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What Courts are Saying about THE COMPARISON OF UCP600 & UCP500 …

Since UCP600 entered into force 1 July 2007, there have been <u>two major LC cases</u> involving credits subject to UCP600 and <u>both courts have referenced this book</u>.

From *China New Era International Ltd. v. Bank of China (H.K.) Ltd.*
[2010] HKCU 1276 (June 10, 2010) [Hong Kong]:

> Article 2 contains definitions of "negotiation" and "complying presentation". Taking "negotiation" first, it will be seen that it engages the notion of "purchase". Prof. James E. Byrne, in his monograph *The Comparison of UCP 600 and UCP 500* (published (2007) by The Institute of International Banking Law & Practice), notes (at p. 35) that 'purchase' itself is not defined but that it
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> "connotes the acquisition of an interest in the drafts and/or documents by the purchaser as opposed to not having any interest in them by merely forwarding them."
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> He went on to explain that while the purchaser does not enjoy all the attributes of ownership of the documents in the sense that it could exercise the discretion not to present them and to deal with the goods that they represent directly for its own account without having first presented them,
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> "there is an element of ownership which can be exercised where the presentation is refused."
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> 23. Also, it is to be noted that 'purchase' is conditioned on the purchaser (the negotiating bank) having either advanced funds or agreed to do so by a date set at or before the anticipated reimbursement date. That such advance or agreement to do so is an integral part of the meaning of "negotiation" is apparent from the wording of the definition.
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> 24. While the definition (of 'negotiation') appears to tie the notion of 'negotiation' to the notion of 'complying presentation', two matters may be noted. First, as Prof. Byrne points out (at p. 36), "there is no necessary relationship" between the two notions:
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> "While it may be expected that the documents that are the subject of the negotiation would be complying documents, whether or not they comply has no bearing on whether or not there is negotiation. If the issue or confirmer that undertakes to negotiate fails to note a discrepancy, the negotiating bank will still have negotiated. In that situation, the issuer and any confirmer are precluded from asserting the discrepancy and required to reimburse nominated bank that has negotiated under the preclusion rule of UCP600 Article 16(f) (Discrepant Documents, Notice and Waiver) even in the event of beneficiary LC fraud."
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> I respectfully agree with that reasoning and with his observation that the linkage is "unfortunate".

– The Honourable Doreen Le Pichon
Justice of Appeal, Hong Kong Court of Appeal

From *Fortis Bank S.A./N.V. v. Indian Overseas Bank*
[2010] EWHC 84 (Comm); [2010] All ER (D) 189 (Jan) [England]:

> It would appear that the only text in which the issue of the change in wording is specifically discussed is a publication of The Institute of International Banking Law and Practice by its director Professor Byrne called The Comparison of UCP 600 and UCP 500. In the commentary on Article 16 it is said that "the removal of this provision arguably takes it outside of the UCP 600 preclusion rule". It therefore recognises the argument but does not express any firm or reasoned view on its correctness.

– Mr Justice Hamblen
Queen's Bench Division, Commercial Court