UCP600 Article 1
Application of UCP

The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 ("UCP") are rules that apply to any documentary credit ("credit") (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded in the credit.

Summary of Topics:

A. Introduction

1. **Generally.** UCP600 Article 1 indicates the intended scope of the UCP. It addresses five issues: i) Intended application of UCP600 including an informal definition of "documentary credit"; ii) Applicability to standby LCs; iii) Method by which UCP600 is to be made applicable to a credit; iv) Variance of the provisions of UCP600; and v) Who is bound when UCP600 is applicable. In addition to these topics, Article 1 is an appropriate place to consider the UCP itself, its relationship to local law, and to electronic commerce.

2. **Background & Context.** It is useful for rules to indicate their scope of application in order to enable those applying them to understand their reach. While such a provision is not binding because the UCP is not positive law, the statement of intent as to its application in this article is useful in interpreting and applying it.

3. **Application of UCP600 Article 1 & Its Impact.** UCP600 Article 1 is itself the scope provision of UCP600 and is so entitled. Unlike positive law, private rules of practice are applicable only to the extent to which they have been chosen and to which the applicable law gives effect to them. While UCP600 Article 1 indicates that the effect of the rules can be modified or excluded, the scope of the application of the rules is itself determined by the choice of making them applicable. There is, however, another sense in which the rules can be applicable to an independent undertaking in general and a commercial letter of credit in particular, namely as an articulation of standard international letter of credit practice. To the extent that applicable law looks to standard international letter of credit practice for guidance, many of the provisions of UCP600 provide a reliable indication of that practice whether or not the undertaking is subject to it. The U.N. LC Convention, for example, makes reference to such practices, apart from express incorporation of the rules, in Articles 13(2) (Determination of Rights and Obligations),14(1) (Standard of Conduct and Liability of Guarantor/Issuer), 16(1) (Examination of Demand and Accompanying Documents).
   a. **Who is Impacted.** UCP600 Article 1 indicates that its rules are "binding on all parties thereto" although it does not indicate who is a party "thereto". UCP600 certainly affects the issuer of a credit expressly subject to the rules. It also impacts a beneficiary or transferee beneficiary as well as a nominated bank that elects to act under such a credit.
   b. **Where the Credit or Amendment Reiterates its Provisions.** There are situations where letters of credit are drafted to contain or reiterates provisions of UCP600 including provisions of UCP600 Article 1. These terms are included for emphasis and their restatement does not indicate that they represent an attempt to vary the other applicable provisions of UCP600 Article 1. As a result, the scope provisions of UCP600 Article 1 should be read in conjunction with any terms in the credit and supplement them to the extent possible unless it is apparent that a different result is intended.
   c. **Impact on Other UCP600 Articles.**
      i. **Effect on Other UCP600 Articles.** As indicated, the scope provision of UCP600 Article 1 is determined by the terms of the credit and, as such, it impacts the applicability of all of the articles of UCP600. The provision of the variation or modification of the rules, however, affects every article in UCP600. In particular, it affects undertakings that might be issued under UCP600 in addition to letters of credit such as confirmations, advices, pre-advices, reimbursement undertakings, transfers, and undertakings to purchase documents. It also indirectly impacts acceptances that are given under a UCP600 credit. While applications frequently reference UCP600, the extent to which the application is subject to UCP600 is not addressed with any precision in the UCP itself although the applicable is said to be a "party" in the definition of UCP600 Article 2 ¶ 2.

ii. **Coverage by Other UCP600 Articles.** In addition to the matters discussed and treated in UCP600 Article 1, other articles refer to undertakings other than letters of credit, as indicated in the preceding subsection, and may reflect on the scope of the applicability of UCP600 to these undertakings.

d. **Effect on the Documents presented.** UCP600 Article 1 does not directly affect the documents presented under a credit except to the extent that they must comply with the terms and conditions of a credit subject to it except to the extent that it is modified or excluded.

e. **Effect on Communications.** It is unclear to what extent UCP600 affects communications between banks regarding a letter of credit that is issued subject to it. It certainly affects the advice of a credit, a pre-advice, advices of transfer, and a notice of refusal which are addressed in the chapters on UCP600 Articles 9 (Advising of Credits and Amendments), 11 (Teletransmitted and Pre-Advised Credits and Amendments), 38 (Transferable Credits), and 16 (Discrepant Documents, Waiver and Notice) respectively.

4. **UCP600 Defined Terms Used in UCP600 Article 1.** UCP600 Article 1 uses the following term defined in UCP600 Article 2 (Definitions):[1] "Credit" (UCP600 Article 2 ¶ 8) and also provides a parenthetical defining "documentary credit" as "(credit)".

5. **UCP600 Interpretations Generally.** UCP600 is not self contained. It relies heavily on interpretations of its provisions. These interpretations[2] are of varying value and sophistication and many of them are collected and published by ICC Publishing as "ICC Opinions". Under UCP500 (1993), another layer of formality was added to these opinions with the drafting of the International Standard Banking Practices or ISBP (2003)[3] (ICC Publication No. 645) which was a term taken from UCP500 Article 13(a)'s (Standard of Examination of Documents) somewhat obscure statement that compliance "shall be determined by standard international banking practice as reflected in these articles." In 1996, the International Financial Services Association in conjunction with the Mexican Bankers Association produced a formulation of international practices entitled *Standard Banking Practice for the Examination of Letter of Credit Documents* that were considered by other national letter of credit groups.[4] This idea was taken by the ICC and the ISBP (ICC Publication No. 645) was produced in 2003 which was more modest in scope. ISBP was revised somewhat to align it with UCP600 as ISBP (2007) and renumbered as ICC Publication No. 681. While the alignment is similar, some provisions of ISBP (2003) were upgraded to the text of UCP600 and deleted from the text of ISBP (2007) and others were downgraded from the text of UCP600 to ISBP (2007). Despite the apparent

1. For convenience, the definitions contained in UCP600 Article 2 (Definitions) are reprinted on the inside of the front and back cover of this *Analytical Commentary*. Although the definitions contained in UCP600 Article 2 (Definitions) do not contain distinct subdivisions and are only separated as unmarked paragraphs, references to them in this *Analytical Commentary* are identified by the use of the "¶" symbol and numbered sequentially.

2. Although the interpretations contained in UCP600 Article 3 (Interpretations) do not contain distinct subdivisions and are only separated as unmarked paragraphs, references to them in this *Analytical Commentary* are identified by the use of the "¶" symbol and numbered sequentially.

3. The ISBP is an official publication of the ICC Banking Commission. It was initially credited to supplement UCP500, ISBP (2003), and revised to supplement UCP600, ISBP (2007). As its name implies, it attempts to articulate standard international letter of credit practice with more detail and specificity than does the UCP and also offers interpretations of terms contained in LCs. The ICC Banking Commission has suggested that the ISBP not be given as the primary reason for a refusal of documents. The ISBP and its role in letter of credit practice is treated in connection with the study of UCP600 Article 14 (Standard for Examination of Documents) in this *Analytical Commentary*.

4. International Financial Services Association, Inc. 1996. This text was reprinted in *Standby LC Rules & Laws: Critical Texts* (IIBLP 1999), whose subsequent editions were renamed *LC Rules & Laws: Critical Texts.* This text was not included in subsequent editions, because for all practical purposes, it was superseded by ISBP (2003).

similarities between the role of these practices under UCP500 and UCP600, changes of considerable significance have been introduced by references in UCP600 Articles 2 (Definitions) ¶ 5 "Complying Presentation"and 14(d) (Standard for Examination of Documents) to "international standard banking practice" without expressly referring to the ISBP itself. As a result, the precise role of these interpretations is not altogether clear. The Introduction to the ISBP suggests that letters of credit should not be expressly issued subject to them but without being so issued, it is not certain to what extent they are applicable to letters of credit. This issue is one that the ICC itself has been largely unable to address in a cogent or compelling manner apart from unconvincing statements that they do not add to the terms of the UCP, a notion that is patently not correct from even a cursory glance at the table of contents which reveals extensive paragraphs with detailed provisions about drafts and certificates of origin, documents not taken up by UCP600. The ISBP should be treated with deference as an interpretation of UCP600 by the body promulgating it. They are not binding on courts or arbitrators and should only be followed to the extent that they fairly and rationally are consistent with the UCP itself and the practices that it reflects.

6. **Organization of this Chapter.** For convenience, this chapter of the *Analytical Commentary* is organized under the following headings:

A. Introduction
B. Scope
C. Standby Letters of Credit
D. Miscellaneous Scope Issues
E. Variation of UCP600
F. Legal Issues
G. Miscellaneous Issues
H. References

B. Scope

7. **Intended Application.** UCP600 Article 1 expresses the intended scope of the UCP, namely that it records standard international LC practice applicable to "documentary credits" and applies when the text of the credit indicates it is subject to the rules.[5] Because UCP600 is not law, which alone is able to mandate exclusivity of application, other types of undertakings may be issued subject to it in whole or in part. Indeed, it is not uncommon for the UCP to be referenced in undertakings regarding LCs reimbursement agreements with applicants, correspondent banking agreements, pre advices, and silent confirmations (Undertakings to Purchase Documents). Occasionally, independent guarantees are also issued subject to it.[6] While it could be used in connection with other non-independent

5. *See Ross Bicycles, Inc. v. Citibank, N.A.*, 613 N.Y.S. 2d 538, 540 (N.Y. Sup. Ct. 1994) [U.S.] ("Although not having the force of legislation, the UCP is an internationally accepted codification of banking practice and custom regarding letters of credit. When a letter of credit expressly incorporates the UCP, it becomes a part of the undertaking of the parties and its provisions have binding force."); *In re Auto Specialties Mfg. Co.*, 153 B.R. 510 (Bankr. W.D. Mich. 1993) [U.S.] ("The Application and Agreement accomplished this through its incorporation of a source frequently referred to in examining letters of credit, the UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, (Int'l Chamber of Commerce 1983) (the "UCP"). The UCP provides that it may be incorporated into agreements by reference, Article 1, and such was the case in this instance; the Application and Agreement incorporated the UCP in its ¶ 5.").

6. Technically, independent guarantees and undertakings are as much "documentary credits" as are standbys. They fall into the LC family and are documentary. However, in common usage, an independent guarantee is not regarded as a "documentary credit" and UCP600 is not intended for independent guarantees. Use of UCP600 in independent guarantees would have the advantage of providing a time frame for honor, a method for refusal, and standards for examination and might be a valuable supplement to local law. It would also make the intended independence of the undertaking apparent. *See, e.g. Team Telecom International v. Hutchison 3G,* UK Ltd., [2003] EWHC (QB) 762 [England] (oddly worded undertaking deemed to be independent principally due to being expressly

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undertakings, it would have little relevance. Indeed, such peculiar references to the UCP in connection with transactions that have no relationship to independent LC undertakings raises the distinct possibility of commercial fraud.[7]

8. Documentary Credits. UCP600 is entitled the "Uniform Customs and Practice for Documentary Credits" and UCP600 Article 1 indicates that it applies to "any documentary credit". A documentary credit is an independent undertaking to honor conditioned on the presentation of a required document or documents. UCP600 Article 1 also provides that the term "documentary credit" includes standby LCs. This UCP usage is, however, in conflict with a usage common in many parts of the world where "documentary credit" is used in a sense contrary to the UCP usage. UCP82 (1933) was the first version, entitled the "Uniform Customs and Practice for Commercial Documentary Credits". It referred to the undertakings that it regulated as "commercial documentary credits". The earliest literature indicates that the term "commercial credit" was the generic name for these undertakings.[8] This terminology was retained in the UCP until the 1962 revision, UCP222, which changed the title to "Uniform Customs and Practice for Documentary Credits" and the name in the text to "documentary credits". The use of the term "documentary" became problematic with the advent and increase in use of standby LCs and the express application of the UCP to them starting with UCP400 (1983). All standbys require presentation of documents and are "documentary credit[s]" and UCP600 Article 1 classifies standbys as "documentary credit[s]". If the term "documentary credit" is used to encompass both standbys and traditional letters of credit, as the term is used by

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subject to ISP98, a rule of practice that is understood to be applicable to independent undertakings) (the same principle could apply to a guarantee subject to UCP600, although ISP98 would be more appropriate for such an undertaking). *See also* the interpretative ruling of U.S. regulators permitting U.S. banks to issue guarantees provided that they are clearly independent. OCC Interpretive Ruling, 12 C.F.R. § 7.1.1017 - National Bank as guarantor or surety on indemnity bond.

7. It is, for example, common for prime bank or high yield undertakings to contain references to the UCP, often in respect to undertakings that have no relationship whatsoever to a documentary credit. In re Tri-West Inv. Club, 2001 BCSCECCOM 429, Doc. No. 2001/04/20 [Canada] (Prime bank scam using letters of credit "issued under the International Chamber of Commerce (ICC 400) guideline requirements" as part of "[a] secured asset management program" where the "investor can purchase large bond offerings and sell the purchases in 24 to 48 hours . . . .") (summarized in J. Byrne, *The Myth of Prime Bank Fraud* (3rd ed. 2002) at 236). *See generally, The Myth of Prime Bank Fraud* (reprinting at 70-1 a 1993 Interagency Advisory from the Board of Governors of the Federal Reserve which warns "you should be attentive to the attempted use of any traditional type of financial instrument – such as a standby, performance or commercial letter fo credit – that is somehow referred to in an unconventional manner, such as a letter of credit referencing forms allegedly produced or approved by the International Chamber of Commerce. Examples of these include bogus schemes involving the supposed issuance of an "ICC 3034" or an "ICC 3039" letter of credit by a domestic or foreign bank.").

8. *See* William F. Spalding, *Bankers' Credits* 41 (1921) (U.K.) (stating "[t]he generic name for these instruments is 'Commercial Credit'", distinguishing between commercial credits that are issued by anyone and bankers' credits that are issued only by banks.); William F. Spalding, *Foreign Exchange and Foreign Bills* 150, 158 (3rd Ed. 1919) (U.K.) (explaining that a Documentary Credit "often contains a clause pointing out that it is not to be considered a bank credit . . . ."); G. W. Edwards, *Commercial Letters of Credit*, 7 Fed. Res. Bull. 158, 159 (Feb. 1921) (U.S.) (quoting *Union Bank v. Cole*, 47 L.J.Q.B. 100 (1877) to the effect that commercial LCs are "letters giving credit but not requesting any third party to give credit" in distinguishing commercial LCs from traveler's or tourists' LCs); George W. Edwards, *Foreign Commercial Credits* 25 (1922) (U.S.) (distinguishing commercial credits between "clean" credits, a U.S. practice, that requires only a draft and "documentary credits" that require presentation of documents evidencing title to goods.) "The adjective 'commercial' is at times specified in order to distinguish this instrument from the travel's letter." *Id.*; Wilbert Ward, *American Commercial Credits* 9 (1922) (U.S.) (referencing that an undertaking "has come to be known as a 'commercial letter of credit'"); Edgar S. Furniss, *Foreign Exchange* 205, 234 (1923) (U.S.) (distinguishing a commercial letter of credit from a traveler's credit); Ira B. Cross, *Domestic and Foreign Exchange* 234 (1924) (U.S.) (distinguishing commercial LCs from authorities to purchase); Albert C. Whitaker, *Foreign Exchange* 98, 131 (1922) (U.S.) (speaking of "documentary draft" or "documentary bill of exchange" and equating "bank credit" and "commercial letter of credit" or "commercial credit"); William E McCurdy, "Commercial Letters of Credit", 35 Harvard Law Review 539 (1922) and "The Right of the Beneficiary Under a Commercial Letter of Credit", 37 Harvard Law Review 323 (1924).

UCP600 Article 1, there is no conceptual problem. But the term "documentary credit" is used in some regions to refer more narrowly to more traditional LCs (i.e. an undertaking to pay the purchase price against documents evidencing the sale and delivery of goods) as opposed to standbys.[9] The term "commercial letters of credit" (or "commercial credits" or "commercial LCs") is, therefore, used in this *Analytical Commentary* to describe traditional LCs as opposed to standby LCs, both of which are documentary credits.

C. Standby Letters of Credit

9. Standby Letters of Credit Defined. While UCP600 Article 1 refers to standby LCs, it does not attempt to define them. Indeed, a definition is difficult if not impossible.[10] As indicated in Article 1, both standbys and commercial Lcs are documentary in that they contain an undertaking to pay against the presentation of required documents. Commercial letters of credit require presentation of documents that are linked to and reflect a current delivery of goods or services. Standby LCs, on the other hand, involve either so-called "clean" credits in which only a demand is made and which were known as early as the 18th century.[11] Where a standby requires other documents, their origin and meaning is not necessarily homogenous, internally consistent, or predictable. At most, it is only possible to say that standbys are not commercial LCs.[12] While commonly described as default undertakings, they are not necessarily and most financial standbys

9. Under this aberrant usage, the term "documentary" is also used to refer to a letter of credit that is not a standby and that requires presentation of transport documents contemporaneously relating to a shipment of goods. The UCP has facilitated this confusion by failing to use a unique term for these credits. Unfortunately, UCP600 does not take the opportunity to clarify this confusion of terminology. It defines "credit" in Article 2, but does not use the appropriate term for documentary credits that are not standbys, namely "commercial letters of credit" or "commercial credits" to distinguish the two types of credit. As noted in the text, this usage of the term "commercial credit" has a long and distinguished history and is still properly used in many parts of the world, including North America, parts of South America, and Asia.

10. ISP98 does not attempt to define standbys and most definitions, such as that used in the U.N. Convention Article 2, if accurate, would apply equally to commercial letters of credit. Neither prior nor current U.S. UCC Article 5 made any distinction between standbys and commercial letters of credit. The explanation of a standby as a letter of credit other than a commercial letter of credit requires that "commercial letter of credit" be defined. The explanation of standbys frequently suggested in regions where they are not widely used as default undertakings is not adequate since most financial standbys have a direct pay feature by which the undertaking is to pay interest and principal as it becomes due without any default in addition to payment of the accelerated amount on the occurrence of a default. 12 C.F.R. 208.24 (Letters of credit and acceptances) provides: "(a) Standby letters of credit. For the purpose of this section, standby LCs include every LC (or similar arrangement however named or designated) that represents an obligation to the beneficiary on the part of the issuer: (1) To repay money borrowed by or advanced to or for the account of the account party; or (2) To make payment on account of any evidence of indebtedness undertaken by the account party; or (3) To make payment on account of any default by the party procuring the issuance of the letter of credit in the performance of an obligation.[6]

> Footnote 6: A standby LC does not include: (1) Commercial LCs and similar instruments, where the issuing bank expects the beneficiary to draw upon the issuer, and which do not guaranty payment of a money obligation; or (2) a guaranty or similar obligation issued by a foreign branch in accordance with and subject to the limitations of 12 CFR part 211 (Regulation K)."

11. *Pillans v. Van Mierop*, (1765) 3 Burr 1663; 97 ER 1035 [Eng.], involved an undertaking to accept a draft drawn on the issuer of the undertaking in the event that a loan was not repaid, a classic example of a clean letter of credit.

12. The U.N. Convention attempts to define them, stating "an undertaking is an independent commitment, known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents in conformity with the terms and any documentary conditions of the undertaking indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person" but this definition is descriptive rather than analytically rigorous since it could encompass commercial LCs, as well.

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have a direct pay feature in which payment is regularly made without reference to default. Nor is the name used in the undertaking to describe itself determinative. While some standbys are expressly so denominated, others are simply labeled "Letters of Credit", still others are labeled guarantees, indemnities, "irrevocable undertaking", or other terms, and some are unlabelled, it not being necessary that they be labeled. Furthermore, some commercial parties regularly use commercial LCs as standbys.[13] As a result, it is often necessary and sometimes difficult to determine from the text of the credit rather than the name given to it whether it is a commercial letter of credit or a standby.

10. Applicability of UCP600 to Standby Letters of Credit. UCP600 Article 1 provides that a documentary LC includes standby LCs where they are subject to its terms. Strictly speaking, this provision is unnecessary because a standby could be issued subject to the UCP whether the rules themselves envisioned it or not since the UCP, not being law, could not prohibit its application to a standby.[14] The reference to standbys was retained in UCP600 Article 1 from its first use in UCP400 (1983).[15]

11. The Extent to Which Specific Articles of UCP600 are Applicable to Standbys. UCP600 Article 1 states that it applies to standbys "to the extent to which they [the articles/rules] may be applicable". This phrase was inserted into UCP400 (1983) to clarify that the UCP could be used for standby LCs. It reveals the half-hearted acceptance of the standby LC by the traditionalist commercial LC community, which at the time controlled the ICC Banking Commission.[16] It also reveals the haste and inadequacy with which this acknowledgment was drafted since it raises the question as to what extent the several articles are applicable to standbys, a question as to which UCP400 gave no guidance. That subsequent revisions, including UCP600, have repeated this phrase, however, reveals that the problem is deeper and more long-standing. Since the UCP had been drafted to reflect commercial LC practice, its acknowledgment of standbys was recognized as incomplete without some adjustments of the text. UCP400, therefore, contained modifications of several specific articles to accommodate standbys, chiefly by inserting

13. *See, e.g., Subaru Distribs. Corp. v. Subaru of Am., Inc.*, 1999 WL 216617 (S.D.N.Y. 1999) (U.S.) (finding that "[a] few times per year, [the applicant] and its (then) bank would arrange for [the beneficiary] to "draw down" on the letters of credit, in order to satisfy bank regulators that the letters were in fact documentary LCs. After draw down, an LC would then be reinstated in its full amount. Thus, the parties arranged a system whereby documentary letters of credit were made to function as standby letters of credit".)

14. Indeed, prior to their formal recognition in the UCP from UCP400 in 1983, standbys were regularly issued subject to the UCP because issuers desired to have standbys benefit from the norms of standard international letter of credit practice. *In re Wille*, 308 N.Y.S.2d 520, 528 (N.Y. Sup. 1968). This practice was finally acknowledged by the Banking Commission in *Opinions 1975-1979* R 1 (p. 11). ("The Commission decided that the stand-by credit [form used by the Foreign Exchange Dealers Association of India] . . . fell within the definition of a documentary credit given by [UCP290 (1974) General Provisions (b)]"). The 1983 revision (UCP400) expressly referred to standbys in Article 1 and 2, indicating that the UCP was applicable to them in order to remove any doubt and make it clear by wording in the UCP that the UCP applied to such letters of credit. *290/400 Compared* 10. The reference to standbys was retained in UCP500 (1993) Article 1 (Application of UCP) and Article 2 (Meaning of Credit).

15. UCP400 (1983) Article 1 provides "[t]hese articles apply to all documentary credits, including, to the extent to which they may be applicable, standby letters of credit, and are binding on all parties thereto unless otherwise expressly agreed. They shall be incorporated into each documentary credit by wording in the credit indicating that such credit is issued subject to Uniform Customs and Practice for Documentary Credits, 1983 revision, ICC Publication n° 400." UCP400 Article 2 states "[f]or the purposes of these articles, the expressions 'documentary credit(s)' and 'standby letter(s) of credit' used herein (hereinafter referred to as 'credit(s)') . . . ."

16. This attitude is illustrated by the title of an article by Bernard Wheble, then chair of the ICC Banking Commission and drafter of UCP400 (1983), *"Problem Children" – Standby Letters of Credit and simple First Demand Guarantees*, 24 Arizona L. Rev. 301 (1982).

the term "drawing" in various articles.[17] However, since the chief draftsperson had no intuitive understanding of standby LC practice, these adjustments created more problems than they solved.[18] These changes were retained in UCP500 (1993) but no other effort was made to accommodate standbys.[19] If a standby did not exclude those UCP articles that were problematic and inappropriate for standbys, the question to be asked was whether their effect could be avoided by deciding that the specific article was not applicable. While superficially attractive, this approach would cause considerable uncertainty and difficulty in application since it required an understanding of the motives and expectations in those requesting issuance of the standby.[20] Noting that UCP500 had not identified specific articles that might be inapplicable, the then Chair of the ICC Banking Commission stated that: "[National Committee]s must acknowledge that not all the articles in the UCP apply to commercial credits or to a standby credit; the majority of the articles do not apply to the standby credit. It is recognized that the parties to the credit may wish to exclude certain articles of the UCP from a specific type of credit. If a party desires to do so, they should state this clearly in the terms and conditions of the commercial credit or the standby credit."[21] As indicated in ICC Opinion R 303, "Care is needed in the use of standbys in a commercial setting, for which additional training may be necessary. Moreover, use of the UCP with a standby imposes additional questions which must be duly considered." UCP600 Article 1 also retains this phrase without identifying what articles are inapplicable. It must be concluded that the appropriate interpretation is that, while some articles will not be relevant to a particular standby where, for example, no such document is required or the issue addressed does not arise, no provision that does apply can be deemed inapplicable because of the phrase in UCP600 Article 1.[22] To exclude

17. *See* UCP400 (1983) Articles 1 and 2 (analogous to UCP500 (1993) Article 1 (Application of UCP) and 2 (Meaning of Credit)) are changed to include "stand-by letters of credit". UCP400 Article 4 (UCP500 Article 4 (Documents v. Goods/Services/Performance)) expanded the provision for performance to include "goods, services and/or other performances" to more readily accommodate standbys. UCP400 Article 23 (UCP500 Article 21 (Unspecified Issuers or Contents of Documents)) was changed to identify presentation documents by type by stating "other than transport documents, insurance documents and commercial invoices". UCP400 Article 42 included the phrase "every credit which calls for a transport document" in part to indicate that it did not apply to credits not requiring a shipping document, which would typically include standbys. UCP400 Article 44 (UCP500 Article 40 (Partial Shipments/Drawings)) extends the scope of the article to "partial drawings" as necessitated by the inclusion of standbys. Lastly, UCP400 Article 45 (UCP500 Article 41 (Instalment Shipments/Drawings)) was extended to include "drawings" to reflect the case of a standby. *See 290/400 Compared* 10, 12, 14, 71, 72.

18. *See, e.g.,* UCP600 Article 32 (Instalment Drawings and Shipments) provides that when any instalment is not drawn or shipped the credit ceases to be available; the 21 day rule of UCP600 Article 14(c) (Standard for Examination of Documents); UCP600 Article 14(d) (Standard for Examination of Documents) requiring presented documents to "not conflict" with each other, and the substantive provisions for specific documents including commercial invoices, transport documents, and insurance documents.

19. "[T]ried to address the misapplication of this Article to Standby Credit by Suggesting in an earlier draft of these Rules that this Article did not apply to Credits, whether commercial or standby, which called for only a copy of the transport document. This suggestion was not acceptable to the [National Committees] and therefore it was deleted from the final text of the sub-Article." *400/500 Compared* 112.

20. Since standbys are flexible and used in a variety of situations, including commercial transactions that require presentation of many of the documents required by commercial letters of credit, it is difficult to determine which articles are applicable in a generic manner. *See* J. Dekker, II *Case Studies* 14 (Case 168) (1991). UCP provisions regarding commercial documents such as transport documents, insurance documents, commercial invoices and shipment stipulations "would not normally be regarded as applicable to stand-by letters of credit." It should be noted that such arguments have never been universally persuasive and since the introduction of ISP98, they are even less convincing.

21. *400/500 Compared* 3.

22. The only aspect of UCP600 that lessens the problems for standby letters of credit is the adjustment of the default rule regarding the latest date for presentation of transport documents of UCP500 (1993) Article 43 (Limitation on the Expiry Date). UCP600 Article 14(c) (Standard for Examination of Documents), following ISBP Paragraph 20, specifically limits its application to originals of specific articles. Under prior revisions, it was not clear whether this 21 day applied to documents presented under commercial standbys which usually created a trap for beneficiaries.

the application of a specific rule, a UCP600 standby must do so expressly.[23]

D. Miscellaneous Scope Issues

12. Interpretation of the Term "Credit" in UCP600. UCP600 Article 1 reflects an early more informal approach to definitions based on unchanged prior versions of the UCP. As such, it defines the term"credit" as a "documentary credit" and notes that standbys are included in this use of the term. UCP600 also provides a formal definition of "Credit" in UCP600 Article 2 ¶ 8. Neither of these terms precisely address whether the term includes an amendment or a confirmation.

a. Credit as Including Amendment. As noted in the chapter on the definition of "Credit" in UCP600 Article 2 ¶ 8, it is not clear whether the definition includes an amendment or not. However, the drafters seem not to have consistently thought so because at several points in UCP600, they refer to "credit and amendment". This practice is not consistent, however, and there are others places where the term "credit" appears alone although there is no reason not to apply the same principle to an amendment.[24] In UCP600 Article 1 which also retains the prior parenthetical definition of "credit", Sentence 2 states that the provisions of UCP600 are binding on all parties "unless expressly modified or excluded by the credit." In this sense, the term "credit" should be interpreted as including an amendment because a modification or exclusion would have the same effect whether it was in the credit itself or an amendment.

b. "Credit" as Including Confirmation. The definition of "credit in UCP600 Article 2 ¶ 8 would not encompass a confirmation. UCP600 Article 38(g) (Transferable Credits) expressly refers to "the terms of the credit, including confirmation, if any . . . ." However, there are numerous rules in UCP600 that are equally applicable to a confirmation but where the text refers only to a credit.[25] In these situations, the term "credit" is a shorthand expression that includes the confirmation. With respect to UCP600 Article 1, a confirmation could modify or exclude provisions of the rules and the term "credit" used in Sentence 2 should be interpreted to include a confirmation.

13. Making UCP600 Applicable; SWIFT Protocol. UCP600 Article 1 provides that UCP600 applies "when the text of the credit expressly indicates that it is subject to these rules". The underlying assumption is that a credit must be made subject to UCP600 for it to apply.[26] UCP500 (1993) had required that the rules be "incorporated" in the text of the credit. Although no ICC Opinion or legal case had imposed a greater formal requirement

23. Since ISP98 is specifically designed for standby letters of credit and anticipates and makes adjustments for differences between commercial letter of credit and standby practice, the differences and problems between the rules are well known. The choice of the UCP should be given respect.

24. It is so used in UCP600 Articles 1, 2 (¶¶s 1, 5 & 7), 13, 14, 17, 18-25, 28, 30, 32, 35, 37. In fact Article 37 (Disclaimer for Acts of an Instructed Party) provides in subarticle (c) both an instance of credit used where credit or amendment could be meant, and an instance of the phrase "a credit or amendment".

25. It is so used in UCP600 Articles 1, 2 (¶¶s 1 & 7), 13, 14, 17, 18-25, 28, 30, 32, 35, 37.

26. Although this proposition may seem self evident in light of the status of the UCP as rules of practice rather than law, the UCP did not always take this position. The original versions of the UCP including UCP290 (1974) were worded as if it were generally applicable to all credits and in theory regarded as so applicable if banks in a given country subscribed to it. Notwithstanding that theory, most LCs expressly referred to the UCP. ICC Document No. 470/251 (4 March 1974) requested that banks insert a clause in the text of the credit reading "subject to Uniform Customs and Practice for Documentary Credits". Under this provision, a credit is subject to the UCP if the credit expressly incorporates it. This approach originated with Prior to that time, the UCP was In the 1983 revision, it was deemed "preferable" to include this phrase in the text of UCP400 (1983) itself. *290/400 Compared* 10. For "clarity", UCP500 (1993) changed the formulation, providing that the rules were applicable "where they are incorporated into the text of the Credit". *400/500 Compared* 2.

under this phrase, UCP600 Article 1 has reverted to the somewhat more flexible standard of UCP400 (1983) Article 1, requiring that the text indicate that the credit is subject to the UCP. This new terminology will not evoke any practical change since there remains a requirement that the text "indicate" the applicability of UCP600.[27] While in the past credits issued via SWIFT MT700 did not need to expressly incorporate it pursuant to SWIFT protocols[28] effective in November 2006, an MT700 LC must indicate applicable rules in mandatory Field 40E.[29] As indicated in the following paragraphs, however, there is another situation not addressed in Article 1 where UCP600 may be applied to a credit even though there is no express indication.

14. UCP600 Applied by Courts as Letter of Credit Customary Practice Even Though Not Incorporated. Notwithstanding UCP600 Article 1's requirement that the credit

27. Compare the different approach of ISP98 Rule 1.01 (Scope and Application) which provides that a standby "may be made subject to these Rules by express reference to them." This non-exclusive approach recognizes that there are other ways by which the ISP may be made applicable to a standby, partially in recognition of the fact that the question in difficult cases is one for a court or arbitral tribunal and that practice rules should simply suggest common means of applicability. The UCP600 is a vestige and example of the approach that the UCP is "law".

28. Until November 2006, Credits issued via SWIFT MT 700 were subject to the current revision of the UCP even though they need not expressly state that they are subject to it in the text of the credit or expressly incorporate it. The protocol effective among SWIFT system members provided that "[u]nless otherwise specified, the Documentary Credit is issued subject to the Uniform Customs and Practice for the Documentary Credits, International Chamber of Commerce, Paris, France, which are in effect on the date of issue". SWIFT, *Standards Category 7 Documents Credits & Guarantees, November 2001 Standards Release,* p. 27 (Sept. 2001 ed.). Strictly speaking, this approach did not meet the literal requirements of UCP500 (1993) Article 1 (Application of UCP). Nonetheless, there was never any doubt that SWIFT credits were subject to UCP500. The ICC Banking Commission agreed with this interpretation under the stiffer terms of UCP500 Article 1 (Application of UCP). *See 400/500 Compared* 3; ICC Opinion R 305 ("Whilst credits issued using the SWIFT system (without mention of UCP) would seem to be inconsistent with Article 1, it has long been accepted that these types of credits are subject to UCP in operation on the day of issue and this has become a recognized practice."); ICC Opinion R 248 (p. 8) ("Whilst credits issued using the SWIFT system (without mention of UCP) would seem to be inconsistent with Article 1, it has long been accepted that these types of credits are subject to the UCP in operation on the day of issue. This has become a recognized practice.") ("The silence in the original SWIFT credit advice as to whether the credit was subject to UCP500 does not imply that the credit was not subject to the rules."). Although UCP600 Article 1 uses the more encompassing phrase "indicates", it still requires that the indication be contained in the text of the credit. Therefore, the ICC Opinions would also apply to UCP600 Article 1 which is even less rigid in its formulation than UCP500 Article 1 (Application of UCP). ICC pronouncements have suggested that the onward transmission of the credit outside the SWIFT system, for example by the advising bank to the beneficiary, should expressly indicate by an affirmative statement that the credit is subject to the UCP. *See 500/400 Compared* 3 ("Despite the lack of a statement as to the UCP's incorporation or applicability in the SWIFT message itself, the credit nevertheless is subject to the UCP. However, a specific reference to the incorporation of the UCP must be included in the onward transmission of the Credit by the Advising Bank."); *see also* ICC Opinion R 101 ("Banks advising credits issued through SWIFT should ensure in accordance with SWIFT rules that the appropriate UCP incorporating clause was included in the credit advice sent to the beneficiary."); ICC Opinion R 248 ("The silence in the original SWIFT credit advice as to whether the credit was subject to UCP 500 does not imply that the credit is not subject to the rules. The advising bank should adhere to the opinion given in R. 101."); ICC Opinions R 305 (quoting ICC Opinion R 248); SWIFT, *Standards Category 7 Documents Credits & Guarantees, November 2003 Standards Release,* p. 6 (indicating that the "Advising Bank (i.e., the Receiver of the message) must inform the Beneficiary or another Advising Bank when the credit is subject to the ICC UCP."). Despite statements that the adviser "must" specifically refer to the UCP in its advice to the beneficiary, it does not follow that if the adviser were to fail to do so, the credit itself would not be subject to the UCP. The issuer would be hard-pressed to sustain such an argument against the beneficiary or a nominated bank were the credit issued via SWIFT. On the other hand, the beneficiary of such a credit may be able to avoid the effect of the UCP if it reasonably relied on the absence of a reference to its detriment. So as to avoid confusion, most bank software provided an interface by which SWIFT transmissions were, so to speak, translated automatically to include such an express reference to the UCP.

29. Issuers may choose, in new Field 40E (Applicable Rules), six different possible codes that represent to what rules the credit is subject: UCP LATEST VERSION; EUCP LATEST VERSION; UCPURR LATEST VERSION; EUCPURR LATEST VERSION; ISP LATEST VERSION; or OTHR. If "OTHR" is chosen, subfield 2 of Field 40E must be used to specify what rules do apply (up to 35 characters). The "OTHR" option could be used to make the credit subject to UCP500 (1993) (or any other prior version of the UCP) or to local law. UCP600 Article 13 (a) & (b) makes reference to "the ICC rules for bank-to-bank reimbursements" which are the ICC Uniform Rules for Bank-to-Bank Reimbursements Under Documentary Credits (URR725 (2008)). Field 40E allows for credits to be made subject to these rules.

See Pocket Part on back cover or www.iiblp.org/UCP600Commentary for current update.

indicate that it is subject to UCP600, the UCP also constitutes a reliable reflection of standard international letter of credit practice. Consequently, were a commercial LC to be issued without providing that it was subject to the UCP, it would not be unusual for a court to look to the provisions of the UCP to determine how to handle issues regarding the issuing or nominated bank that have arisen under the credit, especially in the absence of any statutory guidance.[30] The 2006 Chinese Supreme Court LC Rules expressly instruct Chinese courts to look to the current UCP for guidance on issues of compliance and other LC issues.[31] This approach is proper since the omission of the UCP from a commercial LC is probably due to an oversight.[32] On the other hand, application of UCP600 to a standby that is silent about applicable rules is problematic. Where the standby is subject to local law but not rules of practice, its application, if any, should be limited to those portions of it that are general formulations of LC practice. In such situations and even where there is no reference to local law, several UCP600 rules are inappropriate for standbys and many important standby practices are not addressed. For that reason, ISP98 offers a more accurate source of international standby practice. However, only general standby rules should be referenced and not those ISP98 rules that make specific discretionary choices.[33]

15. Adherence Lists. In order to promote use of the UCP, in the past the ICC developed and maintained so-called "Adherence Lists" by which the national associations that are its

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30. Moreover, U.N. LC Convention Article 14(1) provides:

"In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit."

U.S. Revised UCC Section 5-108(e) provides:

"An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice."

See Emirates Bank Int'l PJSC v. Credit Lyonnais (Suisse) S.A., Swiss Supreme Court Reporter, Volume 130 Part III p. 462 ff, Journal des Tribunaux 2005, Volume I p. 29 ff, Semaine Judiciaire 2004, part I p. 549 ss (2004) [Switzerland]; *AMF Head Sports Wear, Inc. v. Ray Scott's All-American Sports Club, Inc.*, 448 F. Supp. 222 (D. Ariz. 1978) [U.S.]; *See also I Kozolchyk on Letters of Credit and Bank Guarantees* § 7.3 [U.S.] (extensive discussion noting the various attitudes of courts that vary from treatment of the UCP as a contract term to treatment of it as customary rules that should be given effect).

31. Article 2 (Application of International Rules or Practices) of the P.R.C. Rules states "[w]hen hearing a Credit case, a people's court shall apply the international customs and practices or other rules or regulations that the parties have agreed upon; in the absence of such an agreement, the UCP issued by the ICC or other relevant international customs and practices shall be applied." For the entire P.R.C. Rules, *see* Byrne, *LC Rules & Laws* (4th ed.) 223. Another example of a statutory reference to application of the UCP even when the LC is not issued subject to it is U.S. Prior Uniform Commercial Code Article 5 (Letters of Credit) non-conforming amendments 5-102(4) adopted in the states of Alabama, Arizona, Missouri, and New York. The NY Revision provided "[u]nless otherwise agreed, this Article 5 does not apply to a letter of credit or a credit if by its terms or by agreement, course of dealing or usage of trade such letter of credit or credit is subject in whole or in part to the Uniform Customs and Practice for Commercial Documentary Credits fixed by the Thirteenth or by any subsequent Congress of the International Chamber of Commerce." Although all U.S. states, commonwealths, and territories have adopted Revised UCC Article 5, the LC could be made subject to this provision. However, in applying it to problems not addressed by the UCP, courts have looked to the statutory provisions by analogy. *See United Bank Ltd. v. Cambridge Sporting Goods Corp.*, 41 N.Y.2d 254 (N.Y. 1976).

32. Understandably, LC bankers have little sympathy for such errors and most systems make them virtually impossible. Omission of the UCP will only happen with banks with little regular commercial LC practice. However, applying UCP600 to issues where it would operate *against* the beneficiary who did not otherwise have notice would not be appropriate. Where it is intended that UCP600 not be applicable to a commercial LC, the LC should expressly so state.

33. *E.g.*, ISP98 Rule 3.14 (Closure on a Business Day and Authorization of Another Reasonable Place for Presentation) insofar as it sets specific time frames or procedures.

members (or occasionally single banks) signify their "adherence" (and presumably that of their members) to the UCP.[34] Apart from signifying a general willingness to issue, confirm, advise, or negotiate credits subject to the UCP, the effect of these lists is unclear. As the UCP has achieved virtually universal recognition, this "adherence" listing has come to have little significance and with the recognition in UCP400 (1983) Article 1 that the credit should indicate that it is subject to the UCP, the purpose of such lists has become even more obscure. At the ICC Banking Commission's Fall 2000 meeting in Istanbul, Turkey, the Commission reached consensus that UCP500 (1993) adherence lists would be eliminated.[35] Even were such a list to surface with respect to UCP600, it would have no significance in light of the requirement in Article 1 that the LC must expressly indicate the application of UCP600.

E. Variation of UCP600

16. Variability of the Articles. UCP600 Article 1 provides that, where a credit incorporates the UCP, its articles are binding on all parties to the credit "unless expressly modified or excluded in the credit".

a. Even if the UCP did not so state, specific provisions could be modified or excluded since the UCP is not law, and so, cannot be mandatory. Nevertheless, from its initial version, UCP82 (1933) General Provisions (a), the UCP has expressly recognized the principle that its provisions could be varied by terms in the credit.

b. UCP600 does not use the phrase "unless otherwise agreed" or a variant, relying on the provision in UCP600 Article 1 regarding modification or exclusion.[36]

c. UCP600 contains provisions that purport to be mandatory.[37] Although they are so phrased, they can be varied by appropriate terms in the letter of credit.

d. Variation can take the form of a modification of, exclusion of, or addition to a provision in the UCP. Copying the approach of ISP98, UCP600 Article 1 refers to exclusion or modification. Although it omits a reference to addition, a credit may

34. *See 290/400 Compared* 10; ICC Opinion R 147 (p. 7) (expressing concern that the adherence of Spanish banks has not been "confirmed" by the central bank and its implication for following the UCP in a specific court case. Noting a reply that "Spanish banks do adhere to the UCP 400" but that the "'facts' [of the specific case] over-rode UCP".). Such lists also exist for other ICC rules. Originally, the lists signified willingness to use the UCP and support for it by those listed. *See, e.g.,* Ward & Harfield, *Bank Credits and Acceptances* 199 (adhering countries joined the campaign for world-wide adoption of the UCP).

35. Executive Summary, Commission on Banking Technique and Practice, Meeting on 21-22 Nov. 2000, Turkey, ICC Doc. 470/944 at 17 (2000). Although the list was contained on the ICC website as recently as September 2004, it has since been removed. It is not surprising that such lists might be removed from ICC websites since they have no legal or practical effect.

36. UCP600 Article 38(c) (Transferable Credits) does contain the phrase "unless otherwise agreed" in reference to a transfer.

37. While the term "must" appears 73 times in UCP600 and "will" appears 69 times, in many cases the LC need not vary the provision, as such, but be silent on the point. Sometimes there is a default rule in such a situation and at other times there is not. For example, UCP600 Article 6(a) (Availability with) provides that the credit "must state the bank with which it is available or whether it is available with any bank". Whether or not the credit so states, it is available with the issuer and there need be no statement expressly varying the UCP to achieve this result. At other times, however, it is possible that the LC will vary the UCP provision rather than not doing what is supposedly mandated. In such situations, some positive expression is required. For example, UCP600 Article 6(c) (Available by Draft on Applicant) provides that "[a] credit must not be issued available by a draft drawn on the applicant." If the LC requires that a draft be drawn on the applicant, this provision would have been expressly varied. UCP600 Article 9(d) (Advising of Credits and Amendments) requires that the issuer must route amendments through the same bank through which it elected to advise the credit. The terms of the LC could vary this provision. UCP600 Article 11(a) (Teletransmitted and Pre-Advised Credits and Amendments) requires that if the LC states that the mail version is to be the operative instrument, the issuer "must then issue the operative credit or amendment without delay in terms not inconsistent with the teletransmission." A pre-advice could vary these terms. UCP600 Article 14(a) (Standard for Examination of Documents) provides that a nominated bank that acts pursuant to its nomination or the issuer "must examine documents". The LC could provide otherwise, as it could for the any of the other instances where "must" or "will" appear.

be subject to UCP600 and still contain additional provisions not addressed in the rules.

e. While the UCP does not indicate that a credit must use a specific formula to vary it, it does require that any variation be made "expressly". Given this term, it is preferable that any intended variation be express. Unanswered is the question of whether the express variation must indicate a displacement of the provisions of the UCP or whether an express provision to the contrary or in addition suffices. Also unanswered is the question of whether variation of certain provisions should be discouraged. In its treatment of specific provisions, this *Analytical Commentary* identifies many of those provisions for which variation should be expressed by a specific reference and not just implied from the text of the letter of credit.[38] With respect to the latter, it should not be expected that there be any need to state that a condition is being stated in a credit notwithstanding the absence of such a provision in UCP600. The addition will be self-evident. On the other hand, an exclusion of a rule of UCP600 is so drastic that one might expect an express indication that a rule is not to be applicable. Where a provision of UCP600 is being modified, however, it may be implied from the express terms of the credit. While the UCP itself does not detail situations in which a modification will be implied from the express LC terms one must consider the impact on the terms of the credit in light of standard international LC practice based on the purpose of the term and the significance of the particular UCP provision.[39] In many situations, the modification will be apparent. For example, if a credit provides that examination and any notice of refusal must be sent within 24 hours of the receipt of the documents, there is no need to state expressly that the terms of UCP600 Article 14 are being modified. On the other hand, where the provision of the credit would not be understood under standard international LC practice to displace a provision of UCP600, it must be regarded as additional to and not in exclusion of a provision of the rules.

f. Although UCP600 addresses variability in Article 1, unlike ISP98, it provides no guidance.[40] UCP600 does not repeat the statement "unless expressly modified or excluded" outside of Article 1 and so avoids the difficulties raised by the express statements found in various provisions of UCP500 (1993) that had to be understood as being for emphasis and were not to have been understood to signify that other

38. As noted in ISP98 Rule 1.11(d)(i) (Interpretation of these Rules), the phrase "unless a Standby otherwise states" is used to indicate those provisions where the text of the standby must express the variation more clearly. *The ISP98 Official Commentary* 60, comment 10(b), states that "[a]s indicated in ISP98 1.01(c), the application of any of these Rules to a standby issued subject to them may be modified or excluded. Subrule (d)(i) indicates that the phrase "unless a standby otherwise states"or the like, while technically unnecessary, is used to emphasize that the provision may be varied.

39. The degree of specificity required to support the conclusion that the LC expressly varied a provision of the UCP may differ depending on the purpose of the provision, the person asserting that there is a variation, and whether the effect is to modify or displace the UCP provision. Where the UCP Article is a general default rule for a required document (*e.g.*, the provision in UCP600 Article 20(a)(vi) prohibiting a charter party under a bill of lading), any contrary term would be understood to modify the provision (*e.g.*, an express reference in the LC to "charter party acceptable"). Where the UCP rule establishes an interpretation or definition of a term used in the LC (*e.g.*, the provision in UCP600 Article 20(b) interpreting the meaning of a prohibition of transhipment), the credit would have to contain an express exclusion of the UCP provision to nullify it (*e.g.*, "UCP600 Article 20(b) is excluded"). Where the UCP Article establishes a procedure for handling LCs (*e.g.*, the provision in UCP600 Article 16(b) regarding seeking applicant waiver of discrepancies), a variation should not be lightly implied, particularly where it negatively impacts a beneficiary or nominated bank and any alternative procedure in the LC should be interpreted to be cumulative unless the UCP provision is expressly negated. Where a scope provision is affected (*e.g.*, the documentary character of the credit as established in UCP600 Article 14(h)), only an express exclusion of the UCP provision should be interpreted to result in exclusion of the UCP rule. *See generally* James E. Byrne, *Contracting Out of Revised UCC Article 5*, 40 Loy. L.A. L.Rev. 297 (2006).

40. ISP98 Rule 1.04 provides "[u]nless the context otherwise requires, or unless expressly modified or excluded, these rules apply as terms and conditions incorporated into a standby . . . ."

provisions that did not contain such provisions might not be modified or excluded.[41] On the other hand, emphasis could be used with the term "express" to signal those provisions in which variability should be discouraged instead of using the term "express" with respect to all other variations.[42]

g. Notwithstanding the impression that is given that any provision of UCP600 may be altered, there are certain provisions that touch on the fundamental character of the undertaking. It should not be lightly concluded that these provisions are to be varied. If this construction is inescapable, it may alter the character of the undertaking. For example, it is possible to alter the character of a UCP600 LC with respect to non-documentary conditions. Where, however, the alteration requires verification of a condition that involves another obligation by reference to facts related to that obligation that are not within the operational experience of the bank, the undertaking, while probably enforceable, ceases to be independent and is no longer an LC.

17. Binding. UCP600 Article 1 indicates that where it is applicable and to the extent not varied by the terms of the credit, its rules are "binding on all parties thereto". The term "binding" is not explained, but usually is taken to mean an enforceable obligation.[43] In the context in which it is used in Article 1, however, what is meant by the term is quite different. It is merely an unnecessary drafting device that is juxtaposed with modification or exclusion of UCP provisions where the rules are applicable to a credit. In the sense used in Article 1, it means that the provisions of UCP600 can be modified or excluded or that they are applicable under the letter of credit unless modified or excluded.[44] The issues that the word "binding" typically connotes (but does not here), namely when it is binding and when it ceases to be binding (revocation, termination, or fulfillment) are addressed elsewhere.

18. "All Parties Thereto". UCP600 Article 1 states that it is binding "on all parties thereto". The phrase "all parties thereto" could only mean an issuer and any confirmer since they are the only entities "bound" by a letter of credit. As noted, however, the word "binding" is not used in the normal sense and the word "parties" is intended to reach farther in any event. In LC practice, it has been used in different senses, including the more limited sense of those whose consent is necessary to an amendment to an irrevocable LC,[45] those affected by the letter of credit,[46] or any entity that is affected by or acts under the letter

41. UCP500 (1993) repeatedly used the expressed "unless otherwise stipulated in the credit" in Articles 1, 20(b), 20(c)(i), 20(d), 22, 23, 24, 25, 26, 27, 28, 29(a), 29(b), 31, 33, 34(d), 34(e), 34(f)(i), 24(f)(ii), 35(c), 37(a), 37(b), 38, 41 and 46(g). Similar expressions are also found in UCP500 Articles 10(v)(i), 33(a), 34(b), 34(c), 39(b), 40(a) and 48(g).

42. ISP98 provides for this use in ISP98 Rule 1.11(d)(iii) (Interpretations) which provides "[a]ddition of the term **"expressly"** or **"clearly"** to the phrase "unless a standby otherwise states" or the like emphasizes that the rule should be excluded or modified only by wording in the standby that is specific and unambiguous".

43. It is used in the sense of an enforceable obligation in ISP98 Rule 1.06(e) (Nature of Standbys) which states "[b]ecause a standby or amendment is binding when issued, it is enforceable against an issuer whether or not the applicant authorized its issuance, the issuer received a fee, or the beneficiary received or relied on the standby or the amendment."

44. This formula dates to UCP222 (1962) General Provisions and Definitions (a) and has been used in all succeeding versions. It is an example of grandiose Wheblesque drafting which had a firm tone but, when scrutinized, had little exact meaning. At the time, this technique was useful in establishing the credibility of the rules.

45. UCP290 (1974) Article 3(c) used the term "parties" (LC "cannot be amended nor cancelled without the agreement of all parties") in a technical sense that required an understanding of its meaning. *See 290/400 Compared* 23 (stating that UCP400 (1983) Article 10(d) "clarified" the term "parties" in UCP290 (1974) Article 3(c) with respect to an amendment by indicating the parties whose consent was necessary to a proposed amendment to a credit).

46. UCP82 (1933) General Provisions (a) stated that it was "applicable when other expressed and previously agreed arrangements between the parties do not intervene . . . ."

of credit. In UCP600, the term "party" is used in a variety of different contexts.[47] It is applied to the applicant,[48] the beneficiary,[49] the presenter (including a correspondent bank that is not nominated and a non-bank presenter other than the beneficiary),[50] the reimbursing bank,[51] any entity whose obligations are affected by claims under the LC,[52] and any person or entity.[53] Given the broad array of uses, it must be concluded that the word "party" is not a used as a technical term in UCP600 and has no general connotation. Its meaning must be derived from the context of each provision in which it is used and the use of the term itself has no significance.[54]

19. Is the Applicant a Party? Historically, the question that has been of concern to the LC community is whether or not the applicant is a party to the credit. The problem seriously arose in connection with determining whether the applicant was a party to the LC whose consent was necessary for an amendment. While excluding the applicant from the delineated list of those whose consent to an amendment is necessary, UCP600 Article 2 (Definitions) defines the "applicant" as being a "party" although since the term has little significance in UCP600, it probably does not matter for its interpretation although it may cause some difficulties for LCs or collateral agreements that incorporate the UCP and use that term. The broader and more difficult question is whether or not the UCP encompasses the applicant. Despite the common reluctance of bankers to recognize that the UCP does so,[55] the UCP has always addressed and affected applicants[56] and UCP600

47. In addition to being used to describe those entities affected by the rules, it is also used in UCP600 Article 37 (Disclaimer for Acts of an Instructed Party) to name the entity used for carrying out the applicant's instructions ("Instructed Party") and in UCP600 Article 14(*l*) (Standard for Examination of Documents) in connection with the entity who may issue a transport document.

48. UCP600 Article 2 (Definitions) ¶ 1 states that "[a]pplicant means the party on whose request the credit is issued."

49. UCP600 Article 2 (Definitions) ¶ 4 states that "[b]eneficiary means the party in whose favour a credit is issued."

50. UCP600 Article 2 (Definitions) ¶ 14 states that "[p]resenter means a beneficiary, bank, or other party that makes a presentation."

51. UCP600 Article 13(a) (Bank-to-Bank Reimbursement Arrangements) indicates that reimbursement entails a nominated bank "claiming on another party ("reimbursing bank")".

52. UCP600 Article 18(b) (Commercial Invoice) states that a decision by a nominated bank to disregard an invoice in excess of the LC amount where the drawing is within the LC amount is "binding upon all parties".

53. UCP600 Article 25(b) (Courier Receipt, Post Receipt or Certificate of Posting) provides that an LC requirement that courier charges are to be prepaid or paid are satisfied where the courier waybill indicates that the charges are for "a party other than the consignee".

54. The only context in which the term "parties" is used in UCP600 is UCP600 Article 18(b) (Commercial Invoice) in which the first nominated bank to act is given discretion to take up documents even though the invoice is for an amount in excess of the credit. Its decision is said to be "binding on all parties".

55. The notion that the UCP is not addressed to applicants is founded neither on the text of the UCP nor its history. It arose in the past two decades to accommodate artificial distinctions imposed by some local laws that are said to prohibit bank rules that relate to applicants. As such, it may be a useful fiction for some banks in some countries if not taken too seriously. In discussing UCP222 (1962), Bernard S. Wheble characterized the applicant as "one of the three major parties to the documentary credit", B. S. Wheble, *Documentary Credits*, J. Inst. Bankers, Feb. 1963, 27, at 31. In another article, he made the point that the methodology of the 1962 revision involved a review "in light of the fact that the credit and the rights and responsibilities arising from it stem from the mandate given by the applicant for the credit. It [the 1962 revision] stressed the applicant's responsibility for giving clear and precise instructions and placed severe restrictions on the right of the banker to act on an 'intelligent guess' as to what was really intended. This right was 'weighted' in favor of the applicant on the grounds that in the long run it was his money that was being paid." Bernard S. Wheble, *Uniform Customs and Practice for Documentary Credits 1971 Revision*, 4 Cornell Int'l L.J. 97, 98 (1971). There is an indication that these statements were not made casually since the Definitions of Terms and Responsibilities Governing the Issue, *Acceptance and Execution of Contracts of*

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continues to do so.[57] Its relevance to applicants is not through the letter of credit only but also with respect to reimbursement agreements and applications for the issuance of a

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Documentary Credit, reproduced as Appendix B to Gutteridge & Megrah, *Law of Bankers' Commercial Credits* (3rd ed. 1962) (U.K.) Reflects them. They represent a considered formulation of principles of LC practice in the form of a "glossary". In many respects, these definitions reflect provisions that were added to the UCP in the 1962 and 1974 revisions since they were representative of British practice and were, no doubt, influential in these revisions through the work of Bernard S. Wheble, who was familiar with both authors, as an important source of information and as a reviewer. The Definitions provide that they are applicable if the instructions in the LC do not otherwise provide. Among other things, they govern "the relations between banker and customer". They provide that "in the absence of any stipulation to the contrary any application for and acceptance of a credit or of any instructions issued pursuant to the credit shall imply acceptance of these definitions." The parties to the credit include the "person who instructs the bank to establish a credit" (quaintly titled the "orderer" or the "*donneur d'ordre*").

56. The term "applicant" appears in the following articles of UCP500 (1993): Article 2 (Meaning of Credit) (indicating that the issuer is acting on behalf of the applicant and providing an explanatory definition); Article 3 (Credits v. Contracts) (partially directed to the applicant, asserting the independence of the issuer's undertaking from the applicant's arrangements with the beneficiary); Article 9 (Liability of Issuing and Confirming Banks) (not directly applicable and only mentions applicant in reference to drafts drawn on it); Article 14 (Discrepant Documents and Notice) (permitting an issuing bank in its sole judgment to approach applicant for a waiver of discrepancy(ies) after determining documents on their face not complying with the terms and conditions of the credit); Article 18 (Disclaimer for Acts of an Instructed Party) (expressly addressed to the applicant); Article 37 (Commercial Invoices) (requiring an invoice to be made out in the name of the applicant but otherwise relevant to the applicant as indicated subsequently); and Article 48 (Transferable Credit) (permitting substitution of the name of the first beneficiary for that of the applicant in a transferred LC but otherwise relevant to the applicant as indicated subsequently).

Other articles affect the applicant without mentioning it: Article 4 (Documents v. Goods/Services/Performance) (indirectly applicable to the applicant who cannot excuse its obligation to reimburse based on defects in goods, services, or other performances); Article 5 (Instructions to Issue/Amend Credits) (regularly used to urge greater clarity in LC terms); Article 15 (Disclaimer on Effectiveness of Documents) (primarily addressed to the applicant); Article 16 (Disclaimer on the Transmission of Messages) (primarily addressed to the applicant as well as to the beneficiary); and Article 17 (Force Majeure) (applicable to the applicant as well as the beneficiary).

Moreover, UCP500 (1993) Articles 20 through 48 provide normative rules regarding the meaning of various terms, typically indicating the minimum requirement if a given requirement is contained in the credit. While these norms impact the beneficiary in that the presentation does not comply if it fails to meet these norms, they also impact the applicant in that the presentation complies if they do and the issuer is entitled to be reimbursed. For example, UCP500 Article 20 (Ambiguity as to the Issuers of Documents) indicates what documents will comply if the credit requires a "first class", "well known" or "qualified" issuer of a document, what will be regarded as an original; what will be regarded as a copy; and what will be required if a document is to be "authenticated", "visaed" or "legalized". Likewise, UCP500 Article 21 (Unspecified Issuers or Contents of Documents) indicates that where the details of a document other than an invoice, transport document, or insurance document are not stated, it will comply if it is not inconsistent with any other document presented.

Virtually every article of UCP500 has such a significance for the applicant. For example, if the applicant authorizes the issuance of a transferable LC, it is obligated by the consequences detailed under UCP500 Article 48 (Transferable Credit). An issuer will require reimbursement from an applicant if it honors a presentation that meets the normative requirements set forth in the rules of the UCP. Under UCP500 Article 13 (Standard for Examination of Documents), an applicant may resist reimbursing the issuer that honors a presentation that does not comply with these provisions unless otherwise provided in the reimbursement agreement or under standard letter of credit practice.

Treatises also loosely term the applicant as a "party" to the LC, e.g., Clive M. Schmitthoff, *New Uniform Customs for Letters of Credit,* 1983 J. Bus. L. 193. 196 ("In a letter of credit transaction, in principle the following are concerned: the applicant for the credit, who normally is the buyer.").

57. UCP600 references the applicant in terms of its own rules, data in the LC, and purports to affect the liability of the applicant. The term "applicant" is defined in UCP600 Article 2 (Definitions) Paragraph 1; UCP600 Article 2 (Definitions) Paragraph 10 ("Issuing Bank") states that in issuing the LC, it acts either on its own behalf or at the request of the applicant; UCP600 Articles 4(a) (Credits v. Contracts) purports to deny to the beneficiary the right to avail itself of the rights or obligations between the applicant and the beneficiary and 4(b) instructs issuers to discourage the contract, pro forma invoices, or similar matters as an integral part of the LC; UCP600 Article 6(c) (Availability, Expiry Date and Place for Presentation) attempts to prohibit drafts drawn on the applicant; Article 14(j) (Standard for Examination of Documents) states requirements regarding the address and contact details; UCP600 Article 16(b) & (c) (Discrepant Documents, Waiver, and Notice) states requirements regarding waiver of discrepancies; UCP600 Article 18(a)(ii) (Commercial Invoice) describes the entity in whose name the commercial invoice must be made out; UCP600 Article 37 (Disclaimer for Acts of an Instructed Party) describes the allocation of the risk of failure of another bank to follow instructions, or foreign laws or usages; and UCP600 Article 38 (Transferable Credits) describes requirements for documents presented under a transferred credit. In addition,

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credit. It is apparent that an applicant who authorizes issuance of a credit subject to the UCP or otherwise agrees to its application is likewise subject to it to that extent.

F. Legal Issues

20. "Rules" of Practice; Relationship to Applicable Law. For the first time, there is an acknowledgment that the provisions of the UCP "are rules". The implication is that they are rules of practice and not of law. There are only two references in UCP600 to law, UCP600 Article 37(d) (Disclaimer for Acts of an Instructed Party), which shifts the risk of foreign laws, and UCP600 Article 39 (Assignment of Proceeds) which indicates that non-transferability does not affect an assignment of proceeds provided that it is made in accordance with "applicable law". UCP600, however, does not indicate to which local law the credit or the assignment of its proceeds would be applicable. In a sense, the UCP can operate without reference to law as long as it has the voluntary compliance of those that it affects. When a dispute arises that cannot be settled without reference to judicial or arbitral processes, however, the question of the applicable law arises because the UCP itself is not law in the sense of a binding pronouncement of the State and, in a judicial proceeding, is subject to the applicable law. To be enforced by a court, the UCP requires a legal system that is not hostile to its operation and that gives effect to its provisions, at least as a term of the letter of credit (party-made law). Commercial law has not been entirely clear or uniform in its understanding or treatment of the UCP. In part, this confusion is due to the relatively unique nature of the UCP as an internationally accepted code of practice. In part, it is due to an inherent suspicion of unilateral trade association rules being imposed on the marketplace. However, because the UCP provides an internationally-followed and basically neutral conceptual framework as well as specific rules governing letters of credit issued subject to it, in the absence of statutes in most countries, judicial decisions have tended to defer to it in the formulation of letter of credit law, reflecting the willingness of modern commercial law to give effect to the choices of parties who issue and perform under credits subject to it or to enforce rules that reflect standard international letter of credit practice. Virtually all courts throughout the world, recognizing the international mercantile character of letters of credit and the need for uniformity, have given effect to the UCP as if it were law. If there is a difficulty in the judicial application of the UCP, it is on the level of interpretation of the provisions of the UCP and not with respect to recognizing its applicability.[58] The two modern LC statutory schemes, the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit and U.S. Revised UCC Article 5, expressly defer to letter of credit

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there are provisions in UCP600 which do not refer to the applicant but which have as much if not more impact on the applicant than do those that refer to it explicitly. For example UCP600 Article 35 (Disclaimer on Transmission and Translation) which makes a bank not responsible for the failure of transmission of messages even when it chose the delivery service and UCP600 Article 37(b) (Disclaimer for Acts of an Instructed Party) which makes a bank not responsible for the failure of other banks, even ones it chose, to carry out its instructions.

58. Because the UCP was not written for lawyers nor in the manner of statutes, the rigorous methods of statutory construction that some courts have woodenly applied to it have produced results that contradict its meaning as understood under standard international letter of credit practice. Typically in such situations, the court has misused available expertise to explain and interpret the meaning of the relevant provision. *See, e.g., Banca del Sempione v. Suriel Finance*, 852 F. Supp. 417 (D. Md. 1994) [U.S.]; abstracted at *1995 Annual Survey* 451, *rev'd* in *Banca del Sempione v. Provident Bank of Maryland*, 73 F.3d 951 (4th Cir. 1996) [U.S.], reprinted at *1997 Annual Survey* 536, abstracted at 451; remanded to, Civ. No. B-91-3179 (D. Md. 997), reprinted at *1998 Annual Survey* 527, abstracted at 406; *aff'd*, 160 F.3d 992 (4th Cir.), reprinted at *1999 Annual Survey* 417, abstracted at 324 (misinterpreting the term "if any" in UCP400 (1983) Article 10(c) to mean that an issuer could avoid its obligation on an amendment that it had advised directly among other errors); *Glencore v. Bank of China*, 1 Lloyd's Rep. 135 (C.A. 1996) [U.K.] (misapplying UCP500 (1993) Article 20(b) (Ambiguity as to the Issuers of Documents) to conclude that a document produced by reprographic means but bearing a wet ink signature was not an original), distinguished in *Kredietbank Antwerp v. Midland Bank PLC*, [1999] Lloyd's B.R 219. (C.A.) [England].

rules of practice.[59] The P.R.C. Rules are even more expansive, expressly making the UCP applicable even where the LC does not incorporate it.

21. Local Law; Applicable Law; the Law of the Forum. LC bankers tend not to think about matters that lawyers would consider under conflict of laws or private international law rules. This field is obscure even for lawyers and virtually incomprehensible for non-lawyers. There is a distinction between the law that governs and the place where the litigation occurs. The former is referred to as the applicable law and the latter as the forum. The point that is lost on most non-lawyers is that the two need not be the same. The forum can apply another law where it is selected and its own choice of law rules permit such a selection. Thus, the choice of law is not necessarily determinative as to the applicable law. Occasionally, letters of credit state the law to which they are subject. Usually, commercial letters of credit are silent in the assumption that the law of the place of issuance will govern the obligation of the issuer to the beneficiary. More frequently, standby letters of credit will indicate the law to be applied to the issuer's obligation. But even standby letters of credit rarely address the forum in which a dispute will be litigated. The law applicable to the letter of credit will typically be determined by the choice of law rules of the forum. These rules may result in the application of a law that is different than that of the forum. In some jurisdictions, the law chosen in the letter of credit will be applied, although courts often assume that the chosen law is the same as their own unless proven otherwise and also will apply their own law to procedural questions. Where no law is chosen, the choice of law rules will provide guidance. The rule adopted in the U.N. Convention Article 22 is that of the place of the issuer which corresponds to the expectations of most LC bankers.[60] In this *Analytical Commentary*, the phrase "Local Law" is used to mean that system of substantive law that is applicable to the undertaking. In many cases, it will also be the law of the forum where the dispute is litigated. However, where it is not and even where the forum applies the law chosen in the undertaking, it may apply its own law for procedural matters and will generally apply its own substantive law unless the differences in the chosen law are proven.

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59. U.N. LC Convention Article 5 Principles of interpretation ("In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in the international practice of independent guarantees and stand-by letters of credit".); Article 13(2) Determination of rights and obligations ("In interpreting terms and conditions of the undertaking and in settling questions that are not addressed by the terms and conditions of the undertaking or by the provisions of this Convention, regard shall be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice."); Article 14(1) Standard of conduct and liability of guarantor/issuer ("In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall act in good faith and exercise reasonable care have due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit."); Article 16(1) Examination of demand and accompanying documents ("The guarantor/issuer shall examine the demand and any accompanying documents in accordance with the standard of conduct referred to in paragraph (1) of Article 14. In determining whether documents are in facial conformity with the terms and conditions of the undertaking, and are consistent with one another, the guarantor/issuer shall have due regard to the applicable international standard of independent guarantee or stand-by letter of credit practice.").

UCC § 5-116(c) (1995) (stating "the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject"). The U.S. Comptroller of the Currency, charged with supervising national banks, in its Interpretive Guidelines, *The Interpretive Ruling of the U.S. Comptroller of the Currency*, Independent Undertaking to Pay Against Documents, 12 C.F.R. § 7.1016 (1999) (provides that "[a] national bank may issue and commit to issue letter of credit and other independent undertakings within the scope of the applicable law or rules of practice recognized by law" and indicates that "examples of such laws or rules of practice include: . . . the Uniform Customs and Practice for Documentary Credits . . . .").

60. U.S. Rev. UCC § 5-116(b) adopts a similar rule. Where the dispute is between the confirmer and the beneficiary, the confirmer's law would apply to its confirmation under this approach. Neither statute consider the applicable law in disputes between banks. It is expected that the issuer, and through it, the applicant, bears the risk of the application of foreign law as is provided in UCP600 Article 37(d) (Disclaimer for Acts of An Instructed Party).

22. Rules. UCP600 Article 1 describes itself as "rules". This word has not been used in prior versions of the UCP. ISP98 uses the word "Rules" to describe its provisions and also names them "Rules" and this usage may have been partially copied here[61] although the specific units into which UCP600 is divided are labeled as "Article" and referred to internally as an "article". The relationship between the two words, however, is not always clear. In some provisions, the word "rules" signifies UCP600 as a whole. All the "definitions" of UCP600 Article 2 (Definitions) and the "interpretations" of UCP600 Article 3 (Interpretations) are said to be "for the purpose of these rules". A UCP600 letter of credit is said to be "subject to these rules"[62] and even a performed act under them can be said to have been performed "subject to these rules".[63] There are, however, also instances in which not all of the provisions of UCP600 are meant but only some of them. UCP600 Article 2 (Definitions) Paragraph 5 ("Complying Presentation") is, among other things, one that is in accordance "with applicable provisions of these rules"and UCP600 Article 14(c) (Standard for Examination of Documents) refers to "the date of shipment as described in these rules". These usages sometimes overlap with variations of the word "article". In most of its appearances in UCP600, the word "article" is used in reference to a proper article or subdivision of it followed by the specific number or numbers.[64] However, in two instances, the general term "article" is used without giving the specific number.[65] Since these uses are internal to the article itself, it might be surmised that the drafting convention is that the term "rules" is used when the entire text or groups of applicable groupings but that "article" is used when a specific or internal reference is intended. The usage "for the purpose of this article" which appears in the transport articles with regard to transshipment, although it is parallel to the phrase "for the purpose of these rules", also follows the difference between a reference to the rules as a whole and a specific article. However, in UCP600 Article 38(g) (Transferable Credits) the word "articles" is used to refer to the entire UCP in a manner indistinguishable from the use of "rules" in other articles.[66] In addition, the phrase in UCP600 Article 14(*l*) to "articles 19, 20, 21, 22, 23 or 24 of these rules" is also inconsistent with other multiple references to articles and with the use of the word "rules" to refer to the UCP as a whole. Rather than seek any consistent pattern with significance to the uses of the words or the definitions, these words must be regarded as not having any specific difference and rather as the result of less precise drafting of the sort that can be expected in a project of this magnitude undertaken without professional drafting assistance.

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61. Not only is each unit of ISP98 a Rule (e.g. Rule 1.01 (Scope and Application)), but the word is used in the rules to describe the collective whole. ISP98 Rule 1.02 (Relationship to Law and Other Rules) states "These Rules supplement the applicable law to the extent not prohibited by that law."Interestingly, the ISP98 is used in the singular, unlike UCP600, but the word "rules" in the plural is used in specific provisions to refer to the constituent provisions taken collectively.

62. UCP600 Article 1.

63. UCP600 Article 2 (Definitions) ¶ 3 "Banking Day".

64. It is used in one article to refer to another article in UCP600 Article 10(a), 18(a)(i), 29(a), and 30(c); in the plural to refer to other specific articles in 14(c), 14(j), and 14(*l*); in an article to refer to specific subarticles within the same article in 14(f), 16(d), 29(b) & (c), 30(c), and 38(j); within one article to refer to specific subarticles in other articles in 6(e), 16(b) and 18(a)(ii); and within one article to refer to multiple specific subarticles within the same article in 16(e). Curiously, the latter usage is "sub-article" even though the subject of the clause is multiple although the parallel usage with respect to multiple articles uses "articles" in the plural, leading to the expectation that the reference to more than one subarticle would be "sub-articles". Although care is used to refer to a subarticle as distinguished from an article, the full citation is used, that is to say, for example, within UCP600 Article 14(f), the reference to Subarticle (d) is noted as "Sub-article 14(d)", making the use of the word "sub-article" redundant. Despite this usage, the references to subdivisions within a subarticle, UCP600 Article 16(e), is not referred to as "sub-sub-articles" as might be expected for the sake of consistency but as "sub-article 16 (c) (iii) (a)".

65. UCP600 Articles 16(f) and (g) (Discrepant Documents, Waiver and Notice).

66. UCP600 Article 38(g) (Transferable Credits) states "[t]he percentage for which insurance cover must be effected may be increased to provide the amount of cover stipulated in the credit or these articles."

G. Miscellaneous Issues

23. Implications of Non-Bank Issuance. UCP600 only refers to issuance of letters of credit by a bank.[67] Nonetheless, letters of credit can be issued by non-banks in many nations and these LCs can be issued subject to UCP600 since UCP600 is not law and cannot prohibit its application to an undertaking.[68] Furthermore, non-bank LCs can be advised or confirmed by banks. While this practice may be permissible, it poses certain risks and interpretation questions that should be recognized by beneficiaries. To those risks of issuer and country risk associated with any bank that makes an independent undertaking, the beneficiary must also weigh integrity and operational expertise. It is common to distinguish between issuance by a financial institution that is not a bank such as an insurance company, a non-bank that is engaged in trade finance such as a factor, and a non-bank that is engaged in the underlying industry such as a retail store. Each non-bank issuer raises different levels of concern. Where a non-bank LC is issued subject to UCP600, certain questions of interpretation arise where its rules are directed expressly to banks. In its treatment of specific articles, these concerns are addressed in this *Analytical Commentary*.

24. "UCP"; "UCP600"; Singular or Plural References. UCP600 Article 1 states that it will use the abbreviation "UCP" to describe itself.[69] This shorthand form is unlikely to be used elsewhere to refer to UCP600 as opposed to the UCP in general nor should it. The term "UCP" is used in this *Analytical Commentary* to refer to the UCP generally and not to UCP600. Where the term appears, the context must be taken into account. Since UCP500 (1993) will continue to be applicable to some credits for many years,[70] the general reference to "UCP" will be inadequate in many situations to signal that this particular UCP revision is being referenced, and such usage, were it to be followed, would generate confusion. For that reason, in this *Analytical Commentary* the revision will be referred to as UCP600 and prior revisions will be referenced by their publication number.[71] As noted, generic references will be referred to by "UCP". Article 1 also retains the plural usage when referring to itself. Since the UCP is more than a collection of rules and has an existence separate and apart from its individual rules but is an institution in its own right, this plural usage, "the UCP are" is an anachronism that general usage in the LC community and the literature has largely abandoned in favor of the singular usage, "the UCP is". This convention, which is correct and preferable, is followed in this *Analytical Commentary*, notwithstanding the plural usage in Article 1.

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67. The March 2006 Draft stated that "[t]he term 'bank' includes, but is not limited to, entities traditionally known as a bank or other financial institution." This approach met with considerable hostility and was changed as a result of the Spring 2006 meeting of the ICC Banking Commission to the approach reflected in the final version.

68. The ICC Banking Commission recognized this practice in its Official Opinion TA537. It sated "[i]t does not 'violate' the UCP for a non-bank to issue a credit subject to the UCP, even though such issuance is not contemplated in the rules". Who may issue a letter of credit is determined under local law or banking regulation. In the US, the issuance of a letter of credit by a non-bank was recognized as early as 1973, when in *Barclays Bank D. C. O. v. Mercantile National Bank*, 481 F.2d 1224 (5th Cir. 1973), the court of appeals held that a bank may confirm a credit issued by a non-bank. The U.S. model statute recognizes non-bank issuance in Section 5-102(a)(9) which states "'Issuer' means a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family, or household purposes."

69. Interestingly, although the shorthand term appears in UCP600 Article 1, it never appears again in the text.

70. Indeed, it is reported that there are standbys still outstanding that are subject to UCP 400 (1984), 290 (1973), and even 222 (1962).

71. For a quick reference to the UCP revisions, *see* Prior Versions at the end of this Chapter.

25. **Clean Letters of Credit.** UCP600 does not refer to clean letters of credit. The term "clean letter of credit" can be found in the early literature of the 20th century in the U.S. to refer to a credit issued to pay the purchase price for the sale of goods under which only a draft drawn on the issuer was required to be presented.[72] Their use, however, dates much earlier. In a 1765 English decision, Lord Mansfield describes a "virtual" acceptance generated by a letter of credit which is, in effect, a clean credit.[73] "Clean credits" were contrasted with "documentary credits" in which documents, especially those representing title to the goods, were required. While such credits were sometimes described as "unconditional"[74], this term is incorrect because the requirement that a draft be presented prior to expiration constituted a condition as opposed to an unconditional obligation such as a negotiable instrument under which the obligation is due at maturity whether or not the instrument is presented at that time.[75] LC treatises contained warnings that clean credits lacked the security of commercial credits under which documents of title were typically presented and should only be used with trusted and well established customers.[76] In any event, the term "clean" is no longer often used and, when used, refers to a standby letter of credit that requires only the presentation of a demand or draft. ISP98 Rule 1.10(a)(v) provides "**clean** or **payable on demand** (if it does, it signifies merely that it is payable upon presentation of a written demand or other documents specified in the standby)."

26. **Electronic Commerce and UCP600.** There are four principal areas of letter of credit practice that are impacted by electronic commerce, namely issuance, presentation of documents, bank to bank communication, and reimbursement/payment. As technological improvements reduced the cost and increased the convenience of electronic issuance of letters of credit and with the advent of SWIFT, electronic methods became the norm. While UCP600 does not mandate the medium in which credits are to be issued, advised,

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72. *See* William F. Spalding, *Foreign Exchange and Foreign Bills* 156 - 157 (3rd Ed. London 1919).

73. *Pillans v. Van Mierop*, (1765) 3 Burr 1663; 97 ER 1035 [Eng.].

74. H. Finkelstein, *Commercial Letters of Credit*, 18 (1930).

75. *See* G. W. Edwards, *Commercial Letters of Credit*, 7 Fed. Res. Bull. 158 (Feb. 1921) (U.S.) ("It is termed a clean or 'open' credit if such stipulation [bills of lading, consular and commercial invoices accompanying a draft] are not mentioned."); *See also* Herman N. Finkelstein, *Legal Aspects of Commercial Letters of Credit*, 17 (1930).

76. *See* G. W. Edwards, *Foreign Commercial Credits: A Study in the Financing of Foreign Trade*, 25-26 (1922) (U.S.) ("[T]he bank agrees to honor drafts unaccompanied by any documents evidencing title to goods or other security, and so are clean bills. In that case the same term is applied to the credit itself. . . . This procedure is followed only in dealing with firms of the highest credit standing, for the bills thus unaccompanied by any documents are entirely unsecured."); *See* Ward & Harfield, *Bank Credits and Acceptances* 33 (a clean credit "simply provides for payment of the beneficiary's draft"), K. Llewellyn, paper reproduced in *id.* at 70 noted "[s]cattered here and there among the cases . . . drawn on above is a "clean" credit not conditioned on shipments. Even when found, such clean credits take their flavor from the general mercantile matrix of the institution"; *See American Nat'l. Bank & Trust Co. v. Banco Nacional De Nicaragua*, 166 So. 8, 13 (Ala. 1936) (U.S.) ("A clean letter of credit provides for an acceptance or negotiation of a draft unaccompanied by shipping documents. A documentary letter of credit provides for an acceptance or negotiation of a draft accompanied by shipping documents"). There is no unequivocal link in the literature between clean credits and standby letters of credit, perhaps because some standbys required additional documents indicating shipment of goods had been consigned to the applicant or that payment under the standby was due. *See, e.g.,* Henry Harfield, *Bank Credits and Acceptances*, 68 (5th ed.1974) ("While often characterized as "clean," such credits [standbys] usually are payable against a draft or other demand that is accompanied by some written representation that the beneficiary is entitled to payment."); *McCormack v. Citibank, N.A.*, 100 F.3d 532, 537 (8th Cir. 1996.) ("to draw on a clean letter of credit, the beneficiary must merely demand payment; no documentation, other than perhaps a written demand for payment, is required" citing Burton V. McCullough, *Letters of Credit* § 1.01[1] (1996)). Nonetheless, at least one of the major banks issuing standbys, regardless of whether they only required a draft or demand or additional documents, referred to them as "clean" credits until the 1990s. *See, e.g., Presenting Clean Letters of Credit*, Citibank, 1972 (distinguishing two types of clean credits, "guarantee" and "payment" type and noting that either type can require documents such as a certificate of default in addition to a draft).

or amended nor the medium in which documents are to be presented, and the credit can provide for issuance and presentation in any medium, UCP600 permits and assumes issuance of credits in an electronic medium without mandating it. It also assumes electronic interbank communication and reimbursement although its rules do not expressly provide for it. However, it presumes presentation of documents in a paper medium. This difference can be explained by the historical evolution of the UCP. When it was initially promulgated in 1933, cable and telegraph were already accepted modes for the issuance of letters of credit.[77] Because most commercial letters of credit required presentation of documents of title, electronic presentation was not a realistic option for them.[78]

27. Electronic Presentation. Electronic presentation has traditionally been associated with standby letters of credit, and then only when expressly provided for in the standby. Until recently, there existed no commercially acceptable means by which commercial documents generated by or for the beneficiary could be presented electronically. In order to facilitate electronic presentation, the ICC promulgated rules for electronic presentation designed to supplement UCP500 (1993), the *eUCP Supplement to UCP 500 for Electronic Presentation*, or "eUCP" (ICC Publication No. 500-3).[79] Absent incorporation of the eUCP, documents under a UCP credit must be presented in a paper medium unless the credit expressly provides otherwise. In connection with its adoption of UCP600, the ICC Banking Commission adopted amendments to the eUCP to align it with the revision. The new version is named Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation (eUCP v 1.1, ICC Publication No. 600-3) and contains "minor technical changes to the eUCP to allow it to be consistent with UCP 600". There are many countries that have legislation the provides that where a writing is required that requirement is taken to have been met with electronic writing where certain conditions are fulfilled.[80] It can be argued that in these countries if that law applies to the LC then electronic documents are legally documents and must be accepted.

77. *See Moss v. Old Colony Trust Co.*, 140 NE 803, 805 (Mass. 1923) (U.S.) (the issuing of the LC was by cable).

78. Electronic presentation was less of a problem for standbys which rarely required presentation of instruments in which title was merged into the paper document but was a serious problem for commercial letters of credit that required presentation of documents of title such as negotiable warehouse receipts and bills of lading. Where a standby permitted electronic presentation of a demand or a demand and statement that the amount was due, the credit would contain specific provisions addressing the medium of presentation. In the formulation of the International Standby Practices (ISP98), electronic presentation was allowed for credits requiring presentation of only a draft or demand where the beneficiary was a bank or another person having access to accepted means of authentication. ISP98 Rule 3.06(b) provides: "b. Where no medium is indicated, to comply a document must be presented as a paper document, unless only a demand is required, in which case: i. a demand that is presented via S.W.I.F.T., tested telex, or other similar authenticated means by a beneficiary that is a S.W.I.F.T. participant or a bank complies; otherwise ii. a demand that is not presented as a paper document does not comply unless the issuer permits, in its sole discretion, the use of that medium." In addition, optional rules were formulated to accommodate standbys that expressly permitted electronic presentation of documents. ISP98 Rule 1.09(c) provides definitions of terms that could be used in a standby permitting electronic presentations, including: "Electronic Record", "Authenticate", "Electronic Signature", and "Receipt".

79. With the increasing interest in electronic commerce in traditional transactions for the purchase and sale of goods and the development of electronic means of formulating data to permit secure and reliable presentation of data related to or entailing the ownership of goods, the ICC formulated rules effective as of 2400 GMT hours, 31 March 2002 intended to supplement the UCP where electronic presentation of documents is permitted or contemplated. Known as the eUCP, this supplement addresses presentations that are entirely or partially electronic. The UCP Supplement for Electronic Presentation, ICC Pub. No. 500-3, is available from ICC Publishing. The authoritative *ICC Guide to the eUCP* by J. Byrne and D. Taylor (2002) is available from the Institute of International Banking Law & Practice at www.iiblp.org . Issuance of a credit subject to the eUCP renders it also subject to the UCP and, in the event of conflict between the eUCP and the UCP, the eUCP prevails. *See* eUCP Article e2(b) (providing "where the eUCP applies, its provisions shall prevail to the extent that they would produce a result different from the application of the UCP").

80. Such countries include, but are not limited to, Australia, Hong Kong, India, New Zealand, Singapore, and the United States.

28. Restatement. As a convenience to readers, this *Analytical Commentary* restates the provisions of UCP600 in order to capture and simplify the points and observations made. Should this text be referenced, it should be referred to as "UCP600 Restated". For greater clarity, this rule could be restated as follows:

The Restatement of the 2007 Revision of the Uniform Customs and Practice for Documentary Credits applies to any independent undertaking that expressly states that it is subject to it including a commercial letter of credit [standby letter of credit or independent guarantee][1] including amendments, and its confirmation, Pre-Advice, or advice of such an undertaking. Its rules apply unless modified or excluded by terms that are intended to change the effect of the relevant rule.

1. In the authors opinion, these rules should only be drafted for commerical letters of credit.

H. References

29. Prior Versions:

UCP82 (1933): Provision (a)[81] indicates that the UCP is to be "understood as uniform directions, in regard to Commercial Documentary Credits, applicable exclusively when other express and previously agreed arrangements between the parties do not intervene, and when such contrary agreements are not expressed in the conditions of credits or of Commercial Letters of Credit."

UCP151 (1951): General Provisions Paragraph 1[82] is similar to UCP82 Provision (a) but adds that commercial documentary credits included " including authorities to pay, accept, negotiate or purchase, unless otherwise expressly agreed."

UCP222 (1962): General Provision (a)[83] simplifies UCP151 General Provision 1, indicating that the articles "apply to all documentary credits and are binding upon all parties unless otherwise expressly agreed", and deleting any reference to authorities to pay, accept, negotiate, or purchase but not expressly excluding others.

UCP290 (1974): General Provision (a)[84] is identical to UCP222 General Provision (a).

UCP400 (1983): UCP290 General Provision (a) became Article 1[85] and expressly includes standby letters of credit "to the extent to which they may be applicable". It also provides

81. **UCP82 (1933)** Provision (a) provides "[t]he provisions, definitions, interpretations, &c. contained in the following Articles are to be understood as uniform directions in regard to Commercial Documentary Credits, applicable exclusively when other express and previously agreed arrangements between the parties do not intervene, and when such contrary agreements are not expressed in the conditions of credits or of Commercial Letters of Credit."

82. **UCP151 (1951)** General Provisions ¶ 1 provides "[t]he provisions, definitions, interpretations, etc. contained in the following Articles are to be understood as uniform directions applying to all commercial documentary credits including authorities to pay, accept, negotiate or purchase, unless otherwise expressly agreed."

83. **UCP222 (1962)** General Provision (a) provides "[t]hese provisions and definitions and the following articles apply to all documentary credits and are binding upon all parties thereto unless otherwise expressly agreed."

84. **UCP290 (1974)** General Provision (a) provides "[t]hese provisions and definitions and the following articles apply to all documentary credits and are binding upon all parties thereto unless otherwise expressly agreed."

85. **UCP400 (1983)** Article 1 provides "[t]hese articles apply to all documentary credits, including, to the extent to which they may be applicable, standby letters of credit, and are binding on all parties thereto unless otherwise expressly agreed. They shall be incorporated into each documentary credit by wording in the credit indicating that such credit is issued subject to Uniform Customs and Practice for Documentary Credits, 1983 revision, ICC Publication No. 400."

that the UCP was applicable to each credit "indicating that such credit is issued subject to" the UCP.

UCP500 (1993): Article 1 reworded UCP400 Article 1,[86] indicating that the articles of UCP apply "where they are incorporated into the text of the Credit"and moved the provision about varying the UCP to a new sentence at the end.

UCP600 (2007): UCP500 Article 1 has been reproduced in UCP600 Article 1 with minor changes to style and substance, namely the use of the term "rules" to describe the provisions of UCP600, the use of the phrase "subject to" instead of a reference to "incorporation" of the UCP into the credit, and reference to modifications or exclusions instead of stipulations otherwise. The most notable difference from UCP500 is a result of the revision and not with its provisions, namely that, notwithstanding the continued use of the phrase "to the extent to which they may be applicable", all of the terms of UCP600 in fact are applicable to a UCP600 standby unless expressly excluded or modified.

30. Other Sources:

eUCP: Article e1(b) provides that "[t]he eUCP shall apply as supplement to the UCP where the Credit indicates that it is subject to eUCP." Article e2 provides that an eUCP credit is also subject to the UCP and, where the eUCP applies, its provisions prevail if they would produce a different result. Article e2(c) ousts the eUCP from application to a credit where it contains no electronic dimensions to a presentation.

ISBP: The introduction to ISBP (2007) states that the ISBP is "consistent with the UCP and the Opinions and Decisions of the ICC Banking Commission. This document does not amend UCP. It explains how the practices articulated in the UCP are to be applied by documentary practitioners."

ISP98: Rule 1.01 (Scope and Application) outlines the scope and application of ISP98, and indicates the types of undertaking for which the Rules are intended. It indicates that rules of the ISP may be modified or excluded. Rule 1.04 (Effect of the Rules) indicates to what and to whom the rules of ISP98 apply when a standby is issued subject to them including the applicant "who authorises issuance of the standby or otherwise agrees to the application of these Rules". Rule 1.11 (Interpretation of these Rules) provides that ISP98 rules are to be interpreted in the context of standby practice.

URDG (1991): Article 1 provides that the URDG applies to guarantees which state that they are subject to its provisions and its rules are binding on parties to the guarantee unless it or an amendment to it expressly states that they are not bound. Article 2 provides the meaning of a demand guarantee and its terms in the context of the Articles of the URDG, but there is no rule which addresses how to interpret the URDG. Article 2 mentions the principal and other provisions are directed to the principal, notably the disclaimer provisions of URDG Articles 11-14, some of which expressly mention the obligation of the principal, nonetheless the principal is not a party to the independent guarantee.

U.N. LC Convention: As a law, the scope of application of the U.N. LC Convention differs from a private rule. Article 1 (Scope of application) states that the rules apply to independent guarantees and standby letters of credit "[i]f the place of business of the guarantor/issuer at which the undertaking is issued" is in a state which has adopted the

86. **UCP500 (1993)** Article 1 provides "[t]he Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC Publication No. 500, shall apply to all Documentary Credits (including to the extent to which they may be applicable, Standby Letter(s) of Credit) where they are incorporated into the text of the Credit. They are binding on all parties thereto, unless otherwise expressly stipulated in the Credit."

Convention or "[i]f the rules of private international law lead to the application of the law of a Contracting state". In addition, the Convention will apply to other types of international letters of credit (*e.g.*, commercial letters of credit) if they state that they are subject to it. The U.N. Convention refers to the applicant in Article 2 (Undertaking) and other provisions affect the obligation of the applicant. Article 5 (Principles of interpretation) states that, when interpreting the Convention, "regard is to be had to its international character and the need to promote uniformity in its application and the observance of good faith in the international practice of independent guarantees and stand-by letters of credit".

Rev. UCC Article 5: As a law, the scope of application of Rev. UCC Article 5 differs from that of a private rule. Section 5-103 (Scope) states that Article 5 "applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit". Rev. UCC Article 5 refers to the applicant and Section 5-108(i) (Issuer's Rights and Obligations) provides for a right of reimbursement. The Official Comment to Section 5-101 (Short Title) states that "[l]etter of credit law should remain responsive to commercial reality and in particular to the customs and expectations of the international banking and mercantile community" and instructs courts to "read the terms of [Article 5] in a manner consistent with these customs and expectations".