

Art. 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 by the credit.

Inclusion by reference

Academics and courts agree that parts of the UCP may reflect commercial usage or usage, however, the entire UCP do not. Consequently, whoever wants to use the UCP needs to include them by reference as contractual terms. The dispute regarding the qualification of the UCP is academic, since banks reference the UCP on their forms. This applies also to the opening of credits via SWIFT. This has never been disputed in practice, even if the SWIFT message did not contain a reference to the UCP.¹¹ In the meantime the SWIFT messaging has been improved, so that in MT 700, 710 and 720 a reference to the UCP is possible.¹²

¹¹ *Gary Collyer, More queries and responses to UCP 500: Opinions of the ICC Banking Commission / queries and responses on UCP 500, UCP 400 and URC 522*, Volume 596, ICC publication / International Chamber of Commerce, (Paris, 1982), ISBN 9284212537, R 248: "Whilst credits issued using the SWIFT system (without mention of the 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."

¹² *UCP 600 Drafting Group* (as in n. 3), p. 12

No more adherence lists

Referencing the UCP when opening the credit has become relevant also, since the ICC discontinued its practice to publish adherence lists which detailed the banking associations which have signed up to the UCP on behalf of their member banks.¹³ The ICC discontinued publication of the adherence lists since they were incomplete as to the countries/banking associations that had signed up and of doubtful validity, since it was unclear in how far banking associations were authorized to represent their members when signing up for the UCP.

Individual articles as usance

Even if it is necessary to expressly reference the UCP in order to include them into a LC transaction, the majority of the UCP constitute commercial usance.¹⁴ Additionally, rules that are added with a new revision are "potential usance" since they will be accepted after some time without exception by all parties involved. However, the party claiming that a particular rule is usance bears the burden of proof in this regard.¹⁵

The UCP and standby letters of credit

The 1983 revision was the first to apply the UCP to standby letters of credits. SBLCs are guarantees issued by US banks which were issued as letters of credits due to US bank legislation. These types of guarantees were payable against presentation of a document. Until 1996 US banks were not permitted to issue suretyships or guarantees, whereas the issuance of letters of credit was allowed.¹⁶ In 1996 the Office of the Comptroller of the Currency finally extended the gamut of allowable transactions for banks to include the is-

¹³ Gary Collyer and Ron Katz, *Unpublished opinions: 1995 - 2004 ; on UCP 500, e-UCP, URR 525, ISBP, UCP 400, URC 522 and 322 and URDG-458*, Volume 660, ICC publication, (Paris and France: International Chamber of Commerce, 2005), ISBN 9789284213412, No 394, R 490: Regarding the applicability of the UCP 500 the ICC noted, that the adherence lists were incomplete and not stating definitely which country or bank had acknowledged the UCP. The dissemination of these lists was subsequently stopped. For this reason each LC has to reference the UCP, this however does not apply in case the credit uses the SWIFT protocol.

¹⁴ Eckhard Wälzholz, 'Die Anwendbarkeit des AGBG auf die Einheitlichen Richtlinien der ICC insbesondere bei Akkreditiven und Demand Guarantees', *WM*, [1994]

¹⁵ *Canaris* (as in n. 9), mn. 926

¹⁶ Richard A. Lord, 'The No-Guaranty Rule and the Standby Letter of Credit Controversy', *Banking Law Journal*, 96 [1979], pp. 46f; E.P. Ellinger, 'Standby Letters of Credit', *International Business Lawyer*, 6 [1978], pp. 604f

suance of guarantees.¹⁷ Thus, the issuance of standbys instead of bank guarantees would have become obsolete. However, the marketplace trusted the well-established standby and did not warm to the new instrument "guarantee". The ICC took this development into consideration by endorsing the Rules for International Standby Practices (ISP 98, ICC-Publ. 590) which Institute of International Banking Law & Practice had developed. In view of the specialized rules of the ISP it does not make sense to apply the UCP to standbys. Nevertheless, the ICC refrained from deleting the reference to standby letters of credit in Article 1 UCP 600, since some US banks continue to use the UCP when issuing standbys.¹⁸

Limited applicability of the UCP to standby letters of credit

The UCP are to be used with standbys "to the extent to which they may be applicable" (Article 1 UCP 600). The UCP limit their applicability since standbys are basically guarantees to which the rules for the processing of documents like invoice, shipping and insurance documents are not relevant. This becomes obvious for e.g. the provision regarding dates in shipping documents. The ICC Banking Commission for example has refused to apply the 21 day limit for the issuance of shipping documents (Article 43 UCP 500, formerly, Article 47 a UCP 400) to standbys:

"The commission decided that under a standby credit Article 47 a UCP does not apply, particularly where it is only a copy document which is, therefore, not a transport document."¹⁹

Except for this specific case, the ICC has not been able, to generally designate the articles which are not applicable to standbys:

"NCs must acknowledge that not all the Articles in the UCP apply to a Commercial Credit or to a Standby Credit and that a majority of the Articles to not apply to the Standby Credit. It is recognized that the parties to the

¹⁷ *Jens Nielsen and Nicolai Nielsen, 'Standby Letters of Credit and the ISP 98: A European Perspective', Banking & Finance Law Review, 16 [1999]*

¹⁸ *UCP 600 Drafting Group (as in n. 3), p. 12*

¹⁹ *B. S. Wheble, Opinions of the ICC banking commission on queries relating to uniform customs and practice for documentary credits (UCP) 1987-1988, Volume ICC publication no. 469, (Paris: International Chamber of Commerce, 1989), ISBN 9284210917, R 168*

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Credit may wish to exclude certain Articles of the UCP from a specific type of Credit.”²⁰

Legal scholars consider that not only the rules for shipping documents are inapplicable to standbys but also the rules regarding reimbursement, partial drawings or shipments, and force majeure.²¹

Art. 1 sentence 2 - Modifications and exclusions of the UCP

The UCP are not mandatory for parties engaged in LC transactions, hence, they are only binding ”unless expressly modified or excluded”. When banks open credits that exclude or modify certain UCP Articles, the issuing bank should emphasize these changes by marking them e.g. with bold face fonts. Even though the ICC does not expressly require it, the marking serves to avoid surprises of beneficiaries and secondary banks. The ICC Commission recognized a credit whose payment was conditional; this unusual obstacle to payment - even though merely mentioned under ”Special Conditions” - was considered valid.²²

Validity of LC conditioned on acts of the beneficiary

The obligation of the issuing bank regarding payment might be conditioned on the beneficiary providing a bank guarantee acceptable to the applicant, e.g. to guarantee the performance of the underlying contract. Nevertheless, the ICC considers it bad practice,

²⁰ *Wheble, Wheble 1989 – Opinions of the ICC banking* (as in n. 19), p. 3

²¹ *Georges Affaki, ‘How to the ISP Standby rules fit in with other uniform rules ?’ INSight 5 [1999], No. 1, p. 3.*”It follows that a number of UCP Articles are inappropriate for standby practices and, as a consequence, have to be excluded in the standby’s text. These include Articles 23 to 38, dealing with transport documents, which were rarely required in standbys. Other inappropriate UCP Articles include 17 (force majeure), 19 (reimbursement arrangements), 21 (content of documens), and 41 (installment drawings).”

²² *Charles Del Busto, Case studies on documentary credits under UCP 500*, Volume ICC publication – no. 535, ICC publication, (Paris: International Chamber of Commerce, 1995), ISBN 9284211832, Case 1: Issuance of an irrevocable credit by I-bank, advised through A-bank, payable at I-bank with the following condition: - Sight draft on the Issuing Bank; - Bills of lading issued to order of I-bank for account of the Applicant; - Special Conditions: Payment of drafts hereunder will be made only after the realisation of the re-exports program. According to the experts of the ICC, the beneficiary relied on an LC that did not provide any security to him. The ICC does not discuss whether the advising bank violated a duty to protect but limits its comments to :”That advising this type of credit was not a service to the banking industry.”

to open such credits if the conditions are not clearly defined, as would be the case if the beneficiary is asked to provide import licenses.

”The credit is designated as being irrevocable on the part of the issuing bank.

The fact that the operativeness of the credit was subject to the issuance and acceptance of a bank guarantee does not detract from the irrevocable nature of the credit. ICC has previously commented that it is bad practice for banks to issue credits that are deemed to be inoperative without specifying the reason or action required to secure operativeness.”²³

Excluding individual articles might be advisable in the following cases:

1. The ISBP²⁴ recommend that an applicant exclude UCP sub-Article 23 (d) to make a prohibition against transshipment for marine bills of lading effective.
2. Similarly, regarding shipments by air, the applicant might want to exclude Article 23 c (ii) to enforce a prohibition against transshipment, since Article 23 c (ii) permits transshipment even if the credit provides otherwise.
3. Article 6 a provides that a credit available with a nominated bank is also available with the issuing bank. It might be advisable to exclude Article 6 a in order to clarify that a demand for payment against the issuing bank is only permissible after the nominated bank has not paid.

The most recent publications of the ICC seem to display a tendency to exclude additional clauses of the new UCP, even though these exclusions are inexpedient or create new ambiguities. ²⁵

²³ *Gary Collyer and Ron Katz, Collected opinions 1995-2001: On UCP 500, UCP 400, URC 522 & URDG 458 / queries and responses edited by Gary Collyer & Ron Katz, Volume ICC publication – no. 632, Publication, (Paris: International Chamber of Commerce, 2002), ISBN 9789284212972, R 388 (9)*

²⁴ *ISBP: International standard banking practice for the examination of documents under documentary credits, Volume 681, ICC publication, 2007th edition. (Paris: ICC, 2007), ISBN 9789284200191, No. 3*

²⁵ DCInsight Vol 14, No 2 April - June 2008:

Article 28 h: Banks will accept insurance document entitled ”all risk” even if certain risks are excluded in the body of the document. The exclusion of Article 28 h is not realistic; rather, the ICC suggests that instead of fighting these clauses, the credit should provide for which risks specifically have to be covered.

Article 14 f: Documents other than transport or insurance documents or commercial invoice are to be accepted as presented. Excluding Article 14 h does not make any sense since it will remain unclear,

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according to which criteria these documents will be examined.

Article 35: If documents are lost in transit from the nominated bank to the issuing/confirming bank, the issuing/confirming bank remain liable for payment. It would not be acceptable for the nominated bank if this clause were excluded. A preferable solution is to obligate the nominated bank not only to send originals but additionally to separately mail copies of the originals.