocable and irrevocable.¹⁵ A revocable letter of credit can be revoked without the consent of the applicant of the credit; it may be cancelled or changed up to the time the documents are presented. An irrevocable letter of credit cannot be cancelled or changed without the consent of both the beneficiary and the applicant.¹⁶ From an applicant’s viewpoint the advantage of an irrevocable credit is that the issuing bank’s undertaking to pay the sum of the credit cannot be revoked by that bank or at the behest of the applicant for the credit.

The UCP 500 had clearly stated that credits could be either revocable or irrevocable and that a revocable credit could be amended or cancelled at any time and without notice to the applicant.¹⁷ Therefore, one could argue that by expressly encouraging the concept of revocable credits, the UCP 500 increased the risks for applicants, because, in the absence of a clear provision to the contrary the applicants were faced with amendments or cancellation of credits without being noticed.

The UCP 600 has brought about a change to the text of this provision. Article 3 of the UCP 600 now specifically states that ‘A credit is irrevocable even if there is no indication to that effect.’ This is one of the main differences between the UCP 500 and the UCP 600. In this respect, the observations of one commentator is worth noting: ¹⁸ ‘We know now that credits are going to be irrevocable and Article 3 strengthens it by stating that a credit is irrevocable even if there is no indication to that effect. So the question of revoking a credit as under UCP 500 does not arise any more.’

Therefore, it can be argued that UCP 600 has moved firmly away from the second category of credits, that is, irrevocable credits, recognized under UCP 500. This positive movement is evident in Articles 2, 3 and 10 of the new rules; Article 2 defines a credit as ‘any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation.’¹⁹ Article 3 headed “Interpretations”, states that ‘a credit is irrevocable even if there is no indication to that effect.’²⁰ Finally, Article 10 makes it clear that a credit cannot be cancelled without the agreement of the beneficiary. These three Articles establish the preference of the UCP 600 for irrevocable credits that cannot be amended or cancelled without notice to the applicants. It is argued that this position of the UCP 600 favours the interests of the exporters as beneficiaries of letters of credit.

¹⁵ See Guy W Lewin Smith ‘Irrevocable Letters of Credit and Third Party Fraud: The American Accord’ (1983-84) 24 *Virginia Journal of International Law* 55; See also C V M Hare, ‘Transferable Letters of Credit: Responsibility, Remoteness and Loss of a Chance’ [2005] *Lloyd’s Maritime Commercial and Law Quarterly* 350.

¹⁶ *Ibid.*

¹⁷ See UCP 500, Article 6 (a) and Article 8.

¹⁸ A H M D Nawaz, ‘UCP 600-Some Highlights’ <http://www.acl.srilanka.com/downloads/nawas_ucp_600.pdf>.

¹⁹ UCP 600, Article 2.

²⁰ UCP 600, Article 3.

In addition, UCP 600 has totally eliminated the word “revocable”. This would give an assurance to trading parties that payment undertaking would stand in effect until and unless all parties involved are mutually agreed to have it cancelled. Thus UCP 600 has demonstrated that “revocable” does not serve a function in letters of credit as a payment mechanism.

2 Fundamental Principles

There are two basic principles ingrained in the UCP, which are central to the structure and operation of letters of credit – “Autonomy” and “Strict Compliance”. It is commendable to note that UCP 600 has introduced certain positive changes to the substance and style of the provisions governing these fundamental principles.

2.1 Autonomy of the Credit: ‘Pay First, Argue Later’

The letter of credit is a payment obligation of the issuing bank, independent of the contract between the seller and the buyer and the contract between the buyer and the issuing bank. Hence, the letter of credit is entirely independent of the two underlying contracts giving rise to it. This independence of the letter of credit is described as the autonomy principle.²¹ This principle enables the beneficiary to prompt payment regardless of any dispute relating to the underlying contracts (“pay first, argue later” function).²² Thus forming the basis upon which the whole letter of credit transaction begins.²³

The autonomy principle as it applies under English letter of credit law has been explained by Lord Denning M.R. in the case of *Power Curber International Ltd. v. National Bank of Kuwait*:²⁴

The bank is in no way concerned with any dispute that the buyer may have with the seller. The buyer may say that the goods are not up to the contract. Nevertheless the bank must honour its obligations. The buyer may say that he has a cross-claim in a large amount. Still the bank must honour its obligations.²⁵

The substance of this judicial pronouncement is that the letter of credit should be treated as completely independent of the underlying contract of sale. The English courts’ reluctance to intervene with the operation of the letters of credit is further illustrated by the classic statement of Jenkins LJ of the Court of Appeal in the case of *Hamzeh Malas & Sons v British Imex Industriars Ltd*:²⁶

²¹ See generally Roy Goode ‘Abstract Payment Undertakings’ in Peter Cane and Jane Stapleton (eds), *Essays for Patrick Atiyah* (Clarendon Press, 1991) 209.

²² See Chung-Hsin Hsu, ‘The Independence of Demand Guarantees, Performance Bonds and Standby Letters of Credit’ (2006) 2 *National Taiwan University Law Review* 1.

²³ See William Hedley and Richard Hedley, *Bills of Exchange and Banker’s Documentary Credits* (Lloyds of London Press, 4th ed, 2001) 310.

²⁴ *Power Curber International Ltd. v. National Bank of Kuwait* [1981]2 W.L.R. 1233.

²⁵ *Ibid*, 1241.

²⁶ *Hamzeh Malas & Sons v British Imex Industriars Ltd* [1958] 2 Q.B. 127.

It seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice.²⁷

Jenkins LJ's statement reiterates that the credit is autonomous of the performance of the underlying contract and that the banks that issue letters of credit assume an "absolute" obligation to honour them, without having to investigate the nature of default under the underlying contract. In the light of these judicial pronouncements, it is argued that a bank – which operates a documentary letter of credit – is under no obligation to investigate the nature of the subject matter of the underlying contract. Rather, its obligation is to examine whether the documents submitted for payment corresponds with the requirements for documents contained in the credit.

Article 5(a) of UCP 600, which set out this principle in no uncertain terms, is the identical wording of its corresponding provision, which is Article 3 of the UCP 500.²⁸ However, the drafters of UCP 600, has gone one step forward by adding sub Article (b) to that section (read with Article 14) which cast a responsibility on the issuing bank to exclude certain documents such as copies of the underlying contract and Performa invoice as an integral part of the credit.

2.2 Fraud Exception to the Autonomy Principle

The operation of the autonomy principle enables the beneficiary to demand payment under the credit without having to prove the bank that he has properly performed the contractual duties under the underlying transaction. He only needs to produce documents that are specified in the credit. All he needs to establish is that those documents conform to the requirements of the credit. But what would be the position if the documents are in fact forged or the beneficiary's demand is fraudulent? Fraud exception provides the answer. Xiang Gao explains the role of the fraud exception in letters of credit:²⁹

²⁷ Ibid 129.

²⁸ See UCP 500 Article 4 on Documents v Goods/Services/Performances which reiterates the Autonomy principle; See also Bill Dixon, 'As Good as Cash? : The Diminution of the Autonomy Principle' (2004) 32 *Australian Business Law Review* 391-406.

²⁹ Xiang Gao, 'The Identity Of The Fraudulent Party Under The Fraud Rule In The Law of Letters of Credit' [2001] 24 *University of New South Wales Law Journal* 119; See also Xiang Gao and Ross Buckley, 'A Comparative Analysis of the Standard of Fraud Required under the Fraud Rule in Letters of Credit Law' (2003) 13 *Duke Journal of Comparative and International Law* 293 ; E P Ellinger 'The Tender of Fraudulent Documents Under Documentary Letters of Credit' (1965) 7 *Malaya Law Review* 24.

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Thus, strictly applying the principle of independence could produce harsh and unfair results by operating to unjustly enrich an unscrupulous beneficiary. To prevent such unfairness, the fraud rule has been developed.³⁰

The fraud rule in the law of letters of credit is a common law remedy. The leading English case on the fraud rule is *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)*,³¹ where Lord Diplock stated:

To this general statement of principle [of independence], ... there is one exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue. Although there does not appear among English authorities any case in which this exception has been applied, it is well established in the American cases of which the leading or “landmark” is *Sztejn v J Henry Schroder Banking Corp* (1941) 31 N.Y.S. 2d 631, NY SC.³²

The principle that can be derived from this statement is that ‘fraud’ in letters of credit refers to ‘fraud in the documents’ presented to the bank. In Lord Diplock’s view, the fraud in the documents involves a fraudulent misrepresentation. As one commentator said, ‘this statement may be regarded as a concise summary of the fraud rule in letters of credit under English law, so it has been cited in almost all English letter of credit fraud cases ever since.’³³

The UCP 500 did not recognize fraud on the part of the beneficiary as an exception to the autonomy of the letter of credit. Similarly, there are no provisions in the UCP 600 dealing with the “fraud exception”. Roy Goode has explained the reasons behind this lacuna in the UCP:

The ICC, though an international organization, is not a law-making body but an organizational representation of world business and finance. Its rules do not have the force of law but depend (as the rules themselves expressly provide) on the parties to contracts incorporating them as terms of their contracts...So they can not deal with such matters as the effect of fraud on a beneficiary’s right to payment.³⁴

³⁰ Gao, above n 29.

³¹ *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983]1 AC 168 (Cite case name in full); See also Stephen Leacock, ‘Fraud in the International Transaction: Enjoining Payment of Letters of Credit in International Transactions’ (1984) 17 *Vanderbilt Journal of Transnational Law* 88.

³² *Ibid* 183; In that American case, Shientag J. said that ‘on the present motion it must be assumed that the seller has intentionally failed to ship any goods ordered by the buyer. In such situation, where the seller’s fraud has been called to the bank’s attention before the drafts and documents have been presented for payment, the principle of independence of the bank’s obligation under the letter of credit should not be extended to protect the unscrupulous seller’; *Sztejn v J Henry Schroder Banking Corp* (1941) 31 N.Y.S. 2d 631, 634.

³³ See Gao and Buckley, above n 29; See also *Montrod Ltd.v Grundkotter Fleischvertriebs GmbH* [2002]1 W.L.R. 1975.

³⁴ Roy Goode, ‘Abstract Payment Undertakings in International Transactions: Symposium New Developments in the Law of Credit Enhancement-Domestic and International’ [1996] *Brooklyn Journal of International Law* 1, 4.

Thus, the reason given for this lacuna is that it is not the function of the UCP to regulate issues that are the proper province of national law and national courts.³⁵

2.3 How Strict is 'Strict Compliance'?

The examination of documents in letter of credit transactions is a very sensitive task and it is usually delegated to a nominated bank or confirming bank appointed by the issuing bank. The standard required for examination of such documents under UCP 500 was set out in Article 13. By virtue of this provision, the documents tendered by the beneficiary to the bank must comply strictly with the terms of the credit and that compliance 'shall be determined by international standard banking practice as reflected in these articles.'³⁶ It is argued that this provision in the UCP 500 which set out the standard for examination of documents is the one in essence that recognized the fundamental rule of "Strict Compliance". This provision also indicated the extent to which this rule has been applied under UCP 500. Although, in certain instances the rule has been relaxed,³⁷ the UCP 500 seems to have by and large favoured the strict compliance. The requirements for banks to follow international standard banking practice remains in Article 14 of the UCP 600. However, in relation to compliance of documents, the Drafting Group is of the view that 'the banking practices are broader than what is stated in this publication.'³⁸

The strict compliance rule has long prevailed in the English common law. The House of Lords decision in *Equitable Trust Company of New York v. Dawson Partners*,³⁹ has been considered as authority on the strict compliance rule under English law. Applying this rule to the facts of that case, the House of Lords held that 'the plaintiff-bank was not entitled to be reimbursed by the buyers as the bank acted contrary to the instructions by making available finance on a certificate of one expert only instead of two experts.'⁴⁰ Viscount Sumner speaking for the House of Lords said:

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 any thing else, it is safe; if it departs from the conditions laid down; it acts at its own risk.⁴¹

³⁵ Ross Buckley and Xiang Gao, 'The Development of the Fraud Rule in Letter of Credit Law: The Journey So Far and the Road Ahead' (2002) (23) *University of Pennsylvania Journal of International Economic Law* 663, 700.

³⁶ See *ISBP for the Examination of Documents under Documentary Credits, 2007 Revision for UCP 600, ICC Publication 681 E*, above n 11; Note that the ICC published the ISBP, for the Examination of Documents under Documentary Credits in January 2003 and has updated to supplement the UCP 600. Its intent was to be used as a guide to how the UCP should be applied in a day-to-day working environment.

³⁷ Note that the UCP 500 did allow for some margin error in the case of quantity of goods and the contents of documents tendered as stipulated in Articles 39(b) and 37(c) thereof; See, eg, *Glencore International v Bank of China* [1996] 1 Lloyd's Rep 135; *Soproma SpA v Marine & Animal By-products Corp.* [1966] 1 Lloyd's Rep. 367.

³⁸ See *Commentary on UCP 600, Article-by-Article Analysis by the UCP 600 Drafting Group*, above n 13,16.

³⁹ *Equitable Trust Company of New York v. Dawson Partners* [1927] 27 Lloyd's Rep.49.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, 52.

It is argued that the classic statement of Viscount Sumner indicates in ample measure that English common law has insisted the application of strict compliance in that the description in all the documents should be exactly the same as that of the credit instructions. An American decision also illustrate the substance of the above statement in equally convincing language; ‘Compliance with the terms of a letter of credit is not like pitching horseshoes. No points are awarded for being close.’⁴²

These judicial pronouncements indicate that both in the United Kingdom and America, the common law has heavily favoured the strict compliance rule. The judgments of the English courts in the area of letters of credit indicate that strict adherence to the “strict compliance” rule has caused difficulties and delays in handling this financing instrument in international trade transactions. Subsequent to these decisions, some commentators have been critical of Article 13(a) of the UCP 500 on the basis that ‘such standards effectively introduce greater uncertainty into the documents examination process and that such a standard will frustrate the reasonable expectations of commercial parties.’⁴³

3 THE NEW STANDARD FOR EXAMINATION OF DOCUMENTS

Article 14 of the UCP 600 establishes the responsibility of the banks to comply with the standard for examination of documents tendered under letters of credit. In essence, this article represents the old Article 13 of the UCP 500. However, the new Article 14 of the UCP 600 has introduced three new features that set the standard for examination of documents. They are: (i) the examination of documents “on their face” - Article 14(a), (ii) the time given to the banks for examination of documents - Article 14(b) and (iii) consistency between the documents tendered - Article 14(d) and (e). This paper argues that UCP 600 has somewhat introduced a new structure by setting the standards for examination of documents.

3.1 The Examination of Documents on their Face

Under the new rules the banks are duty bound to examine documents in order ‘to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.’⁴⁴ Two phrases contain in this part of Article 14(a) need to be examined.

Firstly, it is to be noted that the phrase “with reasonable care”, which was used in Article 13(a) of the UCP 500, has now been excluded. It is argued that UCP 600 very specifically has omitted those wording in order to impose a stricter liability on the banks

⁴² *Fidelity National Bank v Dade County* 872 F 2d, 971 as cited in Ravi Mehta, ‘Does UCP 600 soften or end the doctrine of strict compliance?’ Newsletter No 101, March 2007
<http://www.lcviews.com/LCVIEWS_PDF/LCVIEWS101.pdf>.

⁴³ Sathya Hettige, ‘Banker’s Liability in a Documentary Credit’
<http://www.lawnet.lk/docs/articles/sri_lankan/HTML/CV5.html>

⁴⁴ See UCP 600 Article 14(a).

in their examination of documents. This assertion could be substantiated by the comments of the ICC in respect of the removal of the phrase “reasonable care”:

The requirement to use “reasonable care” has been removed and has been superseded by those more comprehensive and precise requirements. This change is prompted also by the progress made since UCP 500 was published in documenting international standard banking practice as applied to the examination of most documents presented under documentary credits, notably in ICC publication No. 645 (2003) and the updated ICC publication No. 681 for use with UCP 600.⁴⁵

The second phrase which attracts much attention is the duty to examine “whether or not the documents appear on their face” to comply. As explained in the *Commentary on UCP 600*, ‘the phrase “on its face” does not mean the front as opposed to the back of a document. Rather the phrase indicates the review of a document in line with international standard banking practice and the features of the document itself.’⁴⁶

3.2 The Time Permitted to the Banks for Examination of Documents

For the beneficiary of the credit, the time permitted to the banks for examination of documents as per Article 14(b), is clearly an important provision. The Article 13(b) of the UCP 500 provided the banks with a ‘reasonable time, not to exceed seven banking days following the day of receipt of the documents’ to examine the documents. Therefore, under UCP 500 the banker was required to either accept or reject the documents within this period.

One of the contentious issues under UCP 500, Article 13 involved the calculation of the number of days, which amounts to “a reasonable time” within the meaning of that Article. However, this does not give a clear statement as to how much time that is. In an attempt to resolve this issue, Article 14(b) of the UCP 600 now gives each bank a fixed maximum number of days in which to examine the documents. The period is ‘maximum of five banking days following the day of presentation.’⁴⁷ It is argued that the deletion of the phrase ‘reasonable time, not to exceed seven banking days’ will resolve the issue of

⁴⁵ See Commentary on UCP 600, Article-by-Article Analysis by the UCP 600 Drafting Group, above n 13, 62.

⁴⁶ Ibid; To quote the UCP 600 Drafting Group:

‘Whilst the phrase “on their face” continues to remain in this article, it has been removed from all other articles of UCP 600. The phrase as it is used in relation to the examination of documents was seen to be a well-established concept understood by those in the legal profession and experienced documentary credit practitioners. The concept of “on their face” does not refer to a simple front versus the back of a document, but extends to the review of data within a document in order to determine that a presentation complies with international standard banking practice and the principles contained in UCP. Because the term remained in the UCP in relation to the examination of documents in general, the Drafting Group did not see any reason to repeat it in other articles, such as the transport, insurance and commercial invoice articles, as was the case in UCP 500. Banks are not obliged to go beyond the face of a document to establish whether or not a document complies with a requirement in the UCP.’

⁴⁷ As per UCP 600 Article 16(d), now this ‘five banking day period’ applies to notice of refusal to honour or negotiate a credit.

how many days, hours, minutes should be permitted to the banks for examination of documents under letters of credit.

The new time period for examination of documents is therefore to be welcomed by bankers all over the world. This new provision should be read with Article 2, which defines “a banking day”.⁴⁸ According to UCP 600, a banking day does not mean a day the bank is open, but a day the bank is regularly opened to perform an act subject to the UCP 600. It is argued that this definition of a banking day would facilitate the interpretation of Article 14.⁴⁹ This definition of a banking day is to be most welcomed because such a definition will be useful in avoiding conflicts between the bank and the beneficiary in the examination of documents under the credit.

3.3 Consistency Between the Documents Tendered

UCP 600 now provides adequate provisions for resolving questions relating to the consistency between the documents stipulated in the credit and the documents tendered to the bank. This came to be known in the UCP 600 revision process as the “linkage” issue.⁵⁰ The UCP 500 did not satisfactorily address this aspect in relation to the description of the goods in Article 37(c) and inconsistency in general.⁵¹ UCP 500 Article 37(c) now appears as Article 14(e) of the UCP 600. However, the strict compliance requirement expected on the product description on the commercial invoice under UCP 500 has now been diminished. Thus, ‘Article 14(e) of the UCP 600 no longer bears such a prescriptive approach on the description of the goods on commercial invoices.’⁵² It is argued that this new provision in the UCP 600 will allow the banks a greater degree of discretion in the examination process that will result in fewer rejections of documents due to discrepancies experienced under UCP 500.⁵³

3.4 Addresses of Applicant and Beneficiary

Technical discrepancies such as typographical errors (as opposed to real discrepancies) have been a tricky area in letter of credit transactions.⁵⁴ The typing errors in addresses are an example of technical discrepancy that may result in rejection of the documents presented for payment. . In this example, the banks might take up the position that they

⁴⁸ See UCP 600 Article 2; See also UCP 600 Articles 14, 15 and 16 (d).

⁴⁹ *Contra* Ole Malmqvist, ‘UCP 600: Key issues reconsidered’ DC Insight, Special section: Comments on the latest UCP draft <<http://www.iccbooks.com/Home/UCP600issues.aspx>>; Ole Malmqvist states that ‘an overwhelming majority voted for deleting ‘reasonable time’ and replacing it by a fixed number of days. We trade finance bankers will regret that we deleted it, and in a few years - fewer than if we retain the ‘reasonable time’ concept - we will have plenty of time to wonder why we did it. I still think the ‘reasonable time’ concept should be retained’; See also H. Bennett, ‘Documentary Credits: A Reasonable Time for What?’ [1992] *Lloyd’s Maritime Commercial and Law Quarterly* 169.

⁵⁰ See *Commentary on UCP 600, Article-by-Article Analysis by the UCP 600 Drafting Group*, above n 13, 65.

⁵¹ See also UCP 500 Article 13(a).

⁵² Roberto Bergami, ‘Will the UCP 600 Provide Solutions to Letter of Credit Transactions?’ (2007) 3 (2) *International Review of Business Research Papers* 41-53.

⁵³ See above n 10.

⁵⁴ See Asanga Gunawansa, ‘Proof of Shipment under Letters of Credit Transactions; Expectation of Banks’ [2001] *Attorney General’s Law Review (Sri Lanka)* 144, 148.

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were unaware whether the documents represented two entirely different addresses or whether the inconsistency is merely a typographical error.

Article 14 of the UCP 600 introduced a provision regarding the addresses of applicant and beneficiary appearing in a document required to be tendered. In practice, companies often have many different offices such as sales outlets, warehouses etc. Under Article 14(j), ‘the addresses noted in the document need not be the same as those stated in the credit (or other stipulated document) provided they are in the same country.’⁵⁵ It is argued that this development will ensure that documents tendered under a letter of credit subjected to the new rules will not be rejected on purely technical grounds.

The aim of these changes to the standard for examination of documents is to expect fewer rejections of documents tendered under letters of credit. The outlook of this provision is favourable because, it would be easier for a document to meet the standard of compliance under UCP 600 than under its predecessor, UCP 500.

As a whole, the introduction of a new standard for examination of documents to the UCP will open up more space for trading parties to adjust themselves comfortably by casting a heavy burden on banks. The new provision emphasizes more on the function of the letters of credit as a mechanism of payment. As noted above, the doctrine of strict compliance has now been relaxed. It gives a good reason why letters of credit should be used as a method of financing trade contracts.

4 THE ROLE OF THE BANKS IN ‘DEFERRED PAYMENT’

The nominating bank paying less than the face value of the credit by paying the beneficiary of the credit early is referred to as “deferred payment” or “discounting”.⁵⁶ UCP 600 expressly acknowledges this undertaking of a nominated bank.⁵⁷ Article 12(b) of the UCP 600 has set out important rules regarding nominated bank’s obligations and responsibilities covering honour, negotiation, prepayment and deferred payment. They were not properly defined in the previous version.⁵⁸ This new provision can be considered as recognition of a current banking practice in international trade.⁵⁹ Commenting on this new development, the UCP 600 Drafting Group stated that:

This provision recognizes the independent, absolute and unconditional nature of a nominated bank’s obligation under its own accepted draft or incurred deferred payment undertaking. It thus responds to legal questions raised as to whether UCP 500 or international standard banking practice supports discounting of such obligations by nominated bank obligors.⁶⁰

⁵⁵ See UCP 600, Article 14 (j).

⁵⁶ Bergami, above n 50.

⁵⁷ See UCP 600 Article 12 (b).

⁵⁸ See UCP 500 Article 10 (d).

⁵⁹ See also Byrne, ‘Negotiation in Letter of Credit Practice and Law: The Evolution of the Doctrine’, *Texas International Law Journal* <<http://law-journals-books.vlex.com/vid/negotiation-letter-credit-evolution-64084349>>.

⁶⁰ See Commentary on UCP 600, Article-by-Article Analysis by the UCP 600 Drafting Group, above n 13, 53.

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Article 7 (c) of the new rules stipulates that the ‘issuing bank must reimburse the nominated bank on maturity whether or not the nominated bank has paid early.’ This provision fills a gap in UCP 500, which failed to acknowledge, “deferred payment”, leading to speculation whether such deferred payment was permitted under UCP 500.

Behind this provision in the UCP 600 is the most famous and often quoted case of *The Banco Santander v Bayfern Ltd.*⁶¹ This case relates to a dispute between an issuing bank and a confirming bank over a deferred payment credit. The following was the sequence of events as set out in Waller LJ’s Judgment. Paribas issued a deferred payment letter of credit, payable at 180 days from bills of lading date, in favour of Bayfern. The letter was subject to the *Uniform Customs and Practice for Documentary Credits (UCP) (1993 revision)* and required presentation of documents to Banco Santander in London. Santander advised Bayfern of the letter of credit and added its confirmation. Bayfern presented conforming documents and Santander made a discounted payment to Bayfern.. Banco Santander forwarded the documents to Paribas but Paribas refused to reimburse Santander on the basis that the documents presented and accepted by Santander included forged documents.

The Court of Appeal considered the provisions of Article 10(d) of the UCP 500 and held that Santander was not entitled to reimbursement under the UCP because under the credit Paribas had requested Santander only to confirm that it would pay the full amount on maturity. Any reimbursement could only be of that payment. On maturity there was no liability to pay because of Bayfern’s fraud. Although it was not a breach of mandate for Santander to discount as it had done, it was not within the mandate. In order to be protected in the circumstances which had happened Santander should have obtained Paribas’s authority to discount and confirmation of reimbursement if it did.⁶² Certainly, this decision discouraged some banks from making deferred payments before the maturity date stipulated in the credit.

Articles 7(c) and 8(c) of the UCP 600 have now attempted to resolve the problem posed by the Banco Santander case. In this context, an article entitled “UCP 600 – Some Highlights”, which appreciates this new development, stated that:

With this revision the controversial issue regarding the nominated bank’s prepayments under acceptance or deferred payment credit may be settled well under UCP600. The controversy arose in cases such as *Banco Santander SA vs Banque Paribas* (2000). This provision on prepayment is bound to prove popular with bankers and judges, since it reflects sound commercial sense and the current prevailing banking and trade practice in international trade.⁶³

This paper argues that the introduction of Articles 7(c) and 8(c) is a forward movement of the ICC in recognizing the deferred payment undertaking of the nominated bank. Simultaneously, the practical effect of these provisions would be to relieve the banks of

⁶¹ *The Banco Santander v Bayfern Ltd* [2000] CLC 906 <

<http://international.westlaw.com.libraryproxy.griffith.edu.au/result/default.wl?mt=316&origin=Search&sri=20%2c21&q uery=BANCO+SANTANDER+%26+BAYFERN&method=TNC&db=UK>> (Cite case name in full); See also Charl

Hugo, ‘Discounting Practices and Documentary Credits’ (2002) *South African Law Journal* 119.

⁶² *Ibid*, 907.

⁶³ A H M D Nawaz, above n 18.

the risk of any fraud on the part of the beneficiary. These positive changes from UCP 500 to 600, particularly, on the item of “deferred payment” are to be welcomed because they will facilitate the bankers in discharging their role in the letter of credit cycle with efficiency and accuracy.

5 NEW APPROACHES AND FEATURES FOR DOCUMENTS

The letter of credit can require an array of documents. However, the most common documents that must accompany the letter include transport documents, insurance document and the commercial invoice.⁶⁴ It is commendable to note that UCP 600 has introduced new approaches and features for the presentation of transport documents and insurance document. However, the changes introduced in the provisions governing insurance documents are considerably less extensive than those made in respect of transport documents.

From the UCP 500 to 600, there are no substantial changes introduced to either the structure or substance of the provision applicable to the presentation of the commercial invoice. The essence of UCP 500 Article 37(c) has now been placed in Article 14 of the new rules.

5.1 Identification of Carriers and Agents

One of the new features in the UCP 600 is that the Articles relating to transport documents in UCP 500 have been amended to remove the confusion over identification of carriers and agents. On this matter, UCP 600 has followed the recommendations set by ICC Banking Commission which stated that: ‘If an agent signs a transport document (Bill of Lading, multimodal transport document, air transport document) on behalf of a carrier, the agent must be identified as agent, and must identify the carrier on whose behalf it is signing.’⁶⁵

It is somewhat ironic that despite this new development the House of Lords in *Homburg Houtimport BV v Agrosin Private Ltd., The Starsin*,⁶⁶ used UCP 500 to help them clarify the identity of the carrier in a case concerning a bill of lading:⁶⁷ ‘The current version of the code (UCP 500) has made significant changes to the previous versions and among other things, requires that the actual identity of the carrier should be disclosed and particularized by naming it or him on the face of the bill of lading...All this is a worthy aspiration.’ This comment from Lord Hobhouse in *The Starsin* suggests that UCP 600 will have a lot to contribute to the identification of carriers and agents in stipulated transport documents.

⁶⁴ See generally Agasha Mugasha, above n 2.

⁶⁵ See *ISBP for the Examination of Documents under Documentary Credits, for UCP 500*, (ICC Services Publications Department, France, 2003), ICC Publication 645.

⁶⁶ *Homburg Houtimport BV v Agrosin Private Ltd., The Starsin* [2003] 2 W.L.R 711 [H.L.].

⁶⁷ *Ibid*, 749.

5.2 Transport Documents Covering at Least Two Different Modes of Transport

The transportation of goods in international sale of goods contracts has, invariably, an international character. The parties may agree in their sales contract whether the transportation is to be executed by sea, land, air or by a combination of these modes of transportation. If a combination of these modes of transport is to be employed, it is considered “multimodal or combined transport” and the beneficiary of the credit is required to present to the bank, documents indicating the adopted mode of transportation. The provisions applicable for the presentation of such documents in the UCP 600 differ from its predecessor, UCP 500. The new Articles in UCP 600 relating to transport documents can be looked at in some detail, taking account more specifically of their increased use and significance in international trade.

Whereas the UCP 500 in setting out provisions relating to transport documents started with marine bills of lading and the standard against which the banks would examine them, the UCP 600 starts with an entirely new concept titled ‘transport documents covering at least two different modes of transport’ in Article 19. The UCP 600 Drafting Group has explained the rationale for this structural change: ‘Because transport by more than one mode of transport is the more common form in which goods are transported from seller to buyer, the Drafting Group placed this article as the first of the transport document articles.’⁶⁸

It is commendable to note that the ICC has realized the increasing recognition of multimodal transport documents in international trade. By virtue of this development, the requirements to be satisfied for tender of transport documents are now set out at Article 19, which is based on Article 20 with appropriate amendments. It is argued that Article 19 (in part) now gives a description of multimodal transport shipments. Unlike Article 26(a) of the UCP 500, the credits now need not call for a transport document to cover different modes of transport.

This new provision is another instance where UCP 600 has followed the recommendations set by ICC Banking Commission which provided that: ‘In all places where the term “multimodal transport document” is used within this document it also includes the term “combined transport document”.’⁶⁹ The failure of the UCP 500 to use “multimodal transport document” instead of “combined transport document” may have caused confusion in the document examination process. To avoid any confusion, UCP 600 now uses the term “Transport Document covering at least two different modes of transport.” This change has been introduced to the ISBP, as well.⁷⁰

It is argued that UCP 600 Article 19 has replaced Article 26 of the UCP 500. The “multimodal transport operator” referred to in Article 26 of the UCP 500 is also now replaced with the term “carrier”. This paper argues that this new concept in the UCP 600 is in line with the modern transport practices in international trade, because it reflects the

⁶⁸ See *Commentary on UCP 600, Article-by-Article Analysis by the UCP 600 Drafting Group*, above n 13, 81.

⁶⁹ See *ISBP for the Examination of Documents under Documentary Credits, for UCP 500*, above n 65, paragraph 121.

⁷⁰ See *ISBP for the Examination of Documents under Documentary Credits, 2007 Revision for UCP 600*, above n 11, 39, paragraphs 68 & 69.

increasing importance and need of a single transport document covering the entire carriage regardless of the mode of transportation involved during the journey. Modern transport companies often seek to control the entire carriage of cargo from its place of origin to the place of its use and likewise, traders are often interested in having one single counterpart that takes care of the entire carriage.

By attempting to remedy many lapses in the UCP 500 with regard to tender of transport documents, the UCP 600 has thus, paved its way for a new approach and procedure for presentation of transport documents. Moreover, from a commercial perspective, what should be appreciated is the fact that these positive changes from UCP 500 to 600, are in line with the trends and developments of modern transportation in international trade. This paper contends that these changes will play an important role in financing exports and imports contracts through letters of credit.

5.3 Insurance Document and Coverage

The loss or damage to goods during transit from exporter to the importer is an important risk involved in international trade. Hence, the contracts often provide for transportation insurance in order to protect the goods during their transit. For example, if a documentary credit requiring insurance document calls for dispatch to be effected from London Heathrow Airport to Singapore Changi Airport, an insurance document presented showing that the insurance coverage commenced from Liverpool, through to London Heathrow Airport, and until the goods arrived at Singapore Changi Airport, will be acceptable.⁷¹ Thus in letters of credit, the insurance document provides proof of the appropriate insurance safeguarding the quality of goods in transit and their safe arrival.

The provisions governing the insurance documents have now been condensed from Articles 34-36 of the UCP 500,⁷² to Article 28 of the UCP 600. From the UCP 500 to 600, there are no substantial changes to the requirement for tender of such documents. However, it is argued below that there is a satisfactory development from UCP 500 to UCP 600 in the context of “original” documents.

5.4 What in the context of UCP is an “original”?

As outlined in the *Commentary on UCP 600*, ‘over a period of several years there have been a number of queries raised with the ICC Banking Commission as to the determination, by banks, of what is an “original” document within the meaning of Article 20 (b) of the UCP 500.’⁷³ To quote the UCP 600 Drafting Group:

In the late 1990s, a number of queries to the ICC banking commission and several court cases raised the issue of what constitutes an original document under UCP 500 sub article 20 (b). These issues prompted the ICC banking commission in July 1999 to issue

⁷¹ See *Commentary on UCP 600, Article-by-Article Analysis by the UCP 600 Drafting Group*, above n 13,132.

⁷² Note that whilst UCP 500 Article 34 set out certain requirements for the existence of the insurance cover, Articles 35 and 36 set out the scope of the insured risks, that is, the provisions relating to the type of insurance cover and all risks insurance cover, respectively.

⁷³ *Commentary on UCP 600, Article-by-Article Analysis by the UCP 600 Drafting Group*, above n 13, 75.

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a Decision on “The Determination of an Original document in the context of UCP 500 sub-article 20 (b).⁷⁴

The effect of Article 20(b) of the UCP 500 was that, ‘unless the credit stated otherwise, banks should accept as “original” all documents which were produced by automated or computerized means and were marked “original” and, where necessary, signed.’⁷⁵ Therefore, it is argued that under UCP 500 there was room for rejection of documents, which were in fact original but not stamped as such. In terms of Article 34(b) of UCP 500, if there is more than one original, all the originals of the insurance document must be presented to the bank. A similar provision appears in the UCP 600 at Article 28(b).

What constitutes an original insurance document under UCP 500 has been subject to judicial scrutiny in the past. *Glencore International v Bank of China*,⁷⁶ is an example where the courts scrutinized this provision in the UCP 500. The facts as appear in the judgment are as follows. G contracted to sell the buyers, S, 1500 tonnes of aluminium. Payment was to be provided by irrevocable letter of credit against presentation of various documents. B rejected the documents on the basis that they identified the goods in question in different ways. The issue arose whether B was entitled to refuse payment on the ground that the documents presented did not comply with the terms of the credits.⁷⁷

The Court of Appeal held, that (1) the *Uniform Customs and Practice for Documentary Credits (1993 Revision)* Art.20 provided a clear rule with reference to documents produced automatically. It was clear that the documents here were produced within one of the means described and so fell within that rule. Article 20(b) provided that a copy document with a signature was not an “original”. It was plain that any origin expressed on the documents was expressed in a broad, generic way; (2) the description of the goods in the commercial invoice did correspond with the description in the credit so as to comply with Art.37(c) of the UCP 500. The additional information supplied was not detrimental to this requirement in the credit and was acceptable and (3) it was not the law that in the absence of any stipulation, the packing list should contain specific reference to or description of the goods themselves. None of the documents could have contained all the information required rather the linkage between the documents was clear, exact and devoid of discrepancy.⁷⁸ In the course of his Judgment Binham MR stated that:

There is abundant room to debate what in the context of modern technology is an original ... Article 20(b) is designed to circumvent this argument by providing a clear rule to apply in the case of documents produced by reprographic, automated or computerized systems ... it is plain that (the certificate) was produced by one or other of the listed means and so was subject to the rule.⁷⁹

⁷⁴ Ibid.

⁷⁵ See UCP 500, Article 20 (b).

⁷⁶ *Glencore International v Bank of China* [1996] 1 Lloyd's Rep 135.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid, 153.

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A review of this decision indicates that the only documents, which are original independently of Article 20(b) are documents produced by hand or by an old-fashioned manual typewriter. Consequent to this decision there was confusion among banks as to the correct practice that should be adopted in accepting original documents. A number of banks required all documents other than hand written or documents produced by manual typewriter should clearly be marked as “original”. However, other banks refused to accept this as the correct position reflected in the UCP 500.

The conflicting interpretation of Article 20(b) of UCP 500 is further illustrated in the case of *Kredietbank v. Midland Bank PLC*.⁸⁰ Among the letter of credit’s requirements was the presentation of an ‘original insurance policy or certificate in negotiable blank form.’ The negotiating bank forwarded the documents to the issuing bank that dishonoured, citing two discrepancies in the presentation, and refused to indemnify the negotiating bank. The first discrepancy cited by the issuing bank was that the presented insurance certificate was not marked as “original” pursuant to Article 20(b) of UCP 500.

The Court of Appeal observed that:

It would be repugnant to the whole scheme for the tender of documents under a letter of credit, and for the examination of those documents by a bank, to construe Article 20(b) as requiring the word ‘original’ to be placed on a document ... where the other markings on the document clearly indicate that it is the original and there can be no doubt about it being the original. It seems that... it would serve no purpose to make compliance with a letter of credit dependent upon whether an empty ritual had been carried out, of stamping the word ‘original’ on the face of the document.⁸¹

The appellate court, thus, ruled that the issuing bank was not entitled to reject a document that was clearly an original despite not being marked “original”, and, noting that ‘the requirement of strict compliance is not equivalent to a test of exact literal compliance in all circumstances’, held that documents complied. Quite significantly, the appellate court ruled that if *Glencore* purported to lay down a different rule, then that part of the Judgment was obiter and wrong.⁸²

Consequently, the ICC issued a Policy Statement.⁸³ In substance, this Policy Statement embodied the general principle upheld in *Kredietbank* that Article 20(b) does not apply to a document, which appears on its face to be an original. It is argued that this Policy Statement should be considered as reflecting the international standard banking practice with regard to the correct interpretation of Article 20(b) of UCP 500. Although the Policy Statement has set out a simple way of identifying the limits of originality, the scope of what constitutes a non-original seems to be somewhat narrow. As a whole, these two clauses are complicated and conflict with Article 20(b) itself. For example, a photocopy should be treated as original if it satisfies the requirements of Clause 3 of the Statement.

⁸⁰ *Kredietbank v. Midland Bank PLC* [1999]1 All ER (Commercial Cases) 801.

⁸¹ *Ibid*, 813.

⁸² *Ibid*, 815.

⁸³ See ‘The Determination of an “Original” document in the context of UCP 500 sub article 20 (b)’, *ICC Commission on Banking Technique and Practice*, 470/871 of July 1999
<<http://www.iccwbo.org/collection4/folder165/id415/printpage.html>>.

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In other words, if the signature requirement is fulfilled even a photocopy can be raised to the status of an original. This interpretation conflicts with UCP 500 Article 20(b), which clearly states that a photocopy cannot be accepted unless it is marked original.

However, the English Court of Appeal in *Credit Industriel et Commercial v China Merchants Bank*,⁸⁴ considered it appropriate to apply the Policy Statement.⁸⁵ Steel J. was of the view that the position in this case was governed by the *Kredietbank* decision which treated ‘documents appearing or known to be copies or in some analogous respect, of a class not prior thereto as originals.’⁸⁶ It was held that the defendant bank was not entitled to reject the documents as non-originals.

Now, under UCP 600, Article 17 re-states the position and incorporates the aforementioned Policy Statement into the rules themselves. However, this new Article goes further to state that not only is a document to be treated as original if it is stamped or marked as such, but it must also be treated as original if:

- (i) it appears to have an original signature, mark, stamp or label of the document issuer;
- (ii) it appears to be produced on original stationery; or
- (iii) it appears to be written, typed, perforated, or stamped by the issuer’s hand (unless the document makes clear that it is merely a copy).⁸⁷

According to this Article, any document stamped or marked as original, any document that appears to contain the issuer’s authorized signature, any document that appears to be a product of original stationery or any document hand written by the issuer will satisfy the requirements for its acceptance as an original document. These specific requirements should facilitate the identification of an original document under UCP 600 and eliminate difficulties posed under UCP 500 in the interpretation of what constitutes an original document.

Thus, UCP 600 has outlined the specific requirements applicable to insurance documents in order to reflect the current insurance practices in international trade. Therefore, the outlook of the new provisions on the presentation of the Insurance Document and Coverage is favourable.

6 Introduction of eUCP

The UCP 600 has introduced 12 Articles of the eUCP, ICC’s supplement to the UCP governing presentation of documents in electronic or part-electronic form.⁸⁸ The updated version of the eUCP took effect on 1st July 2007 and as stated in eUCP Article 1(a), these

⁸⁴ *Credit Industriel et Commercial v China Merchants Bank* [2002] All ER (Commercial Cases) 427.

⁸⁵ *Ibid*, paragraph 62.

⁸⁶ *Ibid*, paragraph 54.

⁸⁷ See UCP 600, Article 17; Note that the distinction between “originals” and “copies” in the current paper-based disappears in the electronic world; See eUCP Article e 8 which provides that ‘any requirement of a UCP or eUCP credit for presentation of one or more originals or copies of an electronic record is satisfied by the presentation of one electronic record.’

⁸⁸ See Article e 1(b).

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provisions would ‘accommodate the presentation of electronic records alone or in combination with paper documents.’⁸⁹ This provision will allow banks to manage the transition over to electronic presentation gradually.

Hopefully, this supplement to the UCP will bring the documentary credit into the electronic age and permit payment to be made on electronic presentation. There are indications suggesting that electronic presentation is the way of the future and once adopted by the international banking community, will revolutionize financing of international trade contracts.

7 Conclusion

The UCP 600 has introduced positive changes that are central to the structure and operation of letters of credit in international trade. The author believes that UCP 600 would be more successful than its predecessor, UCP 500. Has UCP 600 been able to strike the right balance between the interests of bankers on the one hand and the commercial expectations of the business fraternity on the other?

UCP 600 provides clear guidance as to the respective roles of the banks in handling documents presented for payment. In terms of examination of documents, the elimination of phrases such as “reasonable care”, “reasonable time” and “on its face” is meant to facilitate and expedite the process of examination of documents. A new ‘Definitions’ section, clarifies relevant bank definitions. Defining “honour”, “negotiation” and “presentation” should facilitate the functions of banks since these terms have been the subject of disputes under UCP 500. A “banking day” is also now defined which would facilitate the calculation of the stipulated time period for examination of documents presented to the bank. All these positive changes substantiate the bank-friendly nature of the UCP 600.

UCP 600 is also a trader-friendly document. The new rules have emphasized the irrevocable nature of a credit. This would give an assurance to trading parties that payment undertaking of the issuing bank would stand in effect until and unless all parties involved are mutually agreed to have it cancelled. Thus, the issuing bank is not empowered to revoke that undertaking on its own. This position favours the interests of the exporters as beneficiaries and is further strengthened by the recognition of the autonomy principle. Another provision that will benefit the exporters is Article 14, which has introduced a new standard for examination of documents. The effect of this provision is that the Strict Compliance Rule has now been relaxed to a great extent and consequently a greater burden will rest on the banks in their examination of documents. Thus, this new standard will favour the exporters as beneficiaries in their presentation of documents.

This paper contended that the UCP 600 has taken some serious steps to resolve documentary credit disputes in international banking and business practice by providing a neater set of rules, which will benefit both bankers and the business fraternity. Therefore,

⁸⁹ Ibid.

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UCP 600 can be viewed as a document that balances the interests between the bankers on the one hand and the business fraternity on the other.

Notwithstanding this paper also pointed out earlier that there are some areas relevant to the operation of documentary credits that do not seem to have been fully appreciated in the UCP 600. One such area that has not been given consideration by the ICC is the relevance of the fraud exception in the operation of letters of credit. It is difficult to see how the system of financing of international trade through letters of credit remain viable if the party who is responsible for the presentation of the documents is not responsible for the genuineness of the same. The bank is under no obligation to 'investigate' the genuineness of the documents, but is entitled to refuse to honour the presentation if it has knowledge of a forgery or fraudulent presentation of documents. The new rules have failed to appreciate the importance of incorporating such a provision in to the rules themselves. However, by implication, the ICC takes the policy position that UCP is not intended to provide a comprehensive treatment of legal rights and duties and that the issue of fraud is best left to the law of national states.

The questions also emerge with regard to the introduction of eUCP as part of the UCP 600. The new eUCP rules facilitate banks to replace physical presentation of paper documentary credits with electronic presentation. Are the international banking and business community ready to utilize electronic presentation? For the proper function of electronic trade finance it is crucial that the banks are equipped with a proper system to accommodate electronic presentation and that their IT systems can "read" the electronic records presented for payment. It may take time for banks as well as traders in developing countries to take part in the eUCP.

Nevertheless, the UCP 600, to its credit, has made some positive changes that would facilitate the financing of international trade. Therefore, this paper concludes that notwithstanding some of the shortcomings highlighted above, UCP 500 to 600 is indeed a forward movement of the ICC in introducing positive changes that are beneficial to all parties to a letter of credit. But will UCP 600 succeed in practice where UCP 500 failed? Empirical research into this question is beyond the scope of this paper. The author believes that time is needed for the bankers, traders and service providers to get used to applying, interpreting and working with the UCP 600. Whether UCP 600 will succeed where UCP 500 proved unsuccessful remains to be seen.